



EUROPÄISCHER  
RECHNUNGSHOF

Liebe Leserin, lieber Leser!

Hiermit teilen wir Ihnen mit, dass der Europäische Rechnungshof soeben seinen Sonderbericht 11/2022 **"Protecting the EU budget: Better use of blacklisting needed"** (Schutz des EU-Haushalts: Möglichkeiten schwarzer Listen besser nutzen) veröffentlicht hat. Dieser Sonderbericht wurde unter der Leitung von Helga Berger, Mitglied des Hofes, erstellt.

Schwarze Listen werden nicht wirksam eingesetzt, um zu verhindern, dass EU-Mittel an Personen, Unternehmen oder Organisationen ausgezahlt werden, die in illegale Handlungen wie Betrug und Korruption verwickelt sind. Auf der schwarzen Liste der Europäischen Kommission stehen nur wenige Namen, weil es nur unzulängliche Verfahren gibt, um jene zu identifizieren, die von der Beantragung von EU-Mitteln ausgeschlossen werden sollten. Außerdem sind die EU-Mitgliedstaaten – obwohl sie in den meisten Fällen für die Auszahlung von Haushaltsmitteln zuständig sind – nicht verpflichtet, solche Listen zu führen, und sie verfolgen unterschiedliche Ansätze, um die finanziellen Interessen der EU zu schützen. Dieser Flickenteppich von Ausschlussregelungen führt dazu, dass schwarze Listen insgesamt nicht wirksam genutzt werden und es somit in Europa keinen einheitlichen Schutz des EU-Haushalts gibt.

Um den Sonderbericht in englischer und französischer Sprache und die in 24 EU-Sprachen verfügbare Pressemitteilung aufzurufen, klicken Sie bitte [hier](#); andere EU-Sprachversionen des Sonderberichts werden demnächst bereitgestellt.

Für weitere Auskünfte über die Arbeit des Hofes stehen wir Ihnen gerne zur Verfügung. Zudem finden Sie Informationen auf unserer Website [eca.europa.eu](http://eca.europa.eu). Um auf das Publikationsportal des Hofes zu gelangen, klicken Sie bitte [hier](#).

Mit freundlichen Grüßen

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### Europäischer Rechnungshof

Direktion "Dienste des Präsidenten"

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Gemäß der [Verordnung \(EU\) 2018/1725](#) – der neuen Verordnung zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten durch die EU-Organe, die am 11. Dezember 2018 in Kraft trat – setzen wir Sie davon in Kenntnis, dass Ihre Daten vom Europäischen Rechnungshof verarbeitet werden. Bitte klicken Sie [hier](#), um zu erfahren, wie der Europäische Rechnungshof Ihre personenbezogenen Daten behandeln wird und wie er sie schützt. Falls Sie keine Nachrichten vom Europäischen Rechnungshof mehr erhalten möchten, klicken Sie bitte [hier](#).



## Pressemitteilung

Luxemburg, 23. Mai 2022

### EU-Prüfer fordern bessere Nutzung schwarzer Listen zum Schutz vor Betrug mit EU-Geldern

Laut einem Bericht des Europäischen Rechnungshofs werden schwarze Listen nicht wirksam eingesetzt, um zu verhindern, dass EU-Mittel an Personen, Unternehmen oder Organisationen ausgezahlt werden, die in illegale Handlungen wie Betrug und Korruption verwickelt sind. Auf der schwarzen Liste der Europäischen Kommission ständen nur wenige Namen, weil es nur unzulängliche Verfahren gebe, um jene zu identifizieren, die von der Beantragung von EU-Mitteln ausgeschlossen werden sollten. Außerdem seien die EU-Mitgliedstaaten – obwohl sie in den meisten Fällen für die Auszahlung von Haushaltsmitteln zuständig seien – nicht verpflichtet, solche Listen zu führen, und sie verfolgten unterschiedliche Ansätze, um die finanziellen Interessen der EU zu schützen. Dieser Flickenteppich von Ausschlussregelungen führe dazu, dass schwarze Listen insgesamt nicht wirksam genutzt würden und es somit in Europa keinen einheitlichen Schutz des EU-Haushalts gebe.

Sogenanntes Blacklisting – das Führen schwarzer Listen zum Ausschluss unseriöser Zahlungsempfänger – ist für Regierungen und internationale Organisationen ein wichtiges Instrument zum Schutz der öffentlichen Finanzen. Seit 2016 betreibt die Kommission das auf EU-Ebene bislang einzige Früherkennungs- und Ausschlusssystem, das sogenannte EDES. Es soll die für die Genehmigung der Mittelvergabe Verantwortlichen vor Vertragspartnern warnen, die ein Risiko darstellen. Dies gilt für die von der Kommission direkt oder zusammen mit Partnern verwalteten Ausgaben. Das EDES deckt allerdings nicht Ausgabenbereiche wie Landwirtschaft und Kohäsion (Strukturfonds) ab, die der geteilten Mittelverwaltung durch Kommission und Mitgliedstaaten unterliegen und die den Löwenanteil der EU-Ausgaben ausmachen.

*"Blacklisting kann dazu beitragen, dass EU-Mittel nicht in die falschen Hände geraten – es wird aber nicht wirksam genutzt. Es gibt einen 'Fleckerlteppich' unterschiedlicher Ansätze zum Schutz der finanziellen Interessen sowohl auf EU-, als auch auf Mitgliedstaat-Ebene",* so Helga Berger, das für die Prüfung zuständige Mitglied des Europäischen Rechnungshofs. *"Relevante Daten sind entweder nicht verfügbar oder werden nicht für Blacklisting in der EU verwendet. Dies beeinträchtigt die Nützlichkeit und die abschreckende Wirkung solcher Listen. Ein System ist immer nur so gut wie die Informationen, die es enthält".*

Die Prüfer stellten fest, dass das EDES über solide Entscheidungsverfahren verfügt und ein breites Spektrum von Kriterien umfasst, anhand derer Vertragspartner auf die schwarze Liste gesetzt werden sollten. Jedoch seien von den 448 Vertragspartnern, die Ende 2020 tatsächlich auf der

Diese Pressemitteilung enthält die Hauptaussagen des Sonderberichts des Europäischen Rechnungshofs. Bericht im Volltext unter [www.eca.europa.eu](http://www.eca.europa.eu).

## ECA Press

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schwarzen Liste der EU gestanden hätten, bis auf 18 alle wegen Konkurses vom Erhalt weiterer EU-Gelder ausgeschlossen worden. Somit dürften sie wohl künftig ohnehin keine weiteren EU-Mittel mehr beantragen. Nur zwei Einträge habe es aufgrund von Betrug und Korruption gegeben. Dass es nicht mehr seien, liege an den unzulänglichen Verfahren für die Identifizierung von Risiko-Vertragspartnern. Insbesondere seien die Zuständigkeiten dafür innerhalb der Kommission aufgesplittert. Deren Dienststellen hätten außerdem rechtliche und technische Schwierigkeiten beim Zugang zu Daten der Mitgliedstaaten, wie sie etwa in Unternehmensregistern oder Strafregistern enthalten sind. Sie seien jedoch oft auf solche Daten angewiesen, weil es keine entsprechenden EU-weiten Register gebe. Doch selbst wenn einschlägige Daten auf EU-Ebene vorhanden seien, beispielsweise im Zusammenhang mit Betrugsermittlungen, würden sie nicht immer genutzt oder seien nicht immer nutzbar. Darüber hinaus verlasse sich die Kommission zu sehr auf die Zusicherungen derjenigen, die Fördermittel beantragten oder Dienstleistungen anböten: Wenn diese erklärten, sich nicht in einer Ausschlussituation zu befinden, akzeptiere die Kommission ihre Anträge ohne weitere Überprüfung. Dies mache es wenig wahrscheinlich, dass noch vor der Unterzeichnung einer Vereinbarung festgestellt werden könne, dass sich eine Vertragspartei in einer Ausschlussituation befindet. Dies laufe dem ursprünglichen Gedanken der Einführung eines Vorbeugesystems zuwider.

In Fällen, in denen die Kommission EU-Mittel indirekt einsetze, hätten die Umsetzungspartner nur wenige riskante Zahlungsempfänger gemeldet, hauptsächlich aufgrund ähnlicher Probleme wie bei der direkten Mittelverwaltung. In Bereichen, die der geteilten Verwaltung von EU-Geldern mit den Mitgliedstaaten unterlägen, gibt es den Prüfern zufolge derzeit einen Flickenteppich aus unterschiedlichen Kriterien zum Ausschluss unseriöser Zahlungsempfänger, der keine wirksame Grundlage zum Schutz des EU-Haushalts biete. Auch gebe es keinen Ausschlussmechanismus auf EU-Ebene, und aufgrund der mangelnden Harmonisierung zwischen den Mitgliedstaaten könnten Vertragsparteien in ähnlichen Situationen unterschiedlich behandelt werden. Die Prüfer empfehlen, die Anwendung von EDES auch auf die von den Mitgliedstaaten verwalteten EU-Gelder auszuweiten und das Spektrum der Vertragsparteien, die ausgeschlossen werden können, auf Tochtergesellschaften und wirtschaftliche Eigentümer auszuweiten. Außerdem empfehlen sie eine bessere Nutzung von Daten und Software.

### **Hintergrundinformationen**

Nach EU-Recht müssen die Europäische Kommission, ihre Partner und die Behörden der Mitgliedstaaten den EU-Haushalt vor Betrug und Unregelmäßigkeiten schützen. Das Führen schwarzer Listen hilft dabei, keine Vereinbarungen mit unseriösen Vertragspartnern zu schließen, die Fördergelder beantragen oder sich um Verträge bemühen. Die Kommission verwaltet ein Viertel der EU-Ausgaben alleine oder mit Partnern wie der Europäischen Investitionsbank und die übrigen drei Viertel zusammen mit den Mitgliedstaaten. 2020 zahlte die EU im Rahmen von Fördervereinbarungen rund 150 Milliarden Euro unter anderem an Landwirte, Forscher, Unternehmen und Nichtregierungsorganisationen aus. Die EU setzt im Vergleich zur US-Regierung und der Weltbank nur sehr wenige Vertragspartner auf ihre schwarze Liste. Keines der im Rahmen der Prüfung untersuchten Länder (Estland, Italien, Polen und Portugal) hatte ein umfassendes Ausschlusssystem eingerichtet.

Der Sonderbericht 11/2022 "Protecting the EU budget – Better use of blacklisting needed" (Schutz des EU-Haushalts: Möglichkeiten schwarzer Listen besser nutzen) ist auf der Website des Hofes

([eca.europa.eu](http://eca.europa.eu)) abrufbar. Die Prüfungsempfehlungen sollen dem europäischen Gesetzgeber bei der aktuellen Überarbeitung der Haushaltsordnung der EU helfen.

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Special report

**Protecting the EU budget**  
**Better use of blacklisting needed**



EUROPEAN  
COURT  
OF AUDITORS

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## Executive summary

I The EU and the Member States are jointly responsible for protecting the EU's financial interests with respect to EU funds. "Blacklisting" (or exclusion) is a key tool that international bodies and national authorities use to protect their public finances. The objective is to avoid entering into financial agreements with untrustworthy counterparties, such as those involved in fraud, corruption, professional misconduct, money laundering, or non-payment of taxes. In 2020, the EU paid out around €150 billion under financial agreements. Since 2016, the Commission has been responsible for operating the Early Detection and Exclusion System (EDES) for the quarter of EU spending (€39 billion) that it manages directly or indirectly through implementing partners in line with the EU's financial rules. For the three quarters of EU spending involving national authorities (€111 billion), Member States have to follow exclusion-related obligations but they are not required to set up exclusion systems or databases per se.

II The aim of this audit was to assess whether exclusion is being used effectively to protect EU funds from untrustworthy counterparties. We focused primarily on assessing whether the EDES has been operating effectively in direct and indirect management. In particular, we examined the effectiveness of EDES' exclusion situations, exclusion procedures, blacklist of excluded counterparties, and arrangements for identifying counterparties in exclusion situations. As regards shared management, we selected four Member States to review their exclusion arrangements and to identify good practices. We carried out the audit with a view to contributing to the Commission's proposals for revising the EU's financial rules and its plans for enhancing the use of digital tools and data to protect the EU's financial interests.

III We concluded that **exclusion is not being used effectively to protect EU funds from untrustworthy counterparties**. Although the EDES has a broad range of exclusion situations and robust decision-making procedures, the Commission services have recorded few exclusions in the system due to shortcomings in the arrangements for identifying counterparties in exclusion situations. In shared management, where EDES does not apply, Member States' differing approaches undermine the overall effectiveness of using exclusion to protect the EU budget.

IV As regards **direct management**, we found that the EDES has a broad scope of application and a robust exclusion procedure, based on a central assessment of cases by an independent panel that ensures consistent and fair treatment of counterparties.

However, shortcomings in the arrangements for identifying counterparties in exclusion situations have contributed to the low level of exclusions. In particular, responsibility for exclusion is fragmented and Commission departments face legal and technical difficulties in accessing Member State data on exclusion situations, such as business registers and criminal records. Even where relevant data exists at EU level, for example relating to fraud investigations, it is not always used or usable. In practice, the Commission places a high degree of reliance on declarations on honour from EU counterparties regarding the absence of an exclusion situation. In this context, we found limited central monitoring and oversight of the identification and registration of EDES cases and further opportunities to promote the use of the EDES and champion data sharing and digital tools.

**V** As regards **indirect management**, we found that implementing partners have made a small contribution to the number of exclusion cases registered in EDES. This is largely explained by the same factors that apply in direct management. Other contributory factors include agreements with implementing partners not covering all exclusion situations and implementing partners not being allowed to exclude counterparties before a final judgement or administrative decision. We also found that the Commission has been slow to complete its assessment of implementing partners' exclusion arrangements.

**VI** As regards **shared management**, which mostly covers agricultural and cohesion spending and is not covered by the EDES, our visits to four Member States highlighted considerable differences of approach to exclusion, which contribute to an unevenness in the protection of EU funds. We also found that some Member States could make better use of EU level data and tools, including data on fraud and irregularities, and the data-mining and risk-scoring tool, Arachne. Finally, we found that the Commission lacks the overview of Member States' exclusion systems and available data necessary to develop a strategy for improving its own ability, and that of implementing partners and Member State authorities, to identify counterparties in – or at risk of being in – an exclusion situation.

## **VII** We recommend the Commission to:

- extend further the range of exclusion;
- strengthen the implementation of the EDES;
- improve the monitoring of the EDES under indirect management;
- extend the EDES to shared management;
- make better use of data and digital tools for exclusion purposes.

# Introduction

## EU and Member State responsibilities for protecting the EU budget

**01** In 2020, the EU paid out around €150 billion<sup>1</sup> under financial agreements. The agreements mainly cover grant awards, contracts for work, goods or services, and financial instruments, such as loans, guarantees or equity investments. Counterparties to the agreements range from private individuals, such as farmers and researchers, to large entities, such as commercial enterprises, municipalities and non-governmental organisations.

**02** The Commission has overall responsibility for managing the EU budget. In 2020, the Commission implemented around 19 % of operational spending (€28 billion) under agreements directly through its own directorates-general and other departments and a further 7 % indirectly (€11 billion)<sup>2</sup>, through selected “implementing partners”, such as the European Investment Bank (EIB) Group. Member State authorities are involved in implementing the remaining 74 % (€111 billion) of annual EU spending through what is known as “shared management”, which mostly covers agricultural and cohesion spending.

**03** The Commission delegates responsibility for managing the EU budget in the various policy areas to “authorising officers” in its departments (directorates-general)<sup>3</sup>. Their duties include signing financial agreements with the EU’s counterparties (under direct management)<sup>4</sup> or with implementing partners (under indirect management) to entrust them with signing agreements with counterparties on the Commission’s behalf. In shared management, Member States’ managing authorities and paying agencies are responsible for entering into agreements with counterparties.

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<sup>1</sup> Section 2.1.1 of [Annual Management and Performance Report for the 2020 EU Budget](#), excluding “Other services and administration”.

<sup>2</sup> Ibid.

<sup>3</sup> Article 73 of Regulation (EU, Euratom) 2018/1046 (the [Financial Regulation](#)).

<sup>4</sup> Article 74 of the [Financial Regulation](#).

**04** Under EU law, the Commission, implementing partners and Member State authorities must protect the EU budget from fraud and irregularities<sup>5</sup>. To this end, they are required to put in place effective control systems<sup>6</sup>. Member States must take the same measures to counter fraud affecting the EU's financial interests as they take to counter fraud affecting their own financial interests<sup>7</sup>. The Commission is responsible for ensuring a similar level of protection in all types of management arrangement direct, indirect and shared<sup>8</sup>.

### Excluding untrustworthy counterparties from receiving funds

**05** Exclusion (or “debarment”) is an important tool that organisations, such as international bodies and national authorities, use to prevent untrustworthy counterparties from applying for and receiving grants or government contracts. The key elements of an organisation’s exclusion system<sup>9</sup> include:

- a “blacklist” of counterparties excluded from entering into financial agreements with the organisation;
- a set of grounds for excluding a counterparty, such as professional misconduct, fraud, corruption, money laundering, or unpaid taxes (“exclusion situations”);
- a process for adding and removing counterparties to and from the blacklist (“exclusion procedure”);
- arrangements for checking whether counterparties are in an exclusion situation, including use of the blacklist.

**06** *Figure 1* illustrates the relationships between the key elements of an exclusion system.

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<sup>5</sup> Articles 36 and 63 of the [Financial Regulation](#).

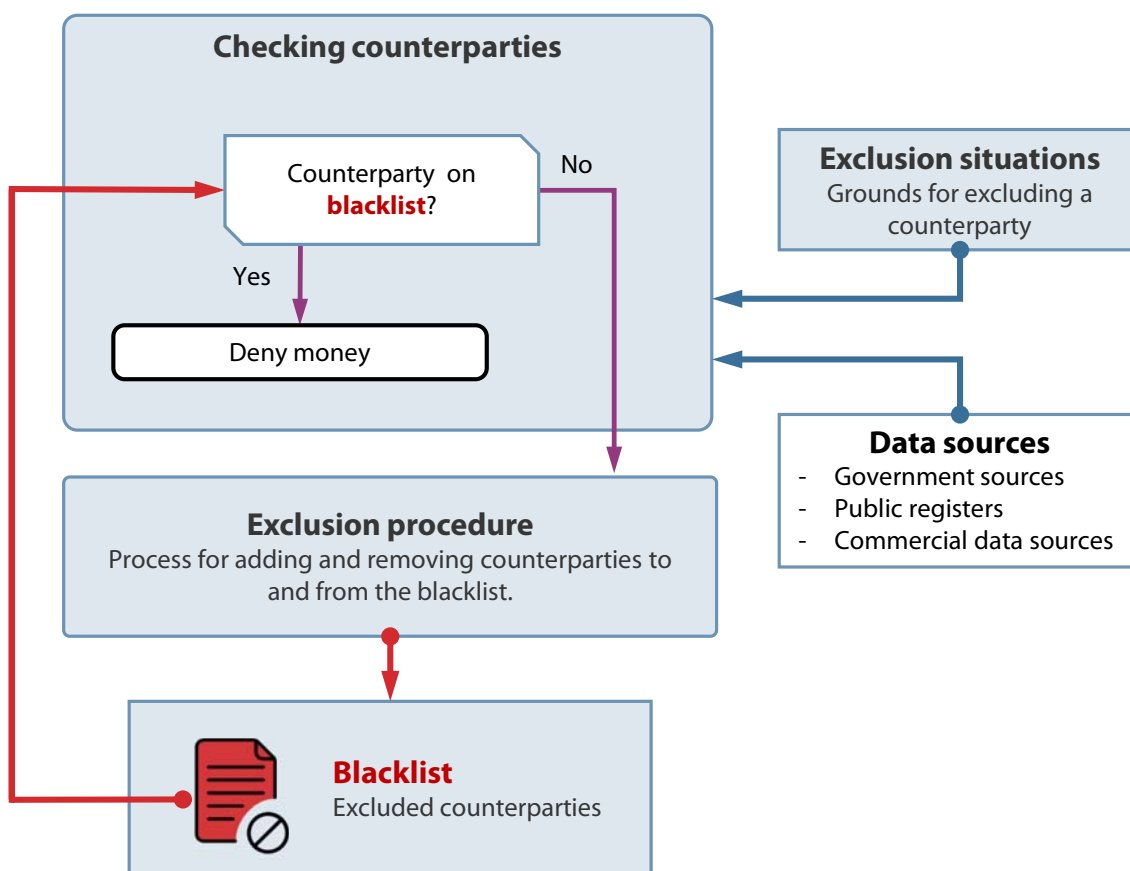
<sup>6</sup> Recital 5 of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ([PIF directive](#)).

<sup>7</sup> Article 325 of the [Treaty on the Functioning of the European Union](#).

<sup>8</sup> Recital 5 of the [PIF directive](#).

<sup>9</sup> Identified by the ECA based on analysis of the World Banking Group and the US Federal Government.

Figure 1 – Key elements of an exclusion system



Source: ECA.

**07** In effect, the blacklist enables financial managers in one part of an organisation to rely on checks previously carried out on a counterparty by financial managers in other parts of the same organisation. Publication of the names of excluded counterparties extends this benefit to financial managers in other organisations and provides a deterrent effect. The US federal government and the World Bank Group have long used blacklisting and they provided inspiration for the EU budget's exclusion system. **Box 1** provides an overview of the US federal government exclusion system implemented by US federal agencies.

**Box 1****Exclusion in US federal agencies**

Counterparties included on a blacklist may not participate in US federal agencies' grant award and contract procedures. All federal agencies use the same systems, such as the Federal Awardee Performance and Integrity Information System and the System for Award Management, to check counterparties for exclusion situations and register blacklisted counterparties.

Each federal agency has a "debarment official", who is independent of the contracting function and responsible for taking decisions to exclude counterparties. Exclusions made by one federal agency apply to all other federal agencies, and prevent a counterparty from receiving further grants or contracts from the US federal budget. The names of excluded counterparties are published online.

**The EU legal framework for exclusion**

**08** Preventing funds from going to counterparties that are not permitted to receive them is a prerequisite for the protection of the EU's financial interests<sup>10</sup>. The EU's financial rules (the Financial Regulation)<sup>11</sup> require the Commission to set up and operate an early-detection and exclusion system (EDES) for EU funds spent under **direct and indirect management**. The Commission set up the EDES in 2016.

**09** The Financial Regulation provides for excluding and/or financially penalising counterparties found to be in an exclusion situation<sup>12</sup> (**Box 2**). In severe cases, the name of the counterparty may be published as a deterrent<sup>13</sup>.

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<sup>10</sup> Article 135 of the [Financial Regulation](#).

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> EDES database: [List of economic operators excluded or subject to financial penalty](#).

## Box 2

### Exclusion situations under the EDES

Under the EDES, it is possible to exclude a counterparty on the following grounds:

- bankruptcy, insolvency and analogous situations;
- non-payment of taxes or social security contributions;
- grave professional misconduct;
- fraud, corruption, and other illegal activities;
- irregularities relating to EU-funded activities;
- significant non-compliance with main obligations under contracts financed by the EU budget;
- circumvention of fiscal, social or other legal obligations or creation of an entity for this purpose.

**10** The Commission’s authorising officers are responsible for identifying excludable counterparties and registering<sup>14</sup> exclusion cases in the EDES database (the “blacklist”). The exclusion procedure to be followed depends on the type of exclusion situation. Authorising officers should directly exclude counterparties for bankruptcy or insolvency as well as for non-payment of taxes or social security contributions based on final judgements or administrative decisions.

**11** In other exclusion situations, the authorising officer should send a request for exclusion to the EDES panel. This body is composed of an independent chair, two permanent members designated by the directorate-general for budget, and a representative of the authorising officer making the exclusion request. It is tasked with assessing established facts and findings, and, where there is no final judgement or administrative decision, making a “preliminary classification in law”<sup>15</sup>.

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<sup>14</sup> Article 135(3) of the [Financial Regulation](#).

<sup>15</sup> Article 143 of the [Financial Regulation](#).

**12** The EDES panel<sup>16</sup> assesses the cases referred to it by authorising officers and issues recommendations on whether to exclude, financially penalise and/or publicise the name of the counterparty<sup>17</sup>. The panel is also responsible for protecting counterparties' fundamental rights, including the "right to be heard". After receiving the panel's recommendation, the authorising officer that registered the case is responsible for taking a final decision on sanctioning the counterparty.

**13** Early detection aims to alert the community of authorising officers to risky counterparties<sup>18</sup>. Authorising officers should register a counterparty under the early detection mechanism, if they presume it is in an exclusion situation but need to collect the necessary evidence to make an exclusion. They should notify the counterparty, unless doing so would compromise an ongoing investigation. A counterparty flagged as an early detection case may continue to apply for and receive EU funds. Early detection cases should not stay open for longer than one year. To extend the period, the authorising officer responsible should refer the case to the panel.

**14** The EDES is currently the only exclusion system operating at EU level. Although Member States are required to set up control systems in shared management to protect the EU's financial interests, EU law does not require Member States to establish exclusion systems per se<sup>19</sup>. *Figure 2* highlights the part of the EU budget covered by the EDES.

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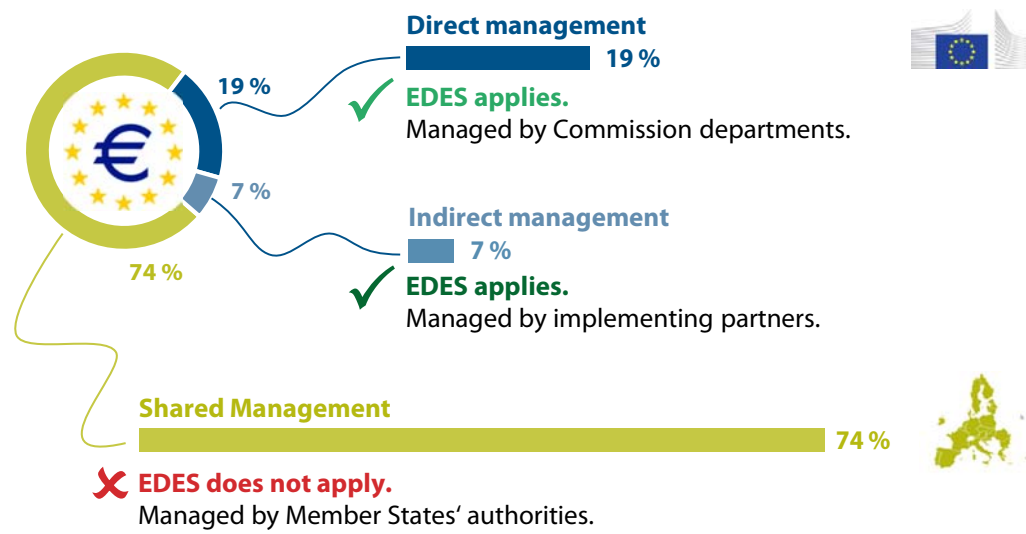
<sup>16</sup> Commission Decision (EU) 2018/1220.

<sup>17</sup> Article 143 of Financial Regulation.

<sup>18</sup> Article 135 of Financial Regulation.

<sup>19</sup> Article 142(5) of Financial Regulation.

Figure 2 – Coverage of the EU budget by the EDES



Source: ECA.

## Audit scope and approach

**15** The purpose of this audit was to assess whether exclusion is being used effectively to protect EU funds from untrustworthy counterparties. The audit covered the period 2016-2020.

**16** We focused primarily on assessing whether the EDES operated effectively in **direct and indirect management**. In particular, we assessed whether the EDES:

- exclusion situations provide sufficient scope to exclude untrustworthy counterparties;
- exclusion procedure provides for robust decision making regarding counterparties identified to be in an exclusion situation;
- database of excluded counterparties (the “blacklist”) contains adequate names to make a significant contribution to protecting the EU’s financial interests;
- arrangements for identifying counterparties in exclusion situations are adequate.

**17** We collected and analysed information on the operation of EDES from:

- two Commission departments responsible for authorising operational expenditure in direct management – Research Executive Agency (REA) – and indirect management – the Directorate-General for International Partnerships (DG INTPA);
- two Commission departments with cross-policy area responsibilities for protecting the EU’s financial interests – Directorate-General for Budget (DG BUDG) and the European Anti-Fraud Office (OLAF);
- the main partners in indirect management that are responsible for implementing EU financial instruments, namely the European Investment Bank (EIB), the European Investment Fund (EIF) and a selection of its financial intermediaries in four Member States (Estonia, Italy, Poland and Portugal).

**18** We compared the EDES to the exclusion systems of the US federal government and the World Bank Group, which we visited in February 2020. In addition, we analysed and cross-checked information on counterparties and exclusion situations in

the EDES, the EU accounting system and other EU level databases, national data sources, and a commercially available compliance data tool<sup>20</sup>.

**19** As regards **shared management**, we reviewed the arrangements in four Member States (Estonia, Italy, Poland and Portugal), which we selected to reflect the diversity of approach with respect to the management of public funds. For each of these Member States, we selected one paying agency and one managing authority responsible for agricultural and cohesion spending. Due to the COVID-19 outbreak, we relied on analysis of official documents, written responses from Member State authorities to our questions about their use of exclusion, and remote interviews with officials at those authorities. We also collected and analysed information on exclusion in shared management from the main Commission departments involved, namely the directorates-general for agriculture and rural development, regional and urban policy and employment, social affairs and inclusion. We also used the compliance data tool to screen a stratified sample of counterparties in shared management for possible exclusion situations.

**20** We carried out this audit with a view to contributing to the Commission's proposal for revising the Financial Regulation in 2022 and its plans for enhancing the use of digital tools and data to protect the EU's financial interests by making available an integrated and interoperable information and monitoring system covering all beneficiaries of EU funds<sup>21</sup>.

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<sup>20</sup> LexisNexis Bridger Insight.

<sup>21</sup> Paragraph 32 of the [Interinstitutional agreement of 16 December 2020 on budgetary discipline](#).

# Observations

## Direct management: despite some strengths of the exclusion system, shortcomings limit its effectiveness

### The Commission's exclusion system has a broad scope and robust exclusion procedures

#### The EDES covers a broad range of counterparties, types of financial agreement, and exclusion situations

**21** To maximise its utility, we would expect an effective exclusion system to apply to all types of potential counterparty, cover all types of financial agreements, and include a comprehensive list of exclusion situations.

**22** We found that exclusion applies to all **types of EU counterparties** that are eligible to apply for and receive funds. However, the possibility of excluding related parties, such as affiliates, beneficial owners, and responsible managers (where they are not themselves recipients of EU funds) are relatively limited under the Financial Regulation<sup>22</sup>.

**23** We also found that, since the 2016 revision of the Financial Regulation, exclusion situations apply to all **types of financial agreements**, notably contracts, grants, prizes, and financial instruments.

**24** Lastly, we found that the Financial Regulation provides for a broad range of **exclusion situations**, comparable to those used by the US federal government. We noted only one significant difference: EU financial rules do not provide for excluding counterparties having debts towards the EU budget; however, authorising officers can mitigate the risk by offsetting any debts against future payments, so exclusion is not necessary.

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<sup>22</sup> Article 136 (4) of the [Financial Regulation](#).

## The EDES's procedures provide for robust decision-making on exclusion

**25** We would expect a robust procedure for adding and removing counterparties to ensure that decisions on exclusion are valid, consistent, fair and proportionate. [Table 1](#) provides an overview of our comparison of EDES with the US exclusion system. The World Bank Group exclusion system shares features with the EDES and the US exclusion system.

**Table 1 – Comparison of the EDES with the US exclusion system**

Feature	EDES	US system
Evidence required	Final judgment or administrative decision.  Or sufficient facts and findings that an exclusion situation exists (preliminary classification in law)	Civil judgment or conviction.  Or sufficient evidence that the fact of the exclusion situation is more probably true than not (preponderance of the evidence)
Decision-maker	Authorising officer of the responsible department or agency (after consultation with the EDES panel)	Suspension and debarment official of the responsible agency
Notification of counterparty	Yes	Yes
Right to be heard	Yes	Yes
Consequences for counterparties	Excluded from new funding for 1 – 5 years  Publication in severe cases  Possibility of a financial penalty	Excluded from new funding for 1 – 5 years  Publication in all cases

Source: ECA.

**26** We found that the EDES has **robust decision-making procedures** on exclusion. The validity of decision-making is assured by reliance on final judgments or administrative decisions. In addition, in the absence of a final judgement or final administrative decision (which might take months or even years), the Financial

Regulation allows for excluding counterparties, where the EU's financial interests are at significant risk and the available facts or findings are sufficient to support an exclusion decision. In such circumstances, the authorising officer responsible must refer the case to the EDES panel.

**27** As in the US system, the Financial Regulation requires counterparties to be given prior notification and an opportunity to make observations before an exclusion decision is taken. The EDES panel considers counterparties observations alongside the facts and findings provided by authorising officers and issues recommendations. The panel's assessment procedure protects the fundamental rights of counterparties, such as the right to be heard<sup>23</sup>.

**28** From 2016 to 2020, authorising officers referred 98 cases to the panel. The panel made 57 recommendations – 43 to exclude and 14 not to exclude the counterparty concerned<sup>24</sup>. The remaining 41 referrals included cases withdrawn by the authorising officer due to a change in circumstances, cases where the panel was not in a position to make a recommendation, and ongoing cases. Since 2016, authorising officers have always chosen to follow the panel's recommendations<sup>25</sup>. The panel's composition and experience in carrying out central assessments of exclusion cases help ensure consistent decision-making. The team of DG BUDG officials that provides administrative support to the EDES panel also helps ensure consistency by advising authorising officers in other departments regarding whether to refer cases.

**29** Once the responsible authorising officer has taken an exclusion decision, other authorising officers are required to respect it until the counterparty has completed the exclusion period. In addition to being able to access the EDES database, departments can check directly in Commission's accounting system whether a counterparty is listed in the EDES database before entering a new financial commitment. Counterparties automatically cease to be blacklisted in the EDES at the end of their exclusion period. Authorising officers may also request the panel to revise a recommendation on exclusion to take account of new facts or circumstances – for example, once the relevant authority has reached a final judgment or administrative decision, or the counterparty has taken remedial action.

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<sup>23</sup> Article 143 of the [Financial Regulation](#).

<sup>24</sup> [Annual reports](#) on protecting the EU's financial interest from 2016 to 2020: [SWD\(2017\)268](#), [SWD\(2018\)382](#), [SWD\(2020\)157](#), [SWD\(2021\)256](#).

<sup>25</sup> Point 7 of [SWD\(2020\)157](#).

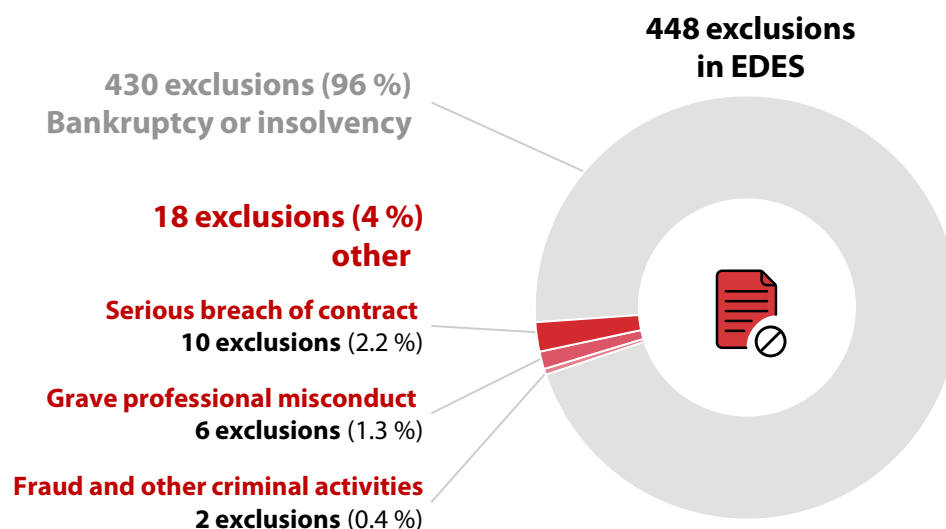
## The EDES “blacklist” contains few excluded counterparties

**30** The utility of a “blacklist” largely depends on its size and scope, which are mainly determined by other key elements of the exclusion system (see [Figure 1](#) above):

- the range of counterparties, types of financial agreement, and exclusion situations covered;
- the operation of the exclusion procedure; and
- the arrangements made for checking whether counterparties are in an exclusion situation, which provide the main input for the exclusion procedure.

**31** We analysed the data on exclusion cases registered in the EDES database during the period 2016-2020. In all, the EU blacklist named 448 excluded counterparties as at 31 December 2020, 430 because of insolvency and bankruptcy and 18 related to other reasons. Insolvent and bankrupt counterparties present little further risk to the EU’s financial interests, as they are unlikely to apply for further EU funds<sup>26</sup>. Only two cases related to fraud and corruption. [Figure 3](#) provides an overview of exclusions by type of situation.

**Figure 3 – Exclusions by type of exclusion situation**






Source: ECA based on the Commission’s EDES database.

**32** The EU excludes very few counterparties compared to the US federal government and the World Bank. Adjusting for the amount of funds involved, we estimate that the

<sup>26</sup> Article 167(2) and Article 198(2) of the [Financial Regulation](#).

US federal government excludes over fifty times more counterparties than the EU does under the EDES ([Table 2](#)). While there are significant differences in the budgets and counterparties of the US government and World Bank compared to the EU, the relatively low exclusion rate for EDES indicates that there may be shortcomings in the EU's arrangements for identifying counterparties in exclusion situations.

**Table 2 – Comparison of exclusion rates**

Description	EDES	US federal government	World Bank Group
<b>Exclusion rate (excluded counterparties per billion euros)</b>	<b>0.5</b> 	<b>25</b> 	<b>27</b> 
Excluded counterparties as at 31 December 2020 (not including bankruptcy and insolvency cases)	18	140 000	1 250
Related annual budget for 2020 (in billion euros)	39*	5 500**	46***

\* Section 2.1.1 of [Annual Management and Performance Report for the 2020 EU Budget](#), excluding "Other services and administration."

\*\* Based on [US government figures](#) for 2020, 1 EUR=1,1922 USD (InforEuro December 2020).

\*\*\* The [Annual Report 2020 of the World Bank Group](#), 1 EUR=1,1922 USD (InforEuro December 2020).

Source: ECA.

**33** The US federal government publishes all exclusions. Under the Financial Regulation, publication is considered to be an additional sanction that must be applied proportionately. As at 31 December 2021, the online EDES database<sup>27</sup> listed seven counterparties.

**34** We found that counterparties, once excluded, are unlikely to receive further EU funds in direct management. We compared the list of excluded counterparties in the EDES to the list of all open financial commitments registered in the Commission's accounting system. We did not identify any cases of authorising officers entering into new financial commitments with excluded counterparties.

<sup>27</sup> EDES database: List of economic operators excluded or subject to financial penalty.

## Shortcomings in the arrangements to check exclusion situations limit the EDES' effectiveness

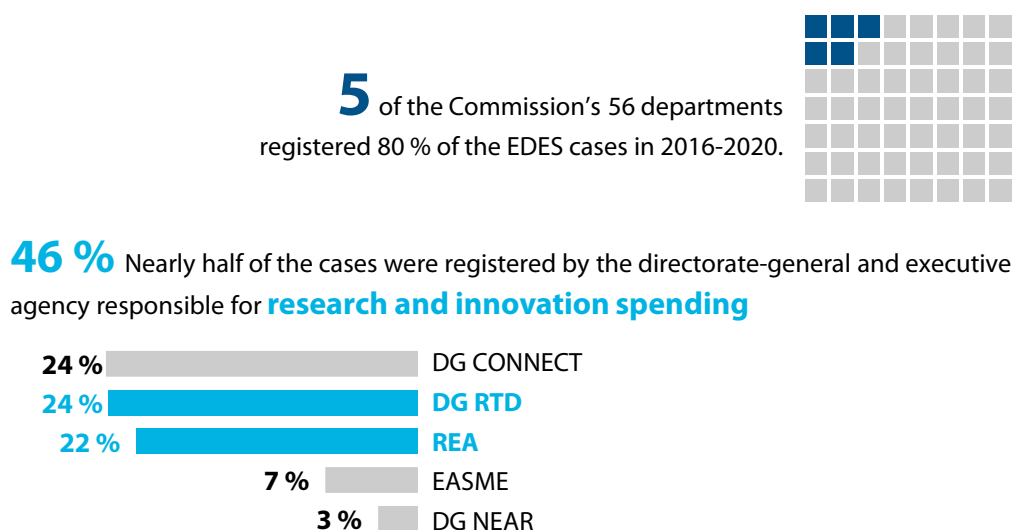
**35** While the EDES has a broad scope and a robust exclusion procedure, there are a number of shortcomings in the arrangements for identifying counterparties in exclusion situations, which have significantly contributed to the relatively low exclusion rate (see sub-sections below, paragraphs [36-63](#)).

### Responsibility for identifying excludable counterparties is fragmented within the Commission

**36** In line with its decentralised governance model for financial management, the Commission has delegated the authority to make exclusion decisions to its authorising officers. However, the actual task of checking whether counterparties are in an exclusion situations is usually carried out by “authorising officers by delegation”, multiple staff in each department, who are responsible for making budgetary and legal commitments and authorising payments.

**37** The large number of officials potentially involved raises the risk of inconsistent approaches to identifying whether counterparties are in an exclusion situation. Five departments, responsible between them for managing around 50 % of the funds under direct management, accounted for around 80 % of all cases (including bankruptcy cases), with nearly half of all cases registered by the department and executive agency responsible for research and innovation spending (DG RTD and REA). [Figure 4](#) shows EDES cases by Commission department. Looking only at situations not involving bankruptcy and insolvency, we found that 17 of the Commission's 56 departments and executive agencies registered exclusion cases from 2016 to 2020. Thirty-nine of the Commission's departments and executive agencies have never registered a non-bankruptcy exclusion case in the EDES.

**Figure 4 – EDES cases by Commission department**



Source: ECA based on Commission's EDES database.

**38** In this context, we note that the Commission's Internal Audit Service (IAS) reported in 2019<sup>28</sup> that the Commission lacked a systematic approach to checking whether counterparties are in an exclusion situation and should be subject to the exclusion procedure. We found that the departments we reviewed have no staff specialised in, or exclusively tasked with, checking counterparties for exclusion situations and registering cases in the EDES. The IAS also reported a general lack of awareness about EDES across the Commission. In response to the report, the Commission has been carrying out training and awareness raising activities, including on the tools authorising officers' must use to identify and report counterparties in exclusion situations.

**39** The fragmentation of responsibility for identifying counterparties in exclusion situations is also apparent with regard to cases of suspected fraud against the EU budget. In such cases, the responsible authorising officer is required to notify OLAF of the suspected fraud and should check whether or not to register an early detection case in the EDES. OLAF is responsible for carrying out investigations and communicating their results in a report with recommendations. However, OLAF is not explicitly required to recommend registering an early detection or exclusion case. The

<sup>28</sup> IAS audit report: IAS.B4-2017-BUDG-001 of 25 January 2019.

responsible authorising officer should take account of OLAF's recommendations in general<sup>29</sup> and should check whether or not to refer the case to the panel if the OLAF investigation confirms fraud.

**40** We found that there were no clear guidelines or procedures regarding OLAF making recommendations to authorising officers about registering cases in the EDES. At the time of the audit, OLAF was revising its procedures for making recommendations and monitoring their implementation. OLAF was also working with DG BUDG on new instructions for the drafting of EDES-related recommendations. In addition, although OLAF specifies in its report the preliminary classification in law of the facts established as required<sup>30</sup>, the descriptions of the facts require further analysis and more details before authorising officers can refer an exclusion case to the EDES panel.

#### **Commission departments face difficulties in accessing Member States' data on counterparties**

**41** The Commission's arrangements for identifying whether counterparties are in an exclusion situation often rely on access to Member States' data, as there are no EU wide registers or records. *Figure 5* highlights the main types of national data sources for a range of EDES exclusion situations<sup>31</sup>.

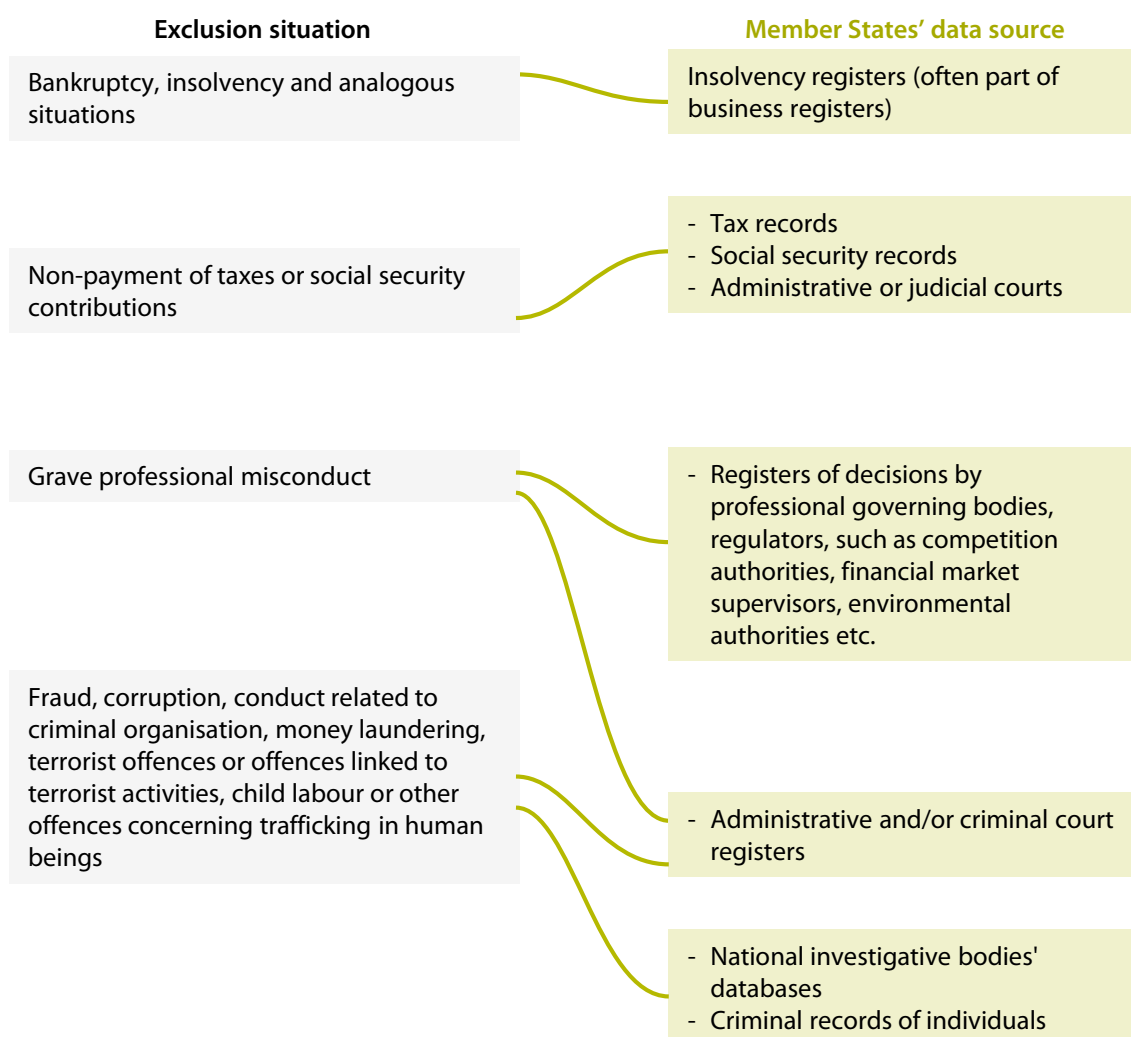
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<sup>29</sup> Article 136(2) of [Financial Regulation](#).

<sup>30</sup> Article 11 of [Regulation 883/2013](#) on investigations conducted by OLAF.

<sup>31</sup> Article 136(1) (a) to (d) of the [Financial Regulation](#).

**Figure 5 – Member States’ data on exclusion situations**



Source: ECA, based on Article 136 of the Financial Regulation.

**42** In direct management, authorising officers may have to deal with counterparties from a wide range of Member States and other countries. In doing so, they face major practical, legal and technical obstacles to accessing data. In general, departments with direct management responsibilities do not have privileged access to Member States’ data and so must rely on publicly available databases that may be fee-based and only accessible in the Member State’s language.

**43** We found that data access varies depending on the exclusion situation and the Member State concerned. For example, access to data on **bankrupt and insolvent** companies is generally good. Estonia, Italy, Poland and Portugal all provided publicly available information on companies’ solvency status; however, the exact nature of the information differs from one Member State to another.

**44** The arrangements for checking unpaid **taxes and social security** contributions also differ among the four Member States. For example, Estonia provides free, public access through its online business register on unpaid tax and social security debts over €100. Poland's business register also provides free public information on such debts, if still unpaid 60 days after the start of a recovery procedure. In Italy, a specific authority provides a certificate on unpaid tax and social security contributions through a dedicated website but only if the requester registers their identity. In Portugal, information on unpaid tax and social security contributions is restricted to authorised users of the government's IT platform.

**45** In addition, there are legal restrictions on access to relevant **criminal records**. In particular, information relating to a counterparty may require authorisation from Member State authorities or even the person concerned. In some cases, a person's criminal record is only available in the form of a certificate whose authenticity may not be readily verifiable by the Commission.

**46** A further problem faced by the Commission is **identifying the counterparty** in the various registers. The lack of an EU unique identifier for a given company or person makes it difficult to match records from different datasets. Such unique identifiers are used in some jurisdictions, such as the US. In the four Member States we reviewed, a company's or person's tax identification numbers were available for use by national government offices. However, these identifiers were not published in all the relevant public registers, and so were unavailable to the Commission.

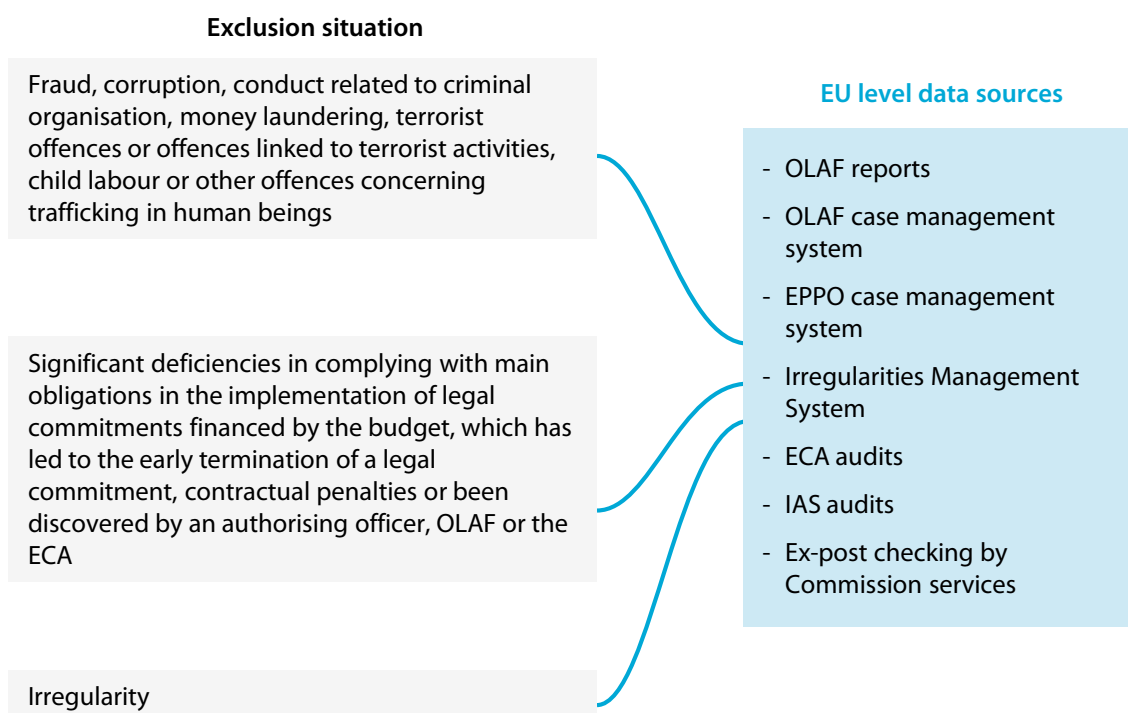
**47** One way to mitigate the impact of data fragmentation and the lack of clear identifiers is to use **data-mining tools**. Such tools are widely used in the financial sector to identify risky counterparties. However, current commercial data-mining tools are not well adapted to the Commission's needs as they do not cover all EU grounds for exclusion and rely on public data of uncertain quality and completeness. While such tools may bring together information relevant to early detection cases, they cannot provide the facts and findings required for exclusion in the EDES.

**48** The Commission has been developing a data-mining and risk-scoring tool, primarily for audit and control purposes in shared management (paragraph **84**). This tool could also be useful for direct and indirect management. However, if it is to be useful for identifying counterparties in an exclusion situation, it will need to find solutions to the **practical, technical and legal barriers** outlined above. This will require EU legislation to open access to existing Member State data, as well as further digitalisation, data sharing and analysis with respect to the management of EU funds.

## EU-level data sources are under exploited in identifying excludable counterparties

**49** The Financial Regulation provides for authorising officers to make use of a number of EU-level data sources to identify counterparties in certain exclusion situations<sup>32</sup>. **Figure 6** highlights the main exclusion situations for which there are EU-level data sources. Where information from these data sources indicates a risk that a counterparty is in an exclusion situation, the responsible authorising officer should register an early detection or exclusion case<sup>33</sup>. The sources overlap to some extent, as early detection and exclusion may result from OLAF investigations originally initiated on the basis of evidence collected during EU-level audits or other checks. We examined the use made of early detection and other sources of EU-level data in checking for exclusion situations.

**Figure 6 – EU-level data sources on exclusion situations**



Source: ECA, based on Article 136 of the Financial Regulation.

<sup>32</sup> Article 136(1) (d), (e) and (f) of the [Financial Regulation](#).

<sup>33</sup> Article 142(2) of the [Financial Regulation](#).

### Early detection

**50** As **early detection** relates to counterparties presumed to be in an exclusion situation, we would have expected it frequently to result in exclusion. In all, there were only 90 cases of early detection closed from 2016 to 2020. Out of the 90 cases, only 15 led to exclusion, eight for bankruptcy or insolvency and seven for other reasons. Of the remaining 75 cases, 13 were closed before the one-year expiry date, with no reason recorded in the EDES database, and 62 expired automatically at the end of the one-year period. As at 31 December 2020, 11 early detection cases were open in the EDES database. The number of cases appears low given the data sources authorising officers are required to use.

**51** The automatic expiry of cases after one year<sup>34</sup> may undermine early detection's role in the monitoring of risky counterparties if it takes more than a year to receive a final court judgment or administrative decision. However, authorising officers may only extend the expiry date for cases referred to the EDES panel for exclusion<sup>35</sup>.

### OLAF data on fraud investigations

**52** We would have expected a significant proportion of **OLAF investigations** to result in the counterparties involved being registered as early detection cases. We found that authorising officers register few cases in the EDES in response to OLAF investigations. Out of 257 investigations concluded by OLAF from 2016 to mid-2020<sup>36</sup> in connection with direct management spending, 143 cases were either suspected fraud (76 cases) or irregularity (67 cases). Ten of the counterparties concerned were excluded - five for bankruptcy and five for other reasons. In addition, six counterparties were registered as early detection cases.

**53** As outlined above (paragraphs **39** and **40**), authorising officers receive information on the results of OLAF investigations in the form of reports. The reports are based on data held in OLAF's case management system. It is also important for authorising officers to be aware of relevant ongoing investigations. However, data relevant to early detection and exclusion is not directly available to the Commission.

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<sup>34</sup> Article 142(4) of the [Financial Regulation](#).

<sup>35</sup> Ibid.

<sup>36</sup> Data supplied by OLAF at the request of the ECA.

**54** Since it began operating in June 2021, the European Public Prosecutor’s office (EPPO) has been responsible for investigating, prosecuting and bringing to judgment crimes against the financial interests of the EU. At the time of the audit, the EPPO was in the process of setting up its own case management system<sup>37</sup>. In accordance with the EPPO regulation, information exchange on whether a counterparty is under investigation is possible between the OLAF and EPPO case management systems. In addition, the EPPO informs the Commission about the follow-up it gives on cases referred to it<sup>38</sup>.

#### Irregularities Management System

**55** The Financial Regulation also provides for authorising officers in direct management to make use of the data Member States are required to report on fraud and irregularities in shared management<sup>39</sup>. Reporting is done through the Irregularities Management System (IMS), which is available to all authorising officers. They are responsible for checking whether any of “their” counterparties are listed in the system<sup>40</sup>. In 2019, the IAS reported that the responsible departments do not systematically check the system for this information<sup>41</sup>. Our analysis produced no evidence that any of the 2 473 cases Member States reported from 2016-2020 were registered in the EDES. However, we identified seven instances of the Commission entering into further commitments in direct management with counterparties registered in the system, but for these we found no evidence of any prior exclusion assessments. These findings indicate that better use could be made of the IMS’s data for exclusion purposes in direct management.

#### Audits and *ex-post* checks

**56** The Financial Regulation also recognises audits and *ex-post* checks by the ECA, the IAS, and Commission departments as potential sources of EDES cases. The ECA transmits the details of irregularities it finds to the Commission and also, in instances

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<sup>37</sup> Article 44 of [Regulation EU/2017/1939](#).

<sup>38</sup> Article 6 of the [Agreement establishing the modalities of cooperation between the European Commission and the European Public Prosecutor’s Office](#).

<sup>39</sup> Article 142.2 (d) of the [Financial Regulation](#).

<sup>40</sup> Article 136.2 (d) of the [Financial Regulation](#).

<sup>41</sup> IAS audit report: IAS.B4-2017-BUDG-001 of 25 January 2019.

of suspected fraud, to OLAF and the EPPO<sup>42</sup>. Similarly, where Commission audits or *ex-post* checks identify suspected fraud, authorising officers are required to send the information to OLAF for investigation. Authorising officers are responsible for using these data sources as a basis for early detection and exclusion cases. The Commission has made no exclusions on the grounds of irregularity despite reporting nearly 8 000 irregularities in direct management for 2016-2020<sup>43</sup> based on *ex-post* checks and audits.

### **The Commission relies too much on counterparties' declarations on the absence of an exclusion situation**

**57** In practice, due to difficulties in checking the counterparty against the main national and EU level data sources (paragraphs [41-56](#)), the responsible Commission departments do not check each counterparty for every exclusion situation before entering into financial agreements. The Financial Regulation normally requires counterparties to declare if they are in an exclusion situation<sup>44</sup>. For example, they may be required to declare any<sup>45</sup> “facts established in the context of audits or investigations” carried out by the EPPO, the ECA, OLAF or the internal auditor, or established by “any other check, audit or control performed under the responsibility of an authorising officer”.

**58** Declarations on honour on the absence of an exclusion situation are required in most cases. Authorising officers may decide not to require counterparties to provide evidence to support the declaration on honour. For example, DG INTPA does not require a declaration on honour for grants under €15 000 or the submission of supporting documents for a declaration for grants under €60 000<sup>46</sup>. For procurement contracts, authorising officers often require counterparties to provide documentary proof, or statements required under the law of their country, that they are not in an exclusion situation.

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<sup>42</sup> Administrative Arrangement between the European Court of Auditors and the European Public Prosecutor's Office.

<sup>43</sup> Table DM3 on p.133 of Part 2 of Statistical evaluation of irregularities reported for 2020 - [SWD\(2021\) 258 final](#).

<sup>44</sup> Article 137(1) of the [Financial Regulation](#).

<sup>45</sup> Example of a Commission [template of a declaration on honour](#).

<sup>46</sup> [Contract Procedures for European Union External Action – A practical guide](#).

**59** The Commission's reliance on declarations on honour in its grant award and procurement procedures reduces the likelihood of identifying that a counterparty is in an exclusion situation before the signing of a financial agreement. It also goes against the main rationale for introducing an exclusion system, namely to move away from a model for protecting finances dependent on detection and correction and towards a prevention-based model.

### **Responsibility for central monitoring and oversight of the identification of excludable counterparties is limited**

**60** Given that multiple authorising officers across the Commission are responsible for identifying counterparties in exclusion situations, monitoring and oversight of their activities are essential to ensuring the effective operation of the EDES. Although the Financial Regulation stipulates that the central assessment of registered exclusion cases should be done, it does not provide for central monitoring and reporting on the effectiveness of the responsible departments in identifying such cases.

**61** In practice, we found limited central monitoring and oversight of the identification and registration of EDES cases from 2016 to 2020. In January 2021, OLAF and DG BUDG reported on the follow-up to recommendations issued between 2012 and mid-2019 to the Commission's Corporate Management Board<sup>47</sup>. This exercise addressed an IAS observation on the absence of adequate corporate monitoring on the follow-up of OLAF recommendations<sup>48</sup>. At the time of our audit, no central monitoring had taken place on authorising officers' use of other data sources, such as IMS cases, ECA and IAS audits, or *ex-post* checks by Commission departments.

**62** The IAS also commented on the need to strengthen guidelines and apply the EDES in practice<sup>49</sup>. In particular, the IAS found that arrangements within departments for identifying cases that should trigger an EDES procedure needed to be improved in order to make this a more integrated part of the internal control system. We note that a corporate guide for the EDES was issued in October 2018. The guide provides clear information on when to register EDES cases and the scope and operation of the exclusion procedure. However, guidance on how authorising officers should use the various sources of data to identify counterparties in exclusion situations is lacking.

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<sup>47</sup> Minutes of the meeting of the Corporate Management Board of 27 January 2021.

<sup>48</sup> IAS audit report: IAS.B4-2017-BUDG-001 of 25 January 2019.

<sup>49</sup> Ibid.

**63** The lack of central monitoring undermines the Commission’s ability to improve the effectiveness of the EDES. Better monitoring would provide a basis for identifying good practice and developing guidance for authorising officers. Such guidance could help promote a more systematic approach to using available data sources to identify counterparties in an exclusion situation and register them in the EDES database. In addition, the department responsible for carrying out this central monitoring would be well placed to champion improvements in the availability of data at EU and national level.

## **Indirect management: the implementation of the Early Detection and Exclusion System has taken longer than planned**

### **Implementing partners have made a small contribution to the number of early detection and exclusion cases**

**64** Since 2016, the EDES has applied to EU funds that the Commission manages indirectly under agreements with implementing partners. We examined the implementation in indirect management of the key elements of EDES (the EDES database of blacklisted counterparties, exclusion situations and procedures, and arrangements for checking counterparties).

**65** Under the Financial Regulation, the Commission may rely on implementing partners provided they are capable of protecting the EU’s financial interests to an adequate level. The Financial Regulation<sup>50</sup> requires authorising officers to make a “pillar assessment” of the financial management arrangements of the Commission’s main implementing partners.

**66** Under their agreements with the Commission, implementing partners should not provide EU financial support to a counterparty in an exclusion situation and should notify the Commission of any counterparties they find in such a situation. This enables authorising officers to assess whether the counterparty should be subject to an exclusion procedure covering all directly and indirectly managed funds. However, from 2016 to 2020, we found no evidence in the EDES of exclusion cases relating to notifications from implementing partners. For example, DG INTPA, the Commission department with the most implementing partners, identified only one instance.

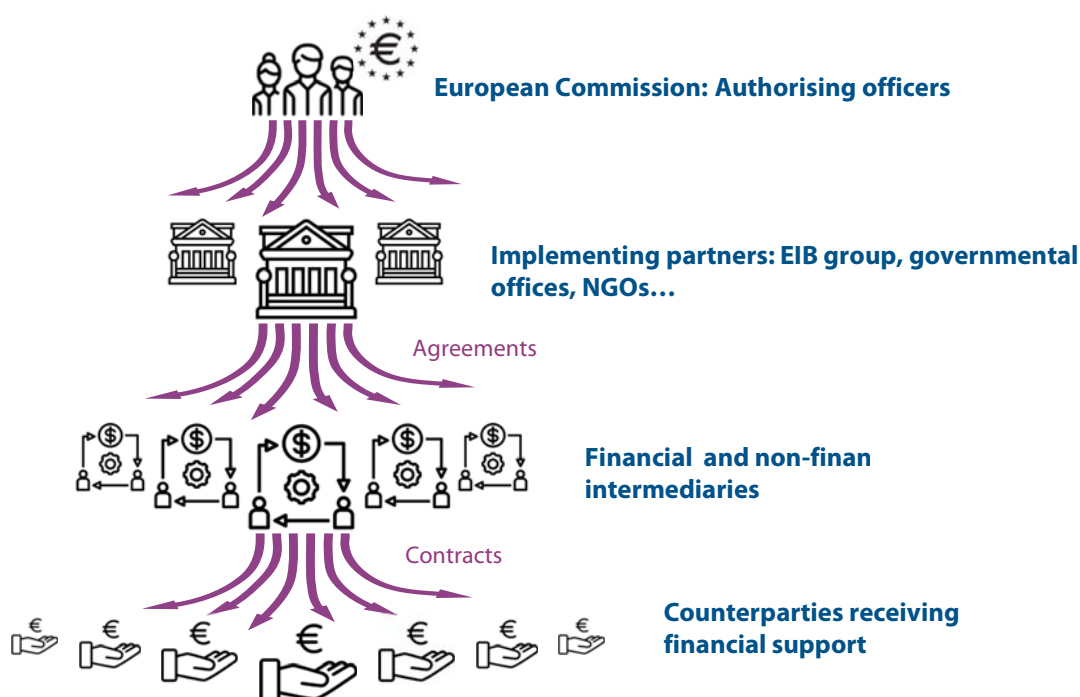
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<sup>50</sup> Article 154 of the [Financial Regulation](#).

**67** The lack of EDES cases relating to counterparties of implementing partners is largely explained by the same factors that apply in direct management:

- **Fragmentation of responsibility for exclusion** - The Commission has agreements with around 200 implementing partners, which may in turn rely on sub-contractors or other intermediaries to implement EU actions. For example, the EIF provides finance to small and medium-sized enterprises through financial intermediaries. *Figure 7* illustrates the many actors and levels of agreement in indirect management.
- **Difficulties accessing national data** - Implementing partners' checks on counterparties are constrained by the availability of relevant national data on certain exclusion situations. Many of the main implementing partners, such as the EIB Group, deal with counterparties established in a wide range of jurisdictions.
- **EU level data sources** - Implementing partners face similar (or even increased) constraints to the Commission with respect to using EU level data sources. For example, unlike Commission departments, intermediaries do not have access to the non-public part of the EDES database or the IMS.
- **Reliance on declarations on honour** - Implementing partners may (and often have to) rely on declarations on honour regarding the absence of exclusion situations when entering into agreements with counterparties.
- **Weak central responsibilities for monitoring and oversight** - the Commission has not yet examined why implementing partners have reported so few cases of counterparties in exclusion situations.

Figure 7 – Many actors and levels of agreement in indirect management



Source: ECA.

**68** We found a number of other factors that may also be contributing to the low-level of notifications from implementing partners of counterparties in exclusion situations for grants and contracts:

- o Agreements with implementing partners may not cover all exclusion situations as derogations are negotiated to reflect the specificities of implementing partners' arrangements. For example, the Financial and Administrative Framework Agreements with the EIB<sup>51</sup> and the EIF<sup>52</sup>, cover five of the seven EDES exclusion situations.
- o Implementing partners may not be in a position to exclude counterparties before there is a final judgment or administrative decision.

**69** As regards financial instruments, effective systems for screening counterparties reduce the likelihood of counterparties in exclusion situations receiving EU financial support. For example, the EIB checks the trustworthiness of its counterparties before

<sup>51</sup> Financial and Administrative Framework Agreement of 8 October 2019.

<sup>52</sup> Financial and Administrative Framework Agreement of 14 February 2020.

considering whether they are eligible for EU support. Similar procedures are applied by the EIF's financial intermediaries.

### **There have been considerable delays in completing the assessments of implementing partners' exclusion systems**

**70** At the time of the audit, the Commission did not have a comprehensive overview of the specific exclusion situations applied by implementing partners or their exclusion arrangements. This was partly due to delays in the pillar assessments of implementing partners' financial management arrangements for EU spending during the 2021-2027 period.

**71** The assessments require implementing partners to engage external auditors to examine and report on their systems. Before 2019, pillar assessments did not specifically cover implementing partners' exclusion arrangements. In 2019, the Commission added a new pillar on exclusion in the implementing partner assessments for the 2021-2027 period<sup>53</sup>. The EDES provisions are reflected in the pillar assessment terms of reference.

**72** As of 31 December 2020, only 5 % of pillar assessments had been updated because of delays resulting from the COVID-19 pandemic. The Commission extended the deadline for finalising assessments to the end of 2021. By the end of 2021, about 42 % of pillar assessments had been updated. The updated pillar assessments are expected to improve the Commission's understanding of implementing partners' use of specific exclusion situations, and their arrangements for identifying counterparties for exclusion. However, without monitoring how the implementing partners subsequently operate, the Commission cannot fully ensure that its overview of the application of exclusion systems is accurate.

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<sup>53</sup> Commission Decision [2019/C 191/02](#) of 17 April 2019.

## Shared management: differences of approach undermine the overall effectiveness of exclusion

### Member States' differing approaches to exclusion contribute to unevenness in the protection of the EU's financial interests

**73** Exclusion systems, such as the EDES, can contribute to ensuring an even protection of EU's financial interests in EU funds under shared management. We examined Member States' obligations under EU law in connection with exclusion and reviewed the arrangements that apply to cohesion and agricultural spending in four Member States (Estonia, Italy, Poland and Portugal).

**74** EU law does not require Member States to establish exclusion systems comparable to the EDES, neither for EU funds nor for their own public funds. However, the Financial Regulation, sectoral legislation for shared management spending, and EU public procurement directives create a number of exclusion-related obligations for Member States for protecting the EU's financial interests.

**75** The Financial Regulation requires Member State authorities to put in place effective internal control systems to prevent or detect and correct irregularities and fraud<sup>54</sup>, but it does not require them to maintain a blacklist and apply exclusion situations and procedures analogous to the EDES, which only covers directly and indirectly managed spending. The Financial Regulation and sectoral legislation<sup>55</sup> also provide for Member States to use the IMS to report cases of fraud and irregularity relating to EU funds under shared management<sup>56</sup>. However, the Commission must consult Member States before using data reported in this way<sup>57</sup> and it can only use the data to exclude counterparties from receiving directly or indirectly managed funds.

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<sup>54</sup> Article 36(2)(d) of the [Financial Regulation](#).

<sup>55</sup> Article 144 of the [Financial Regulation](#), Article 5 of Commission Delegated Regulation (EU) [2015/1971](#) and Article 5 of the Commission Delegated Regulation (EU) [2015/1970](#).

<sup>56</sup> Article 122(2) of [Regulation \(EU\) 1303/2013](#); Article 50(1) of [Regulation \(EU\) 1306/2013](#), Article 30(2) of [Regulation \(EU\) 223/2014](#); Article 5(5) of [Regulation \(EU\) 514/2014](#); Article 21(1)(d) of [Regulation \(EU\) 1309/13](#).

<sup>57</sup> Article 144 of the [Financial Regulation](#).

**76** The sectoral legislation covering shared management spending does not require Member States to establish exclusion systems in the corresponding areas, although some provisions in cohesion and rural development spending are relevant to exclusion. For example, cohesion regulations do not allow companies in financial difficulty to receive EU funds<sup>58</sup>, which is comparable to the EDES exclusion situation regarding bankruptcy and insolvency<sup>59</sup>. In agriculture, except for possibilities to exclude from the same measures for two years<sup>60</sup>, there are no legal requirements for applying exclusion situations to counterparties applying for the entitlement-based payments that make up the bulk of EU spending in that area, even though the recipients may be sizeable companies or high-net worth individuals.

**77** The EU public procurement directive<sup>61</sup> requires Member States' authorities to exclude counterparties in certain situations. The requirement applies to all public procurement in the Member States, including public procurement involving EU funds. The directive lists mandatory and optional exclusion situations for Member States to implement in national law. The optional situations include those that are mandatory for the EDES, such as bankruptcy, insolvency and any analogous situations. In practice, in some jurisdictions Member States' authorities may exercise considerable discretion as to which exclusion situations to apply in specific procurement procedures.

**78** This patchwork of exclusion-related obligations is not an effective basis for using exclusion to protect the EU budget in shared management. In particular, it means that there is no common classification in law of what constitutes an exclusion situation for counterparties receiving EU funds under shared management. It also does not provide for counterparties excluded from receiving EU funds in one Member State to be similarly excluded in other Member States. In addition, Member State authorities are not required to consult or apply the EDES exclusion list (paragraph **83**)<sup>62</sup>.

**79** In the absence of a coherent set of obligations at EU level, we observed considerable differences in the approach to exclusion taken by Member States. The

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<sup>58</sup> [Regulation \(EU\) 1301/2013](#) on the European Regional Development Fund and [Regulation \(EU\) 1300/2013](#) on the Cohesion Fund.

<sup>59</sup> Article 136(1) (a) of the [Financial Regulation](#).

<sup>60</sup> Article 19 and 35(5) of [Regulation 640/2014](#).

<sup>61</sup> Article 57 of [Directive 2014/24/EU](#) on Public Procurement.

<sup>62</sup> Article 142(5) of the [Financial Regulation](#).

extent to which Member States use exclusion to prevent untrustworthy counterparties receiving shared management funds depends on their national legislation. None of the four Member States covered by our audit had established a fully-fledged exclusion system covering all the different types of EU funds under their management.

**80** The lack of consistency in shared management means that counterparties in similar situations may be treated differently. For example, Poland's national legislation on public finances establishes a limited exclusion system covering recipients of EU structural funds with debts or convictions of fraud, corruption or other criminal offences against the EU budget. In Estonia, counterparties may be prevented from receiving EU funds if convicted of fraud, corruption or other criminal activities not related to EU funds. In Italy, national legislation requires final beneficiaries to pass anti-mafia checks and obtain a certificate before receiving EU agricultural or cohesion funds. In Portugal, counterparties with cohesion fund debts are not allowed to receive further EU funding.

**81** Counterparties in similar situations will also be treated differently under shared management compared with direct management. In particular, there is no EU legal basis under shared management for applying the concept of preliminary classification in law to exclude counterparties. In the four Member States covered by our audit, we found differences, with respect to the various exclusion situations, in the extent to which final judgments or administrative decisions were required before the authorities can exclude a counterparty from applying for or receiving EU funds. In effect, the current EU financial rules provide less scope for using exclusion to protect the EU's financial interests under shared management than under direct management.

## **Member States could make better use of EU-level data and tools**

**82** Member State authorities have three main EU-level data sources at their disposal for the purposes of exclusion: the EDES; OLAF data on fraud and irregularities; and Arachne, a data-mining and risk-scoring tool. We examined the use Member States make of the available EU level data sources and tools.

**83** While Member States authorities may consult the EDES, they are not obliged to do so by the EU's financial rules. As the 2019 IAS report on the EDES stated, only 16 Member States had appointed a National User Administrator for the EDES and only four of them had accessed the EDES regularly. Similarly, the IAS found that managing authorities are not aware of OLAF investigations and IMS cases concerning the counterparties of the managing authorities of other Member States.

**84** Arachne is the EU-level data-mining tool for protecting the EU's financial interests. It is designed to identify risky counterparties, though not specifically those in exclusion situations. The Commission originally developed Arachne to assist Member States' managing authorities in cohesion to carry out audits and controls. Under the pilot project for agriculture, seven paying agencies are using Arachne and another four paying agencies are in a testing phase.

**85** The utility of a data-mining tool largely depends on the quantity and quality of the available underlying data. We found that the utility of Arachne for exclusion purposes was limited by its restricted scope of application within shared management (cohesion and a pilot project in agriculture) and the lack of:

- EU data from OLAF, the IMS, and the EDES;
- completeness and accuracy checks on projects by Member States;
- clearly defined indicators covering the EDES exclusion situations.

**86** We note that the Commission has committed itself to exploring possibilities for extending the use of Arachne to all management types (direct, indirect and shared), as part of its anti-fraud strategy<sup>63</sup>.

**87** The sectoral legislation for the 2021-2027 period, covering the common provisions regulation funds and the common agricultural policy as well as the Recovery and Resilience Facility, the European Global Adjustment Fund, and the Brexit Adjustment Reserve, provide for using the Commission's single data-mining and risk-scoring tool (i.e. Arachne). Although the tool will remain voluntary for Member States, the inter-institutional agreement on budgetary discipline for the period commits the Commission to providing the tool with a view to it eventually being used by all Member States<sup>64</sup>.

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<sup>63</sup> Commission Anti-Fraud Strategy: enhanced action to protect the EU budget [COM/2019/196 final](#).

<sup>64</sup> Paragraph 32 of the [Interinstitutional agreement of 16 December 2020 on budgetary discipline](#).

## **The Commission lacks the necessary overview of Member States' exclusion arrangements and data**

**88** Our interviews with the main directorates-general responsible for shared management revealed that they do not have an overview of Member States' exclusion arrangements. Such an overview could help direct efforts to improve the use of exclusion to protect EU financial interests in all types of management. It could also be used to inform financial actors involved in the implementation of the EU budget about the availability of national data sources relevant for exclusion. Better use and re-use of data available nationally and at EU level is a prerequisite for creating an effective data-mining tool capable of helping the Commission's authorising officers to identify counterparties in – or at risk of being in – exclusion situations.

## Conclusions and recommendations

**89** The purpose of this audit was to assess whether exclusion is being used effectively to protect EU funds from untrustworthy counterparties. We concluded that this is not the case. Although EDES has a broad scope and robust decision-making procedures, the Commission had only 18 non-bankruptcy related exclusions recorded in the system at the end of 2020 due to shortcomings in the arrangements for identifying counterparties in exclusion situations. This is mainly due to fragmented responsibility for exclusion, difficulties in accessing Member State data, the under-exploitation of EU data, overreliance on counterparty self-declarations, and limited central monitoring and oversight. In shared management, where EDES does not apply, differences between the approaches taken by Member States' undermine the overall effectiveness of using exclusion to protect the EU budget.

**90** As regards direct management, we found that the EDES covers a broad range of counterparties, types of financial agreements and exclusion situations. However, there is some scope for expanding the range of exclusion situations (paragraphs [21-24](#)).

### Recommendation 1 – Expand the range of exclusion

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The Commission should address the following issue when preparing its proposal to the legislator on revision of the Financial Regulation: the exclusion of affiliates, beneficial owners and responsible managers of EU-counterparties, even if they are not EU-counterparties themselves.

**Target implementation date: 2022**

**91** We also found that the EDES exclusion procedures provide for robust decision-making on counterparties in exclusion situations. In particular, they permit counterparties to be excluded without having to wait for years for a final judgment or administrative decision. The central assessment of cases by an independent panel helps ensure consistent and fair treatment of counterparties (paragraphs [25-29](#)).

**92** However, we found a number of shortcomings in the arrangements for identifying whether counterparties are in exclusion situations. These have contributed to the low number of exclusions:

- Fragmented responsibility for identifying excludable counterparties undermines the systematic assessment of counterparties;
- The Commission does not make sufficient use of some of the main EU level data sources;
- The Commission faces difficulties in accessing national data on certain exclusion situations due to legal restrictions and technical barriers;
- The Commission often relies on counterparties' declarations regarding the absence of an exclusion situation without further checks (paragraphs [30-59](#)).

**93** Limited central monitoring and oversight of the Commission departments' identification of excludable counterparties have helped to perpetuate these shortcomings. In our view, stronger monitoring and oversight arrangements will be key to making better use of exclusion. Such monitoring would benefit from a case management system that is capable of providing an overview of ongoing and closed cases. It would also benefit from better *ex-post* checks of whether counterparties are in an exclusion situation, guidance for authorising officers on the use of the available data, and further promotion of the use of the EDES (paragraphs [60-63](#)).

## **Recommendation 2 – Strengthen the implementation of the early detection and exclusion system in direct and indirect management**

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The Commission should:

- (1) Develop a case management system capable of providing an overview of ongoing and closed cases.
- (2) Strengthen corporate oversight of the effective operation of the EDES, including by monitoring authorising officers':
  - (i) follow-up of OLAF and EPPO recommendations concerning early-detection or exclusion;

- (ii) activities and use of available data sources to identify exclusion cases, such as early detection cases, Irregularities Management System records, ongoing OLAF and EPPO fraud investigation cases, final audit results, competition decisions, and implementing partner notifications;
  - (iii) implementation of the EDES panel's recommendations.
- (3) Carry out *ex-post* checks to ascertain whether counterparties are in an exclusion situation, in particular where authorising officers rely on declarations on honour.
  - (4) Develop standard procedures and guidelines for authorising officers regarding the use of EU-level data sources, such as early detection cases, Irregularities Management System records, OLAF and EPPO fraud investigation cases, audit findings, competition cases, and implementing partner notifications.
  - (5) Promote awareness of early detection and exclusion among Commission departments, implementing partners and the Member State authorities involved in the management of EU funds.

**Target implementation date: 2023**

**94** As regards indirect management, we found that implementing partners have made a small contribution to the number of exclusion cases registered in the EDES. This is largely explained by the same factors that apply in direct management. We also found three other contributory factors: agreements with implementing partners that do not cover all exclusion situations; the fact that implementing partners cannot exclude counterparties before a final judgement or administrative decision; and the practice of screening out untrustworthy counterparties before they are considered for EU financial support (paragraphs [64-69](#)).

**95** The Commission has been slow to complete its assessment of implementing partners' exclusion systems. Once this has been completed, the Commission will be in a better position to investigate and address the underlying reasons for the low number of counterparties being excluded in indirect management. It will then also be essential for the Commission to monitor the operation of the exclusion systems that implementing partners have put in place (paragraphs [70-72](#)).

### Recommendation 3 – Improve the monitoring of early detection and exclusion under indirect management

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To achieve a consistent level of protection of EU funds under indirect management, the Commission should ensure that its partners fulfil their obligation to notify the Commission when counterparties are identified as being in exclusion situations.

**Target implementation date: starting in 2023**

**96** Regarding shared management, which mostly covers agricultural and cohesion spending, we found that there is no EU level mechanism for excluding counterparties. In the absence of a coherent set of obligations for using exclusion, our review of four Member States highlighted considerable differences of approach, which contribute to an unevenness in the protection of EU funds. We also found that some Member States could make better use could of EU-level data and tools, in particular the EDES database, OLAF data on fraud and irregularities, and the data-mining and risk-scoring tool Arachne to protect the EU's financial interests (paragraphs [73-87](#)).

### Recommendation 4 – Extend early detection and exclusion to shared management

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The Commission should address the following issue when preparing its proposal to the legislator on revision of the Financial Regulation: applying the key elements of the EDES to funds under shared management, so that counterparties found to be in an exclusion situation are treated consistently across management modes.

**Target implementation date: 2022**

**97** Finally, we found that the Commission lacks an overview of exclusion systems and data in Member States. Such an overview could help direct efforts to improve the use of exclusion and data to protect EU financial interests in all types of management and to create a data-mining tool to help identify counterparties in – or at risk of being in – exclusion situations (paragraph [88](#)).

## Recommendation 5 – Make better use of existing data and digital tools

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Within the context of its broader efforts to use data and digital tools to protect the EU budget, the Commission should take measures to improve the use of data that is relevant to exclusion, in particular by:

- (1) carrying out a mapping exercise to identify the sources of relevant data to protecting the EU budget, including national data, and determine how they can be accessed;
- (2) proposing an adequate legal basis for the access and use of data on EU counterparties, including national data, for audit and control purposes;
- (3) developing a common data mining and risk-scoring tool with access to all relevant EU and national data with the ownership at corporate level;
- (4) ensuring the availability of data and promoting its sharing at corporate level; and
- (5) developing a strategy to ensure that national and EU data on EU counterparties is digital, accessible, standardised and interoperable.

**Target implementation date: for recommendations 5(1) and (2) by 2023, recommendations 5(3) by 2025, recommendation 5(4) beginning of the next Multiannual Financial Framework, and recommendation 5(5) by 2023 for EU data and by the date of application of the revised Financial Regulation for the national data**

This Special Report was adopted by Chamber V, headed by Tony Murphy, Member of the Court of Auditors, in Luxembourg at its meeting of 26 April 2022.

*For the Court of Auditors*

Klaus-Heiner LEHNE  
*President*

## Acronyms and abbreviations

**Arachne:** Data-mining and risk scoring tool developed by the European Commission

**DG BUDG:** Directorate-General for Budget

**DG INTPA:** Directorate-General for International Partnerships

**EDES:** Early Detection and Exclusion System

**EIB:** European Investment Bank

**EIF:** European Investment Fund

**EPPO:** European Public Prosecutor's Office

**IAS:** Internal Audit Service of the European Commission

**IMS:** Irregularities Management System

**OLAF:** European Anti-Fraud Office

**REA:** Research Executive Agency

# Glossary

**Authorising officer:** A person responsible for implementing an EU body's revenue and expenditure.

**Common provisions regulation:** Regulation setting out the rules that apply to all five of the European Structural and Investment Funds in the 2014-2020 period.

**Digitalisation:** The shift towards incorporating and using digital technology and digitised information to make processes and tasks simpler, faster, more efficient and/or more economic.

**Direct management:** Management of an EU fund or programme by the Commission alone, in contrast to shared management or indirect management.

**EIB group:** The European Investment Bank and European Investment Fund.

**European Investment Bank:** EU bank, owned by the Member States, which provides financing for projects in support of EU policy, mainly in the EU, but also externally.

**European Investment Fund:** A specialist provider of risk finance to small and medium-sized enterprises in the EU and certain non-EU countries. Part of the European Investment Bank Group.

**Financial instrument:** Financial support from the EU budget in the form of equity or quasi-equity investments, loans or guarantees, or other risk-sharing instruments.

**Fraud:** Intentional and unlawful use of deception to gain material advantage by depriving another party of property or money.

**Managing authority:** The national, regional or local authority (public or private) designated by a Member State to manage an EU-funded programme.

**Paying agency:** A body appointed by a Member State to administer EU agricultural spending.

**Pillar assessment:** A Commission assessment of an implementing partner's financial management arrangements.

**Preliminary classification in law:** A legal assessment of facts and findings on a specific matter carried out before the competent authority has reached a final judgment or administrative decision.

**Public procurement:** The purchase by a public body or other authority of works, supplies or services, through an open and competitive procedure, in order to achieve quality and value for money.

**Shared management:** A method of spending the EU budget in which, in contrast to direct management, the Commission delegates to the Member State while retaining ultimate responsibility.

**Small and medium-sized enterprises:** A size definition applied to companies and other organisations, based on the number of staff employed and certain financial criteria. Small enterprises have fewer than 50 staff, and turnover or a balance sheet total not exceeding €10 million. Medium-sized enterprises employ fewer than 250 staff, and have turnover up to €50 million or a balance sheet total up to €43 million.

## Replies of the Commission

<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=61175>

## Timeline

<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=61175>

## Audit team

The ECA's special reports set out the results of its audits of EU policies and programmes, or of management-related topics from specific budgetary areas. The ECA selects and designs these audit tasks to be of maximum impact by considering the risks to performance or compliance, the level of income or spending involved, forthcoming developments and political and public interest.

This performance audit was carried out by Audit Chamber V Financing and administration of the EU, headed by ECA Member Tony Murphy. The audit was led by ECA Member Helga Berger, supported by Silvia Janik, Head of Private Office and Franz Ebermann, Private Office Attaché; Judit Oroszki, Principal Manager; James McQuade, Head of Task; Tomasz Kokot and Attila Horvay-Kovacs, Auditors. Thomas Everett provided linguistic support.



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“Blacklisting” is a measure aimed at preventing fraud. Through its EDES database, the EU tries to exclude untrustworthy counterparties, such as those involved in fraud, corruption or other irregularities, from receiving public funds. Our audit assessed whether blacklisting is being used effectively to protect the EU budget. We concluded that the current system is not effective as there is no coherent set of obligations for the different payment modes. Furthermore, for funds managed by Member States, the use of exclusion systems is not mandatory. Fragmented responsibilities and shortcomings in identifying excludable counterparties lead to few cases on the EDES-blacklist. We thus recommend to extend the use of EDES to funds managed by the Member States, where a patchwork of legal obligations on exclusion currently applies. We also recommend making better use of data and digital tools to identify untrustworthy counterparties.

ECA special report pursuant to Article 287(4), second subparagraph, TFEU.



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# REPLIES OF THE EUROPEAN COMMISSION

TO THE EUROPEAN COURT OF  
AUDITORS' SPECIAL REPORT

**Protecting the EU budget:** Better use of  
blacklisting needed

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This document presents the replies of the European Commission to observations of a Special Report of the European Court of Auditors, in line with Article 259 of the Financial Regulation and to be published together with the Special Report.

# I. THE COMMISSION REPLIES IN BRIEF

## a) General introduction

The Early Detection and Exclusion System (EDES), introduced in 2016, aims at reinforcing the protection of the EU's financial interests.

This system, which applies to direct and indirect management, has brought improvements in relation to the application of administrative sanctions, in particular with regard to independence of assessments of exclusion situations, respect of fundamental rights, and transparency vis-à-vis the economic operators.

EDES requires a strong and fruitful interaction between the responsible authorising officer (RAO) and the EDES Panel. On the one hand, the RAO has the obligation to launch the administrative procedure, when he/she becomes aware of an exclusion case. The reason lies in the fact that the RAO has the knowledge of the contracts and grants signed, the overview of the relevant ongoing procedures, and the right to adopt immediate contractual measures to safeguard the Union's financial interests. On the other hand, the system enables to act against an unreliable economic operator also in the absence of a national final judgment or a final administrative decision, on the basis of a recommendation made by a centralized, inter-institutional Panel, that performs a preliminary classification in law of the facts and findings of the case.

The EDES Panel, presided by a standing high-level, independent chair, has provided from the start a powerful harmonization driver as opposed to the risks of diverging interpretations by different RAOs.

The EDES Panel has adopted 57 recommendations<sup>1</sup> including for the most serious misconduct, most of them resulting in corresponding exclusion decisions of the RAO.

The validity of EDES procedures has been confirmed by the European Court of Justice in two recent cases<sup>2</sup>, whereby the Court has fully upheld the system and its features, including the role of the RAO and the authority of the Panel.

Finally, drawing from the lessons learnt since the creation of the system, the Commission had identified some of the weaknesses of the system and had started to take measures of administrative simplifications and awareness raising actions to enhance its effectiveness. Some of the improvements will however necessitate legislative modifications. Therefore, the Commission decided to table a proposal, expected to be adopted in the first semester of 2022, that will also cover some of the key observations raised by the European Court of Auditors (ECA) and further improve the overall system.

Against this context, the Commission welcomes the report of the ECA which will support the Commission action in further improving the system (see further below).

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<sup>1</sup> Out of over 100 referrals

<sup>2</sup> Cases T-672/19, *Indico* (EU:T:2022:64) and T-652/19, *Elevation* (EU:T:2022:63).

## **b) The Commission's position on the key ECA observations and recommendations**

The ECA acknowledges that EDES has a broad range of exclusion situations and robust decision-making procedures.

The fact that Commission services have recorded relatively few exclusions in the system must be seen against the need to ensure a sound balance between the protection of the EU financial interests and the need to ensure the right of defence and other rights enshrined in the Charter of Fundamental Rights, by requiring the necessary level of substantiated evidence (established facts) checked through the exercise of the right to be heard. This is in line with due process and the rule of law principle, taking into consideration that an exclusion decision might have a significant economic and even social impact towards the entities that eventually are subject to exclusion decisions. Furthermore, the responsibility to refer cases to the EDES Panel lies with the RAO who makes a preliminary assessment of the case taking due consideration of specific circumstances of the case (*e.g.* need to ensure the continuity of service, the assessment of the remedial measures, proportionality and financial impact).

The Commission acknowledges that efforts must continue to provide the RAO with consolidated access to data sources to help them discover situations of exclusions keeping in mind the legal and technical obstacles.

The Commission also agrees that EDES should be further reinforced and will address the findings of the ECA, in particular regarding the extension of its scope.

Our replies to the main observations of the ECA are provided under sections II and III. The Commission accepts recommendations 1, 2(1), 2(2), 2(4), 2(5), 3, 4 and 5 and partially accepts recommendation 2(3).

## **c) Relevant latest developments and next steps**

After a first term of office, a new chair and deputy chair, Ms Isabel Rofes and Mr Igor Ludborz respectively, took up duties in the EDES Panel as of November 2021. In addition, the rules of procedure of the Panel<sup>3</sup> have been amended to introduce the possibility for a representative of the European Public Prosecutor Office (EPPO) to participate in the Panel's proceeding (observer status) when based on information transmitted by the EPPO.

As far as the extension to shared management is concerned, the Commission is taking steps to further enhance the protection of this large part of the budget while respecting the delegation of the tasks relating to budget implementation to Member States pursuant to Article 63(1) of the Financial Regulation. A targeted and proportionate extension of EDES to shared management taking into account the delineation of responsibilities between the Commission and Member States requires legislative changes which have to be proposed by the Commission as part of the revision of the Financial Regulation in the first semester of 2022.

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<sup>3</sup> Commission Decision (EU) 2018/1220 of 6 September 2018 on the rules of procedure of the panel referred to in Article 143 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 226, 7.9.2018, p. 7) as amended by Commission Decision (EU) 2021/1081 of 28 June 2021 (OJ L 234, 2.7.2021, p. 99).

## II. COMMISSION REPLIES TO MAIN OBSERVATIONS OF THE ECA

### 1. Broadening EDES' scope

With a view to enhancing the effectiveness of EDES<sup>4</sup>, the Commission is working on a targeted proposal, in the context of the upcoming revision of the Financial Regulation, to broaden EDES' scope.

Under the new proposed rules, it will be possible to target three new categories of subjects, when falling in one or more exclusion situations: (i) beneficial owners, (ii) affiliated entities, and (iii) natural persons with power of control, management or representation. The inclusion of these new categories of subjects in the scope of EDES will serve the purpose of improving the overall effectiveness of the system by tackling the 'alter-egos' of the economic operators directly subject to exclusion, and which, without it, could have continued bidding for EU public contracts or otherwise benefit from EU funds.

In addition, three new grounds of exclusions with an appropriate penalty range will be added: (i) failure to cooperate in investigations, audits or checks carried out by EU enforcement bodies; (ii) taking advantage of a conflict of interest; (iii) incitement to hatred and discrimination.

The above changes would serve the purpose of enhancing the overall effectiveness of EDES. By widening its scope and substantive rules, EDES would be able to cover a broader range of exclusion situations and to better protect the Union's financial interests under all management modes.

### 2 Making EDES more efficient

In order to increase the efficiency of the EDES<sup>5</sup>, the Commission is also proposing to introduce in the upcoming Financial Regulation's revision:

- an expedited procedure for cases that need to be treated with priority, without prejudice to the right to be heard;
- improvements of the conditions for notifications of adversarial letters and decisions related to sanctions to unreliable economic operators who deliberately conceal their whereabouts to circumvent adverse consequences of their misconduct;
- an obligation upon the person or entity in an exclusion situation to substantiate the adequacy of the remedial measures taken by means of an external audit or a decision of a competent national or European authority.

Such improvements should result in faster exclusion decisions and a reduced administrative burden.

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<sup>4</sup> See section on "Direct management", para 21-29, of the special report.

<sup>5</sup> See section on "Direct management", para 30-34, of the special report.

### 3. Promoting the use of EDES as a tool for accountability

Several actions are being put forward in order to promote the use of EDES<sup>6</sup>. This includes strengthening cooperation with relevant services, such as OLAF and – more recently – EPPO, by laying down working methods and procedures, but also assisting RAOs in bringing cases to the EDES Panel.

In this context, the cooperation between DG BUDG, as owner of the system, and OLAF has grown strong as confirmed by the ongoing cooperation in exchanges, development of guidelines, *ad hoc* trainings for the purpose of making OLAF reports more fit for the EDES procedure. A similar approach is already being adopted for what concerns cooperation with EPPO.

Furthermore, since the launch of EDES, the Commission services have focused on organizing training within the EU institutions, bodies and agencies to raise and maintain awareness on EDES procedures.

Templates, guidelines and procedures have been laid down in order to facilitate the work of the RAOs in gathering and transmitting relevant information on exclusion cases.

The Commission has also enhanced the corporate oversight, with the monitoring exercise on the follow-up to OLAF recommendations and recoveries<sup>7</sup>, as important steps to enhance the initiation of EU exclusion proceedings.

In the future, the Commission will further seek to enhance its activities regarding trainings and guidance, including to Member States authorities and implementing partners<sup>8</sup>.

### 4. Member States, exclusion and data-mining tools

With reference to extending EDES to Member States<sup>9</sup>, note that EDES is currently the only exclusion system operating at EU level. Although Member States are required to put in place effective internal control system to prevent, detect and correct irregularities and fraud, EU law does not require Member States to establish exclusion systems per se.

The Commission will propose to address the need of an enhanced protection of the Union's financial interests at EU level, via a targeted and proportionate extension of EDES to shared management.

Such proposal will be in full respect of the primary responsibility of the Member States in sanctioning and investigating such cases at national level under shared management. However, exclusion at EU level would be possible and necessary where:

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<sup>6</sup> See section on “Direct management”, para 36-64, of the special report.

<sup>7</sup> Taking into account the deadlines referred to in OLAF Regulation for Member States and Institutions to follow up on the OLAF recommendations.

<sup>8</sup> See section on “Direct management”, para 36-64, of the special report.

<sup>9</sup> See section on “Direct management”, para 36-64, of the special report.

- The Member States notify the Commission via the Irregularity Management System (IMS) of any exclusion situation concerning the most serious misconducts (fraud, corruption, etc) established in a final judgment or final administrative decision. The Commission would then act on the basis of such information.
- Evidence of severe cases exists in the relevant EU report (i.e. OLAF report, Commission audit or ECA report) and there is, therefore, a need to protect the EU budget pending or lacking a final decision or judgment that could serve as basis for an exclusion decision (when such a final decision or judgment exists, the Panel must align immediately its recommendation to it).

Furthermore, Member States will have the obligation to consult the EDES Database and enforce the exclusion decisions therein. This means that they should not be able to award funds under shared management to a person or entity listed in EDES. The Commission recalls previous legislative proposals along the same lines to oblige Member States to take into account EDES exclusion when implementing the EU budget in shared management.

The Commission welcomes the ECA support as well as the European Parliament's support on such extension of EDES to shared management.

Finally, the Commission recalls that it has put forward proposals to improve the quality and interoperability of data collected by the Member States on recipients of EU funding where the budget is implemented under shared management and under the Recovery and Resilience Facility, including with the compulsory use of a single data-mining and risk-scoring tool. The agreed legislation however provides only for a voluntary use of the single data-mining and risk-scoring tool.

The Commission released and has been further developing the data-mining and risk-scoring tool "Arachne". Arachne is first a database of recipients and projects. The Commission will continue to modernise the tool, using the most recent technological developments (including artificial intelligence) and will continue to strongly promote the use of ARACHNE, and its new functionalities, by the Member States<sup>10</sup>.

In the context of the upcoming targeted revision of the Financial Regulation, the Commission will strive to further enhancing the protection of the EU budget and is considering proposing the use of the single data-mining and risk-scoring tool, across all methods of implementation of the EU budget.

## III. COMMISSION REPLIES TO THE CONCLUSIONS AND RECOMMENDATIONS OF THE ECA

### 1. Recommendation 1 - Expand the range of exclusion

The Commission accepts this recommendation.

The Commission is proposing to extend, in the Financial Regulation, the scope of EDES. In this context, it would be possible to target three new subjects : beneficial owners, affiliated entities and natural persons involved in the misconduct. The possibility to exclude them will be subject to individual assessments, in line with the European Parliament's recommendation, in order, for example, to make the difference between direct and indirect involvement in exclusion situations, in order to avoid that

<sup>10</sup> See section on "Shared management", para 73-81 and 82-87, of the special report.

entities which did not effectively exercise influence on the involvement in the exclusion situation are unfairly registered in EDES, in accordance with the principle of personal responsibility.

## **2. Recommendation 2 - Strengthen the early detection and exclusion system**

The Commission partially accepts this recommendation.

With reference to the specific sub-recommendations, the Commission notes the following:

1. The Commission accepts recommendation 2(1).

The Commission is developing an internal case management system, capable of providing an overview of the treatment of EDES ongoing and closed cases. The system will be developed with due regard of confidentiality requirements and privacy considerations.

2. The Commission accepts recommendation 2(2).

The Commission, under the umbrella of the Commission's corporate management board, initiated a corporate oversight of the effective operation of the EDES, in particular on the follow up of OLAF's reports and recommendations concerning early-detection or exclusion and the follow up of the Panel's recommendations. The Commission should also provide for a corporate oversight in relation to ongoing OLAF's<sup>11</sup> and EPPO's investigations – while fully respecting possible confidentiality requirements – as well as final audit results, competition decisions, and implementing partner notifications. The roles of RAO and the EDES panel in harmonising the response to exclusion situations must remain unaffected.

When it comes to the use of available data sources to identify exclusion cases, the Commission will explore the possibility to oversee RAO's actions when information on potential exclusion cases is recorded in the relevant database. For IMS data, the records are made available when the RAO finds a hit in the system and requests further information.

3. The Commission partially accepts recommendation 2(3).

The Commission does not solely rely on declarations on honour. On top of the verification of such declarations, the Commission provides for some ex-post safeguards. In particular, the Commission requires the RAO to verify the EDES Database at all stages of the procedures before contract signature. Ex-post checks are also ensured by means of blocking warnings in ABAC linked to excluded entities before payments are made. The system will also warn them if an early detection was introduced in EDES. Thus, authorising officers can be made aware in the course of contract implementation of issues related to EU counterparties with whom they have an ongoing contractual relationship.

However, the Commission will explore the possibility of setting up a one-stop shop for Member States' authorities with the ambition of drawing on relevant available data from EDES, Arachne and linked to Summa (the future application replacing ABAC) to ensure a

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<sup>11</sup> Reference to "ongoing OLAF investigations" should be understood as referring to precautionary administrative measures to protect the financial interests of the Union as described by Article 7 (6) of Regulation 883/2013 (OLAF Regulation).

maximum protection of the EU budget through interconnection, cross-feeding and AI-based tool and techniques. Please see in addition the reply under recommendation 5.

4. The Commission accepts recommendation 2(4).

The Panel Secretariat has developed different guidelines to facilitate cooperation with OLAF and other services for the maximum effectiveness of EDES procedures. This includes guidance on the use of OLAF's reports<sup>12</sup>, guidance on the impact of exclusions on ongoing legal commitments, EDES corporate guidance, etc. The Commission will develop further guidance regarding the use of EDES.

5. The Commission accepts recommendation 2(5).

The Commission will continue to promote awareness of EDES, including within other EU institutions and bodies, Member States authorities and implementing partners.

### **3. Recommendation 3 - Improve the monitoring of early detection and exclusion under indirect management**

The Commission accepts this recommendation.

Indirect management is based on reliance on the rules of the partners and on the recognition of their administrative autonomy, management declarations and related audit opinions provided by partners. The partners' rules and procedures are pillar assessed in order to ensure that e.g. the rules of exclusion of the partner have functioned satisfactorily.

Against this background, the Commission will take an additional step to ensure that its partners fulfil their obligation to notify the Commission when counterparties are identified as being in exclusion situations by updating the management declaration models to add a specific reference to the obligation to inform the Commission of cases of detected fraud and/or irregularity in application of Article 142(2) e) FR). In addition, the awareness of partners implementing funds under indirect management could be raised to remind them of their obligations to inform.

### **4. Recommendation 4 - Extend early detection and exclusion to shared management**

The Commission accepts this recommendation.

In the context of the upcoming revision of the Financial Regulation, the Commission is proposing a targeted and proportionate extension of EDES to shared management, as well as the obligation for Member States to check the EDES database and take into consideration the exclusions therein when awarding EU funds. The targeted extension of EDES to shared management is due to the need to respecting the delegation of the tasks relating to budget implementation to Member States pursuant to Article 63(1) of the Financial Regulation.

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<sup>12</sup> The instructions on drafting, and the Guidelines on monitoring of OLAF administrative recommendations have been finalised and apply as from January 2022

## 5. Recommendation 5 - Make better use of existing data and digital tools

The Commission accepts this recommendation.

With reference to the specific sub-recommendations, the Commission notes the following:

1. The Commission accepts recommendation 5(1).

The Commission will carry out a mapping exercise and has initiated a proof of concept to identify the availability of data. The outcome of the exercise will however depend on the availability of national data.

2. The Commission accepts recommendation 5(2).

The Commission's intention in the revision of the Financial Regulation is to propose to use available national data. The Commission will further extend the legal basis for the use of other relevant national data contained in the Irregularity Management System reported by Member States to initiate EDES Panel proceedings and for the related exclusion decisions to be enforced by Member States for shared management's expenditure. These are the national sources most relevant for the protection of the EU budget. The Commission is also analysing the feasibility of linking EDES, the Irregularity Management System and Arachne. Due to national rules, especially on data protection, the Commission cannot collect and re-use data without due process.

3. The Commission accepts recommendation 5(3).

The Commission will continue to develop the integrated IT system for data-mining and risk-scoring Arachne that it has made available to Member State authorities implementing the EU budget. These developments will include new features and functions such as an ex-ante module, developments from the CAP and new risk indicators to take into account beneficial ownership data. The Commission will also aim at improving its user-friendliness and, to the extent that national data is made available by Member States, its interoperability with other sources of EU and national data relevant for EU budget implementation. In the context of the upcoming targeted revision of the Financial Regulation, the Commission will strive to further enhancing the protection of the EU budget and is considering proposing the use of such integrated IT system for data-mining and risk-scoring, across all methods of implementation of the EU budget.

4. The Commission accepts recommendation 5(4).

The Commission is responsible for making available EU exclusion decision in the EDES Database and strives for the maximal promotion of the tool. The Commission will also take further step to promote, at corporate level, the use of the integrated IT system for data-mining and risk-scoring tool currently named Arachne.

5. The Commission accepts recommendation 5(5).

Please see the reply to recommendation 5(3).

# Timeline – Special report 11/2022

## Protecting the EU budget

Better use of blacklisting needed

Event	Date
Adoption of Audit Planning Memorandum (APM) / Start of audit	21.1.2020
Official sending of draft report to Commission (or other auditee)	3.3.2022
Adoption of the final report after the adversarial procedure	26.4.2022
Commission's (or other auditee's) official replies received in all languages	EN 16.5.2022 FR 20.5.2022