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COMMISSION STAFF WORKING DOCUMENT

**Early-Detection and Exclusion System (EDES) - Panel referred to in Article 143 of the
Financial Regulation**

Accompanying the document

**REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN
PARLIAMENT**

**34th Annual Report on the protection of the European Union's financial interests and
the fight against fraud - 2022**

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1. INTRODUCTION

The European Commission manages the EDES, the Early-Detection and Exclusion System. The EDES was set up in 2016 and is rooted in the Financial Regulation applicable to the EU budget ⁽¹⁾. Over the years, the EDES has become a solid and effective tool for strengthening the protection of the EU's financial interests against unreliable persons and entities and against fraudsters (*e.g.* the system provides for the exclusion of such persons and entities from participating in EU and/or European Development Funds (EDF) award procedures ⁽²⁾).

On the one hand, the EDES protects the EU financial interests by providing for a broad range of prohibited practices that represent a risk and, accordingly, need to be impeded. In this respect, it constitutes a privileged instrument to ensure an effective protection of the EU financial interests through measures of an administrative nature, while national authorities remain competent for adopting sanctions, including those of a criminal nature³. On the second hand, the system ensures: (i) the independent and transparent centralised assessment of administrative measures taken to that effect; and (ii) the respect of the fundamental rights of the persons and entities concerned. In that way, the EDES sets up a balance between the protection of the EU financial interest and the respect of the relevant principles of EU law, such as proportionality, the right to be heard, the right of defence, legal certainty, and the presumption of innocence.

The Financial Regulation contains rules that centralise the exclusion process for all EU institutions, agencies, offices, and bodies. In particular, Article 143 provides for an inter-institutional panel ('the Panel') presided over by a standing high-level independent chair ('the Chair') and acting in each case on request of the competent authorising officer.

The key responsibility of the Panel is to issue recommendations on the adoption of administrative actions (*i.e.* exclusion and/or financial penalty and, where applicable, the

⁽¹⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193 of 30.7.2018, p.1.

⁽²⁾ As of 1 January 2021, the EDF has been included in the general budget under the Neighbourhood Development and International Cooperation instrument (see Regulation (EU) No 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU and repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009). under the Neighbourhood Development and International Cooperation instrument. EDF actions adopted before that date continue to be governed and implemented by the 11th EDF Financial Regulation.

⁽³⁾ Contrary to what had been the norm with previous versions of the Financial Regulation, which provided for the imposition of administrative sanctions on unreliable economic operators, in the current Financial Regulation, adopted in 2018, the purpose of the EDES system is not punitive but aims exclusively at the protection of the financial interests of the EU, by stopping unreliable entities from accessing Union funds, albeit for a limited period and, at the same time, deterring them from misbehaving once they are allowed to benefit from those funds again.

publication of information related to these actions), following a request from an authorising officer by delegation ⁽⁴⁾ of any of the EU institutions, agencies, offices, and bodies. After the assessment of the case, the Panel addresses its recommendation to the requesting authorising officer. It is yet the authorising officer's discretion to follow or to deviate from the Panel's recommendation when deciding the exclusion of persons or entities as well as the imposition of a financial penalty on them. In addition, pursuant to Article 93 of the Financial Regulation, the Panel is also responsible for assessing cases of internal financial irregularities by EU staff.

2022 was the first full year under the 5 year term of office of the second Chair of the Panel, Ms Maria Isabel Rofes i Pujol, a former judge at the European Union Civil Service Tribunal, who was appointed in November 2021. Her Deputy is Mr Igors Ludboržs, a former Member of the European Court of Auditors.

This Staff Working Document presents the seventh year of activity of the EDES Panel and also covers the first months of 2023.

2. THE PANEL

By centralising the requests from authorising officers, the Panel ensures the coherent operation of the administrative actions (*i.e.* exclusion, financial penalties, and publication) adopted at EU level to protect the EU and the EDF budgets. In particular, it relieves the authorising officers in each case from (i) the burden of having to ascertain whether the misconduct is established and having to carry out a preliminary classification in law, (ii) having to ensure that the persons and entities' right to be heard has been respected and, (iii) where applicable, having to assess the remedial measures submitted by the persons or entities.

2.1. The composition of the Panel

As laid down in Article 143 of the Financial Regulation, the Panel is composed of:

- a standing high-level independent Chair;
- two permanent members representing the Commission as owner of the Early-Detection and Exclusion system, who express a joint position on each case submitted to the Panel and;
- one representative of the requesting authorising officer.

The Chair of the Panel and his/her Deputy are appointed by the Commission ⁽⁵⁾ and are independent in the performance of their duties ⁽⁶⁾. They are chosen from among former

⁽⁴⁾ Authorising officers by delegation generally have the rank of Director-General or Director. They are responsible for: (i) implementing revenue and expenditure in accordance with the principle of sound management, including through ensuring reporting on performance; and (ii) ensuring compliance with the requirements of legality and regularity and equal treatment of recipients of EU funds.

⁽⁵⁾ The rules applicable to the Deputies are to be found in the Rules of Procedure of the Panel. These rules also apply to the Chair.

members of the Court of Justice of the EU, the Court of Auditors or former officials who have had at least the rank of Director-General in a Union institution other than the Commission. Their independence is guaranteed by the fact that their term of office is limited and is non-renewable.

The two permanent Members of the Panel representing the Commission in 2022 were Mr Hubert Sztaszewski, a Principal Adviser in the Secretariat General of the Commission, and Mr Olivier Waelbroeck, Director of the Commission Central Financial Service in the Directorate-General for Budget (DG BUDGET) ⁽⁷⁾. In March 2023, Mr Kristian Vangrieken, a senior staff member of the Commission DG BUDGET took over the mandate of Mr Hubert Sztaszewski who had retired.

For each case, the additional member representing the requesting authorising officer is designated according to the rules of procedure and the internal administrative rules of the institution, agency, office, or body concerned.

Where dealing with cases of internal financial irregularities by EU staff pursuant to Article 93 of the Financial Regulation, the Panel is composed of 3 additional members: a representative of the competent appointing authority, a member appointed by the competent staff committee and a member of the legal service of the Union institution concerned.

The Panel is assisted by observers and, as such, a representative of the Commission's Legal Service sits in on each of the Panel's meetings. The observers do not take part in the adoption of recommendations. Members of staff of the European Anti-fraud Office ("OLAF") participate in the Panel's meetings as observers in cases referred to the Panel on the basis of an OLAF investigation. Their attendance allows the Panel to be informed first-hand of: (i) the facts and findings resulting from OLAF investigations; (ii) the estimated financial impact of the misconduct; (iii) the procedural guarantees accorded to the persons and entities concerned; (iv) the state of exchanges of information between OLAF and the competent authorities of the Member States; and (v) where applicable, the state of the exchanges of information between OLAF and EPPO. The active contribution of the Commission's Legal Service and of OLAF to the workings of the Panel is key in providing it with relevant information about the facts⁸ and legal advice on their classification in law and allows it to deliver high-quality recommendations.

The Panel is supported by a permanent secretariat provided by the Commission and administratively attached to the Directorate-General for Budget.

⁽⁶⁾ Article 144(3) of the Financial Regulation.

⁽⁷⁾ Deputies of the Permanent Members are: Mr Rene Sloopjes, Head of Unit in the Secretariat-General of the Commission designated *ad personam* and Mr Alessandro Nucara, Head of Unit in the Central Financial Service in the Directorate-General for Budget.

⁽⁸⁾ The Panel does not have investigative powers.

The Panel has its own rules of procedure, which are laid down by Commission Decision 2018/1220 ⁽⁹⁾. These rules aim to: (i) govern the way the Panel organises its work; and (ii) inform all parties involved, including the persons or entities subject to an exclusion procedure, of their rights and obligations. These rules implement and supplement, as far as necessary, the rules of Article 143 of the Financial Regulation. In 2021, the Commission amended the rules of procedure of the Panel ⁽¹⁰⁾, with the purpose of:

- defining the practical arrangements for close cooperation between the Panel and the European Public Prosecutor's Office ("EPPO") ⁽¹¹⁾;
- ensuring the continuity of the functioning of the Panel and, consequently, the continued protection of the Union's financial interests; and
- harmonising the designation of deputies to the permanent members of the Commission.

2.2. Role of the Panel

Pursuant to the Financial Regulation ⁽¹²⁾, in the absence of a final national judgment – or, where applicable, in the absence of a final administrative decision – the authorising officer who envisages to exclude and/or fine unreliable economic operators must first request a recommendation of the Panel. The grounds for exclusion that require a Panel recommendation are the following ⁽¹³⁾:

- grave professional misconduct resulting from: (i) the violation of applicable laws or regulations or ethical standards of the profession to which the economic operator concerned belong, or (ii) the engagement in any wrongful conduct which has an impact on professional credibility where such conduct denotes wrongful intent or gross negligence;
- fraud, corruption, participation in a criminal organisation, money laundering or terrorist financing, terrorist-related offences or offences linked to terrorist activities, and child labour or other forms of trafficking in human beings;
- significant deficiencies in complying with the main obligations in performing a contract financed by the budget ('serious breach of obligations'), which: (i) has led to early termination of the contract or to the application of liquidated damages or other contractual penalties; or (ii) has been discovered following checks, audits or investigations by an authorising officer, OLAF or the Court of Auditors;

⁽⁹⁾ 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).

⁽¹⁰⁾ Commission Decision (EU) 2021/1081 of 28 June 2021 (OJ L 234, 2.7.2021, p. 99).

⁽¹¹⁾ As of 1 June 2021, the EPPO is operational and has started its investigative and prosecutorial tasks.

⁽¹²⁾ See Article 136 of the Financial Regulation.

⁽¹³⁾ See Article 136(2) of the Financial Regulation.

- irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 ⁽¹⁴⁾ and;
- the creation or use of a shell company in a different jurisdiction from the one of the registered office, central administration or principal place of business, with the intent to circumvent fiscal, social or any other legal obligations.

In principle, each case is assessed by the Panel in two phases. Firstly, it examines the facts and findings and performs a preliminary qualification in law of these facts to hold an adversarial procedure. To ensure the right to be heard, the Panel sends an adversarial letter to the economic operator concerned, providing it with the possibility to submit observations in writing. Secondly, the Panel examines the written observations and adopts a recommendation, which is addressed to the requesting authorising officer. During the COVID-19 pandemic, the Panel started to operate remotely ⁽¹⁵⁾ and resorted to written procedures where necessary and appropriate. Such working methods have proved an effective means of conducting the procedure and have still been widely applied, after the end of the pandemic, during the reporting period.

As a general rule, the Panel must adopt its recommendation within 3 months from the opening of the case. A case is opened when the Chair finds that the file is complete because it contains all the necessary documents and information, and the Panel is in a position to establish a preliminary classification in law, with a view to notifying the economic operator concerned thereof.

The rules of procedure determine that the economic operator is granted 3 weeks to submit its observations. In exceptional cases, following a motivated request from the economic operator concerned, the deadline may be extended by no more than half the period initially granted. The Panel takes particular care to ensure that sufficient time is granted for submitting the observations, taking account, where applicable, of specific justified circumstances. This also allows the Panel to adopt fully informed recommendations, striking a balance between aggravating and mitigating circumstances, and to ensure that equal treatment of economic operators is continuously safeguarded.

Nevertheless, without prejudice to the right of defence of the economic operator concerned, the Panel strives to act swiftly where the nature or the circumstances of the case require that it be given priority (*e.g.* business continuity and pending procurement procedures).

⁽¹⁴⁾ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, p. 1) which defines irregularity as: ‘any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.’

⁽¹⁵⁾ By videoconference.

Prior to adopting a recommendation, the Panel performs an assessment of the facts and findings established against the economic operator. It is important to recall that the Panel has no investigative powers. It therefore relies, *inter alia*, on:

- a) facts established through audits or investigations carried out by: (i) “EPPO”; (ii) the European Court of Auditors; (iii) OLAF; (iv) internal audits; or (v) any other check, audit or control performed under the responsibility of the authorising officer;
- b) non-final administrative decisions, which may include disciplinary measures taken by the competent supervisory body responsible for verifying the application of professional ethical standards;
- c) facts referred to in decisions of persons and entities implementing EU funds under indirect management ⁽¹⁶⁾;
- d) information sent by entities implementing EU funds under shared management with Member States; and
- e) decisions of: (i) the Commission relating to the infringement of the EU’s competition rules; or (ii) a national competent authority relating to the infringement of EU or national competition law.

Where the Panel considers that the economic operator concerned should be excluded as well as where that a financial penalty should be imposed on that economic operator, the Panel’s recommendation contains the preliminary classification in law of the misconduct, including a legal assessment of the measure proposed in relation to the respect of the proportionality principle ⁽¹⁷⁾. More specifically, the Panel’s recommendation may include one or several of the following assessments:

- a) the analysis of the misconduct in light of the established facts and findings;
- b) the analysis of the remedial measures taken by the economic operator (except for cases of fraud, corruption, criminal organisations, money laundering, terrorist financing or offences, child labour, or other offences concerning trafficking in human beings).
- c) the presence of aggravating or mitigating circumstances;
- d) the need to exclude the economic operator concerned and, in that case, the recommended duration of such an exclusion;
- e) the need to publish the information related to the economic operator excluded as well as where it is subject to a financial penalty;

⁽¹⁶⁾ For example, by: the European Central Bank; the European Investment Bank; the European Investment Fund; international organisations; non-EU countries, or the bodies designated by non-EU countries and Member States.

⁽¹⁷⁾ Article 136(3) of the Financial Regulation.

- f) the need to impose a financial penalty and its amount and;
- g) the need for the authorising officer to consider any other relevant elements.

When remedial measures have been taken by the economic operator to address the negative consequences of the misconduct, the Panel may decide to recommend that no actions are adopted. Such an outcome is in line with Articles 136(6)(a) and Article 136(7) of the Financial Regulation, mirrors Article 57(6) of the Public Procurement Directive ⁽¹⁸⁾ and allows a person or an entity to avoid an exclusion where it has adopted remedial measures to an extent that is sufficient to demonstrate its reliability.

2.3. Recommendations of the Panel

In the light of the principle of proportionality ⁽¹⁹⁾, and taking into account the remedial measures – if any – taken by the economic operator concerned ⁽²⁰⁾, the Panel can recommend adopting the following administrative actions:

- the exclusion of the economic operator concerned for a maximum of 3 years ⁽²¹⁾ or 5 years in the case of the most serious misconducts ⁽²²⁾ from participating in award procedures funded under the EU budget;
- the imposition of a financial penalty of a maximum of 10% of the total value of the legal commitment the recipient ⁽²³⁾ of EU funds concerned has entered into:
 - (i) either as an alternative to a decision to exclude the economic operator, where such an exclusion would be disproportionate; or
 - (ii) to ensure a deterrent effect, in addition to an exclusion, where economic operator has adopted a systemic and recurrent conduct with the intention of unduly obtaining EU funds ⁽²⁴⁾.

⁽¹⁸⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65) and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

⁽¹⁹⁾ This principle is enshrined in Articles 49 and 52 of the Charter of Fundamental Rights of the European Union and recalled in the Financial Regulation.

⁽²⁰⁾ Where remedial measures have been adopted to an extent that is sufficient to demonstrate the reliability of the economic operator, no administrative actions can be imposed upon it.

⁽²¹⁾ Exclusion situations provided under Article 136(1)(c), (e), (f), (g) and (h): grave professional misconduct, significant deficiencies in complying with main obligations in the implementation of a legal commitment, irregularity, or intentional circumvention of fiscal, social, or other legal obligation

⁽²²⁾ Exclusion situations listed under Article 136(1)(d): fraud, corruption, conduct related to a criminal organization, money laundering or terrorist financing, terrorist offences or offences linked to terrorist activities, child labour or trafficking of human beings.

⁽²³⁾ A recipient means a beneficiary, a contractor, a remunerated external expert or a person or entity receiving prizes or funds under a financial instrument or implementing EU funds in the method of budget implementation of indirect management. Financial penalties cannot be imposed on participants, since their amount is calculated on the basis of a legal commitment at stake.

However, a financial penalty cannot be imposed on a recipient who has disclosed that it is in a situation of exclusion.

- the publication of the exclusion and, where applicable, the financial penalty on the Commission's website to reinforce the deterrent effect of the administrative action ⁽²⁵⁾.

The recommendation of the Panel is not binding and the referring authorising officer can deviate from it. However, pursuant to Article 143 of the Financial Regulation, the authorising officer who envisages taking a more severe administrative action than what has been recommended by the Panel, has to make sure that his/her decision is taken with due respect for the right of the economic operator to be heard.

Without prejudice to the administrative autonomy of the EU institutions and bodies and with due respect for the full discretion of the authorising officer to deviate from the recommendation of the Panel, the recommendations of the Panel are taken seriously by the authorising officers. These recommendations carry a significant weight because the Panel is a specialised body and because of the recognised authority of its standing high-level independent Chair. This is further embedded in Article 143 of the Financial Regulation which requires the authorising officer to inform the Panel when he or she decides to deviate from the recommendation. In this regard, it must be pointed out that, since the introduction of the early-detection and exclusion system in 2016, no authorising officer has deviated from a Panel recommendation.

3. THE PUBLICATION OF ADMINISTRATIVE ACTIONS ADOPTED WITH REGARD TO PERSONS AND ENTITIES

The publication of the administrative actions adopted concerning economic operators is a powerful tool to ensure a deterrent effect and to prevent misuse of EU funds. Currently, there are four decisions to exclude and one imposing a financial penalty published on the Europa website: [EDES database European Commission \(europa.eu\)](https://eudes.ec.europa.eu/).

There are two reasons why only a limited number of decisions adopting such administrative actions can be found on the website of the Commission.

First, the decision of the authorising officer can only be published 3 months after ⁽²⁶⁾ it has been notified to the economic operator concerned, and the publication is often

⁽²⁴⁾ This possibility is not applicable to cases where the conduct consists of significant deficiencies in complying with the main obligations of a contract.

⁽²⁵⁾ Information cannot be published in any of the following circumstances: (i) where it is necessary to preserve the confidentiality of an investigation or of national judicial proceedings; (ii) where publication would cause disproportionate damage to the economic operator concerned or would otherwise be disproportionate on the basis of the proportionality criteria set out and to the amount of the financial penalty; and (iii) where a natural person is concerned, unless the publication of personal data is exceptionally justified, among other things by the seriousness of the conduct or its impact on the Union's financial interests.

⁽²⁶⁾ Article 140(1), subparagraph 3, of the Financial Regulation.

deferred when an action for annulment is brought before the Court of Justice. In such cases ⁽²⁷⁾, the publication can only occur after a final judgment confirming the decision intervenes. This means that the period of exclusion (and the time frame for the publication) may easily have elapsed by the time the final judgment is delivered ⁽²⁸⁾.

Second, the time frame for the publication of the measure is strictly limited to the duration of the exclusion. This is why, even if new economic operators are included over time, other entries are removed as soon as the exclusion period is over.

4. COOPERATION WITH OLAF

The use of information resulting from OLAF investigations and reports is key to the exclusion system and to an effective protection of the EU's financial interests.

In light of the OLAF Regulation ⁽²⁹⁾, the Financial Regulation and the Rules of Procedure of the Panel, the responsible authorising officers follow up on OLAF reports and other information stemming from – or relating to – OLAF investigations. They will then use these reports and other information in the context of EDES procedures.

The facts and findings established in an OLAF report cannot be disclosed if this threatens the confidentiality of: (i) the investigations conducted or coordinated by OLAF, including the protection of whistle-blowers; (ii) national investigations or judicial proceedings; or (iii) investigations by the European Public Prosecutor's Office. This means that, in compliance with the right of defence ⁽³⁰⁾ and the principle of 'equality of arms', only documents that the economic operator concerned has been able to examine and comment on are taken into account by: (i) the Panel in its recommendation on administrative actions; and (ii) the competent authorising officer when adopting the subsequent decision. To ensure compliance with the above provisions, the information communicated to the economic operator concerned during the adversarial procedure must often be redacted before it is submitted to the Panel ⁽³¹⁾. In each case, the expunction is strictly limited to those parts of the report that might affect the rights mentioned above.

⁽²⁷⁾ This depends on the legislation applicable at the time the misconduct occurred. For facts that took place from 2016 onwards, publication occurs 3 months after the decision has been notified to the economic operator concerned, notwithstanding the lodging of an action contesting the decision. This means that the deferral of the publication of decisions to exclude should gradually disappear over time.

⁽²⁸⁾ This legal anomaly is likely to disappear over time once most situations of exclusion will have arisen at a time where the applicable substantive rules will be those of the most recent versions of the Financial Regulation.

⁽²⁹⁾ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ L 248 18.9.2013, p. 1).

⁽³⁰⁾ The right to be heard, which is a key component of the right of defence, is also enshrined in Article 13 of the Rules of Procedure of the Panel.

⁽³¹⁾ In practice, most OLAF reports and information must be redacted.

This rule applies *mutatis mutandis* to information stemming from the European Public Prosecutor's Office to protect the investigative and prosecutorial tasks conferred upon it. The said regime also applies to all documents used by the Panel, in particular audit reports.

During the reporting period, the Panel and OLAF have sought to enhance their cooperation, in particular in respect of the conditions under which the information contained in the OLAF reports can support the assessments of the Panel, since the latter has no investigative powers.

5. BEGINNING OF THE MANDATE OF THE NEW PANEL

Building on the solid track record and set of precedents established by the first Panel chaired by Mr Christian Pennera⁽³²⁾, in its new composition, the Panel chaired by Ms Rofes i Pujol has continued to develop its practice and has gone deeper into several important fields of interests by:

- interpreting and clarifying the wide and dense set of rules on exclusion enshrined in the successive versions of the Financial Regulation;
- taking into account the number of other legal rules and general principles of law applicable, which lie at the intersection of EU administrative and budget law, business law, contractual law, criminal law, and also national law;
- gaining thorough knowledge of various EU policies and the way they are funded under the rules applicable to direct and indirect management;
- establishing a new set of precedents⁽³³⁾ and drawing out strong principles, which pave the way for the coherent and effective application of the system of administrative actions to be adopted with regard to unreliable economic operators.

On a day-to-day basis, the Panel faces complex situations. To name but a few:

- the application to the facts under assessment of several versions of the Financial Regulation. Indeed, where facts occurred over several years, the Panel needs to evaluate these facts in the light of different provisions depending on the applicable versions of the Financial Regulation, to ensure that the principle according to which no one can be held accountable for acts that were not objectionable at the time they were committed, is respected (legality principle). In this regard, the Panel plays, pursuant to Article 49 of the Charter of Fundamental Rights, an important role in deciding whether the rule applicable at the time of the acts or that in force at the time of the proceedings is the more lenient. This has led the Panel to find that some

⁽³²⁾ Ms Rofes i Pujol was the deputy of the preceding Chair, Mr Christian Pennera.

⁽³³⁾ The domain of administrative actions to protect the EU budget was widely uncharted before 2016, since up until then only a few authorising officers had taken such actions. These initiatives were isolated and taken by the authorising officers on their own.

situations did not legally fall within the scope of the EDES system. For example, for facts that occurred before 2016, the Panel cannot recommend the adoption of administrative actions if they amount to fraud and corruption. Similarly, older versions of the Financial Regulation contain substantial rules that prevent an authorising officer from adopting an exclusion once a rather short period of time since the facts has elapsed. However, the improvements brought by the Financial Regulation in force have addressed these issues and are apt to ensure that facts committed from 2018 onwards lead, where justified, to exclusion from participation in EU award procedures of unreliable economic operators.

- the actual reliability of the sources that support the established facts and findings which ground the preliminary classification in law of a conduct. Since the Panel has no investigative powers, it attaches great importance to the adversarial phase of the procedure conducted with the economic operators. Particularly, the Panel ensures in each case that the entities' right to be heard is fully upheld.
- The inability to adopt an administrative action because the economic operator intentionally avoids notification in the context of the procedure. In line with the case-law of the Court of Justice of the EU ⁽³⁴⁾, the Panel has to verify in each case whether the economic operator concerned acknowledged receipt of the notification through different means (e.g. electronic mail, post or courier service). This issue has been addressed by the Commission's proposal to amend the Financial Regulation. ⁽³⁵⁾

Despite the complex setting in which the Panel is bound to act, the 2022 exercise has confirmed the solidity and the efficiency of the EDES system. Particularly, in a judgment of the General Court, of 29 June 2022 ⁽³⁶⁾, the soundness of the main principles established by the Panel has been confirmed. In its judgment, the General Court recalled that, concerning the judicial review of EDES decisions, it has unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed'. Beyond the mere review of legality, which allows only for the dismissal of the action for annulment or for the annulment of the contested act, that unlimited jurisdiction empowers the Court to vary the contested act, even without annulling it, by taking into account all the factual circumstances, so as to amend, for example, the duration of the exclusion. This entails assessing whether the duration of the exclusion at issue takes into account the mitigating circumstances invoked by the applicant, namely its good cooperation during the investigation and the organisational measures it subsequently adopted ⁽³⁷⁾. In light of its review of all findings and circumstances, the General Court found that the

⁽³⁴⁾ Judgment of 7 December 2018, Case T- 280/17, GE.CO. P. Generale Costruzioni e Progettazioni SpA, v. Commission (par. 62-63).

⁽³⁵⁾ COM(2022)223 of 16 May 2022.

⁽³⁶⁾ Judgment of 29 June 2022, Case T-609/20, LA International Cooperation v. Commission.

⁽³⁷⁾ Par. 62, 63, 66, 161.

decision to exclude had been taken after a thorough application of the rights of defence, in particular, of the right to be heard ⁽³⁸⁾. Likewise, the authorising officer, on the basis of the recommendation of the Panel, had shown a sound application of the right to good administration ⁽³⁹⁾, and had correctly assessed the evidence at his disposal and had linked it correctly to the preliminary classification in law. ⁽⁴⁰⁾

In conclusion, the decision to exclude the concerned entity from participating in procedures for the award of EU funds for a period of four years was fully upheld as it was based on sufficient reasons ⁽⁴¹⁾, in light of the principle of legality. Moreover, the mitigating, as well as the aggravating circumstances, had properly been weighted and had led to proportionate conclusions. ⁽⁴²⁾

Overall, the soundness of the exclusion system, is based on: (i) the quality of recommendations issued; and (ii) the increasing number of cases referred by authorising officers, (this increasing number is partly due to the awareness-raising activities carried out to increase the system's visibility).

By contrast, in a recent judgment ⁽⁴³⁾, the Court has annulled a decision of exclusion taken by an authorising officer based on a recommendation of the Panel on the grounds that the facts and findings resulting from an OLAF investigation were not conclusive enough to demonstrate a grave professional misconduct and accordingly did not allow the authorising officer to take the decision to exclude the applicant from participating procedures for the award of EU funds for a period of two years ⁽⁴⁴⁾.

On the spending areas most covered through cases submitted to the Panel in recent years, the Panel has dealt with referrals involving the most relevant programmes under direct and indirect management:

- Horizon 2020 and its previous versions (FP7 and FP6 namely);
- SAFER;
- SESAR 2020 (Single European Sky ATM Research) Research and Innovation (R&I);
- the European Instrument for Democracy and Human Rights;
- the Marco Polo programme or SME support actions;

⁽³⁸⁾ Par. 74 to 78.

⁽³⁹⁾ Par. 127.

⁽⁴⁰⁾ The merits of the Commission decision are confirmed in par. 121 to 123, 126, 127 and 129 to 134.

⁽⁴¹⁾ Par. 143 to 148.

⁽⁴²⁾ Par. 151 to 164.

⁽⁴³⁾ Judgement of 15.2.2023, Case T-175/21, RH v. Commission..

⁽⁴⁴⁾ Par. 114.

- programmes funded under the European Development Funds (EDF) ⁽⁴⁵⁾;
- other programmes implemented by non-EU organisations concerning enlargement and neighbourhood policies (e.g. ENLARG, the European Neighbourhood and Partnership Instrument or the Instrument for Pre-accession).

Contracts managed directly by EU institutions (in areas like security, IT programmes, audit, communication activities, or technical support to Member States) have also been at the centre of exclusion procedures.

Amongst the various sources of information at the origin of Panel cases, OLAF reports represent the majority ⁽⁴⁶⁾. In this respect, it must be highlighted that a crucial part of the work is carried out by the authorising officers that refer cases to the Panel. Not only have they to detect misconducts, but also have to assess the sources at their disposal, such as OLAF reports, audits and other reports ⁽⁴⁷⁾. In addition, authorising officers play the key role in closely monitoring ongoing legal commitments (grants or contracts mainly) and performing the administrative checks. Thus, OLAF reports do not always represent the initial detection of misconduct as some investigations were launched following an audit carried out at the request of – or following a notification from – the authorising officer.

6. ASSESSMENT OF REMEDIAL MEASURES

According to the Financial Regulation ⁽⁴⁸⁾, the Panel must assess whether the remedial measures adopted by an economic operator are sufficient to demonstrate its reliability, in which case it would recommend the authorising officer not to exclude.

In addition, where an exclusion has been adopted, the Panel can be called upon by the authorising officer to assess the need to revise the decision on the basis of new remedial measures taken. The initiative to revise a decision can be taken by the authorising officer ex officio or following a request from the entity concerned. The Panel then adopts a new recommendation in which it concludes where its former recommendation to exclude needs to be revised, either because the entity has taken remedial measures to an extent that is sufficient to demonstrate its reliability or because it has provided new elements demonstrating that the exclusion situation no longer exists. In such cases, the burden of proof lies with the economic operator.

The Panel must carry out a discretionary assessment, and therefore, just as it did for the original recommendation, has to precisely state the reasons as to whether it should be

⁽⁴⁵⁾ Where legally possible, the recommendations to exclude an economic operator from EU award procedures extend to EDF procedures. Conversely, recommendations to exclude from EDF award procedures cannot generally be extended to EU award procedures for legal reasons attached to the design of the EDF rules.

⁽⁴⁶⁾ OLAF reports represent 54% of the referral sources of the Panel cases.

⁽⁴⁷⁾ E. g. whistle-blowers' information, or national/international decisions.

⁽⁴⁸⁾ Articles 136(8) and 143(7).

revised. Article 136(7) of the Financial Regulation lists a non-exhaustive catalogue of possible remedial measures that the economic operator can adopt. However, the assessment as to how far the remedial measures go is left to the appreciation of the Panel (and/or the authorising officer) ⁽⁴⁹⁾.

The remedial measures are not only assessed following a decision to exclude. Where such measures are submitted by an economic operator as part of the adversarial procedure, they are already taken into account by the Panel. If the measures are deemed sufficient to demonstrate the economic operator's reliability, they are likely to prevent its exclusion ⁽⁵⁰⁾ and the recommendation will state the reasons for reaching this conclusion ⁽⁵¹⁾. The Panel may also consider that excluding an entity may be disproportionate partly because: (i) the entity has adopted remedial measures that, even if not fully implemented, go in the right direction to restore its reliability; and (ii) there is strong evidence that the entity has been substantially improving its corporate governance and therefore the likelihood of recurrence of the misconduct is low.

In harmonising administrative actions adopted with regard to unreliable economic operators, the Panel plays an important role in ensuring that businesses are sound from a professional and ethical perspective.

7. OVERVIEW OF THE CASES

In 2022, 10 referrals to the Panel were made through its permanent secretariat by authorising officers. In addition, 14 cases sent to the permanent secretariat in 2021, 3 in 2020 and 1 in 2019 are considered in the present report, since these cases were, once the files had been completed, dealt with by the Panel in 2022.

Out of these referrals, 2 cases concerned members of staff (Art 93) and 1 case concerned the revision of a prior recommendation. The Panel issued 19 recommendations in 2022, out of which 1 covered an opinion regarding a member of staff under Article 93 of the Financial Regulation and 1 covered, in application of Article 147 of the Financial Regulation, a revision of a previous recommendation following the delivery of a final national judgment. In that second case the Panel decided to revise its recommendation and reduce the length of exclusion, in application of the principle of proportionality. Concerning the other cases (4 from 2022, 14 from 2021, 3 from 2020 and 1 from 2019), the Panel recommended the exclusion of 9 entities. This was based on various legal grounds, including: grave professional misconduct, significant breaches in complying with the main obligations in implementing a contract, and fraud.

Overall, the Panel recommended not to exclude the entities concerned in 10 occurrences due to various reasons. In 4 cases, the Panel lacked sufficiently established evidence. In 3 cases, the recommendation not to exclude was justified by the principle of proportionality

⁽⁴⁹⁾ Article 136(6) of the Financial Regulation.

⁽⁵⁰⁾ Article 136(6)(a) of the Financial Regulation.

⁽⁵¹⁾ Article 143(6)(e) of the Financial Regulation.

and, in 2 other cases, the entity could not be excluded due to the limitation period having expired. And in 1 case, the time remaining before the period of exclusion set by the national court was too short to enable the Panel to perform an adversarial procedure, particularly as far as guaranteeing the entity's right to be heard.

On the recommendations to exclude adopted so far, all of them have been taken by the authorising officers, following the recommendation of the Panel.

In addition, out of the 9 recommendations to exclude, the Panel recommended, in 3 cases, that the exclusions be published. The publication was justified by: (i) the inherent gravity of the misconduct; and (ii) the high impact of the misconduct on the EU's financial interests and/or image.

The following table presents an overview of the cases where the Panel issued a recommendation in 2022 and 1 recommendation and an opinion issued in January 2023. It contains a summary of: (i) facts and findings; (ii) where applicable, the preliminary qualification in law of these facts and findings; (iii) the recommended administrative action and the date that it took effect; and (iv) information on whether publication on the website of the Commission was recommended. The cases have been anonymised.

Annex - Summary of anonymised cases referred to the Panel under Article 143 of the Financial Regulation ⁽⁵²⁾

Recommendation number	Facts	Classification in law (exclusion grounds)	Date of the Panel recommendation or opinion	Recommended actions	Recommended Publication	Date of decision of the authorising officer responsible
Opinion No 2022/1	Financial irregularity: non-disclosure of a conflict of interests.	Member of staff, financial irregularity	07/06/2022	N/A	N/A	N/A
Opinion No 2023/1	Financial irregularity: on-disclosure of a conflict of interests.	Member of staff, financial irregularity	25/01/2023	N/A	N/A	N/A
Rec. No 2022/1	Fraudulent or negligent misrepresentation of information required for the verification of the absence of grounds for exclusion or the fulfilment of eligibility (final judgment)	Grave professional misconduct.	28/01/2022	Not to exclude (Duration of exclusion decided by an authorising officer cannot exceed the duration set by the final judgement of a Member State)	N/A	N/A

⁽⁵²⁾ Only finalised cases are included.

Recommendation number	Facts	Classification in law (exclusion grounds)	Date of the Panel recommendation or opinion	Recommended actions	Recommended Publication	Date of decision of the authorising officer responsible
Rec. No 2022/2	Non-contribution to a project implementation without returning the received pre-financing.	Significant breaches in the implementation of a legal commitment	28/01/2022	Not to exclude (statutory time limits)	N/A	N/A
Rec. No 2022/3	Failure to distribute the pre-financing and interim payments to the other beneficiaries of a project.	N/A	14/02/2022	Not to exclude (expiry of the limitation period, impossibility for the authorising officer to notify the entity)	N/A	N/A
Rec. No 2022/4	Negligence in verifying invoices to the Commission.	Professional misconduct	23/02/2022	Not to exclude (proportionality)	N/A	N/A
Rec. No 2022/5	Failure to inform the Commission of crucial information at various contractual stages.	Significant breaches in the implementation of a legal commitment.	28/04/2022	Not to exclude (mitigating circumstances and remedial measures)	N/A	N/A
Rec. No 2022/6	Scientific misconduct.	None	04/05/2022	Not to exclude (facts and findings not established in the sense of the Financial Regulation).	N/A	N/A

Recommendation number	Facts	Classification in law (exclusion grounds)	Date of the Panel recommendation or opinion	Recommended actions	Recommended Publication	Date of decision of the authorising officer responsible
Rec. No 2022/7	Non-compliance with various contractual obligations	None	13/06/2022	Not to exclude (facts not sufficiently established)	N/A	N/A
Rec. No 2022/8	Impact of a final judgment	Grave professional misconduct, fraud, corruption.	29/06/2022	Revision of a previous recommendation: reduction of the length of the initially recommended exclusion by 3 months (from 48 months to 45 months).	N/A	11/10/2022
Rec. No 2022/9	Defects in the performance under a works contract.	Significant breaches in the implementation of a legal commitment.	06/07/2022	Exclusion for a 30 month period.	N/A	05/09/2022
Rec. No 2022/10	EU financial contribution not used in compliance with contractual conditions.	N/A	07/07/2022	Not to exclude (Impossibility to notify the adversarial letter)	N/A	N/A

Recommendation number	Facts	Classification in law (exclusion grounds)	Date of the Panel recommendation or opinion	Recommended actions	Recommended Publication	Date of decision of the authorising officer responsible
Rec. No 2022/11	Various breaches of multiple provisions of a grant agreement	Significant breaches in the implementation of a legal commitment	12/07/2022	Exclusion for a 24 month period.	N/A	15/09/2022
Rec. No 2022/12	Defects in the performance of works under a works contract.	Significant breaches in the implementation of a legal commitment.	04/08/2022	Exclusion for a 24 month period.	N/A	03/10/2022
Rec. No 2022/13	Various breaches in several grant agreements and misrepresentation in the context of the preparation of a grant agreement.	Significant breaches in the implementation of a legal commitment and irregularities.	28/07/2022	Exclusion for a 36 month period.	N/A	29/09/2022
Rec. No 2022/14	Discrepancy between the country of origin mentioned in the certificates of origin, in other certificates and the invoices provided and fraudulent intention to obtain EU funds by using and presenting false and/or incorrect information and documents.	Significant breaches in the implementation of a legal commitment and fraud.	28/10/2022	Exclusion for a 48 month period.	Yes	20/12/2022
Rec. No 2022/15	Manipulation of a tender procedure through unlawful access to tender confidential information, and collusion.	Grave professional misconduct.	28/10/2022	Exclusion for a 36 month period.	Yes	22/12/2022
Rec. No 2022/16	Breach of competition rules by entering into an agreement with other persons or entities with the aim of distorting competition.	Grave professional misconduct	08/12/2022	Exclusion for a 24 month period.	Yes	18/01/2023
Rec. No 2022/17	Impact of a final administrative decision	Entity where a person having powers of representation, decision or control over it is in an exclusion situation of grave professional misconduct.	12/12/2022	Exclusion for a 12 month period.	N/A	14/02/2023

Recommendation number	Facts	Classification in law (exclusion grounds)	Date of the Panel recommendation or opinion	Recommended actions	Recommended Publication	Date of decision of the authorising officer responsible
Rec. No 2022/18	Breach of competition rules by entering into an agreement with other persons or entities with the aim of distorting competition.	Grave professional misconduct	16/12/2022	Not to exclude (remedial measures)	N/A	N/A
Rec. No 2023/1	Unlawful access to confidential tender details before the launch of a procurement procedure.	Grave professional misconduct	06/01/2023	Not to exclude (Expiry of the limitation period)	N/A	N/A