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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 EUROPEAN PARLIAMENT AND THE COUNCIL

32nd Annual Report on the protection of the European Union's financial interests - Fight against fraud - 2020

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1. INTRODUCTION

The European Commission manages the Early-Detection and Exclusion System (EDES). EDES was set up in 2016 and is rooted in the Financial Regulation applicable to the EU budget revised in 2018[1] (Articles 135 to 145). EDES is an 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 receiving EU and/or European Development Funds (EDF) funds).

The EDES provides for a broad range of sanctionable practices. It ensures: (i) the independent and transparent central assessment of administrative sanctions; and (ii) respect for the fundamental rights of the persons and entities concerned. 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'). The role of the Chair is to issue recommendations on administrative sanctions (i.e. sanctions such as exclusion and/or financial penalties and, where applicable, the publication of information on these sanctions), following a request from an authorising officer by delegation[2] of any of the EU institutions, agencies, offices and bodies. The Panel addresses these recommendations to the requesting authorising officers by delegation who remain solely competent to take the decision to exclude persons or entities and/or to impose a financial penalty on them.

The administrative constraints induced by the COVID-19 pandemic made 2020 a challenging year for the operation of the Panel, including for entities engaged in adversarial procedures. In particular, the Panel had to meet remotely (except on two occasions), and entities were given additional time to submit observations where appropriate.

This Staff Working Document presents the fifth and last year of activity of the EDES Panel and also covers the first half of 2021, which corresponds to the end of the mandate of the first Chair of the Panel and his Deputy.

2. THE PANEL

The Panel ensures the coherence of the administrative sanctions procedure (i.e. exclusion and/or financial penalties and, where applicable, the publication of information related to these sanctions y).

2.1. The composition of the Panel

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

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[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] 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, regularity and equal treatment of recipients of EU funds.

- a standing, high-level, independent chair;

- two permanent representatives of the Commission as the owner of the system, who express a joint position for the cases submitted to the Panel and;

- one *ad hoc* representative of the requesting authorising officer.

The Chair of the Panel and his/her Deputy[3] are appointed by the Commission, and are independent in performing their duties[4]. They are chosen from among former members of the Court of Auditors, the Court of Justice, or former officials who have held at least the rank of Director-General in an institution of the EU other than the Commission. The term of office of the Chair of the Panel and his/her Deputy is 5 years. In the period covered by this report, the chair was Mr Christian Pennera, former Jurisconsult of the European Parliament, and his Deputy was Ms María Isabel Rofes i Pujol, former Member of the Court of Justice of the European Union (Civil Service Tribunal).

The two permanent Members of the Panel representing the Commission were Mr Hubert Szlaszewski, a Principal Adviser in the Secretariat General of the Commission, and Mr Olivier Waelbroeck, Director of the Central Financial Service in the Directorate-General for Budget[5].

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.

The Panel is assisted by observers, and in all cases by a representative of the Commission's Legal Service. The observers do not take part in adopting recommendations. Representatives of the European Anti-fraud Office (OLAF) also participate in the Panel meetings as observers in the cases referred to the Panel on the basis of an OLAF investigation. This status allows the Panel to be informed by OLAF of: (i) the facts and findings resulting from OLAF investigations; (ii) an assessment of the preliminary classification in law of the investigation's facts or findings ; (iii) the estimated financial impact of these facts or findings; (iv) the necessary procedural guarantees; and (v) the state of exchanges of information between OLAF and the competent authorities of the Member States. The active contribution of the Commission's Legal Service and of OLAF to the work of the Panel is key in providing the Panel with relevant information and allowing it to deliver high-quality and timely recommendations.

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

The Panel has its own rules of procedure, which are laid down by Commission Decision 2018/1220[6]. These rules aim to: (i) govern the way the Panel organises its work; and (ii)

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3 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.

4 Article 144(3) of the Financial Regulation.

5 Deputies of the Permanent Members were: Mr Olivier Dandoy, an official (Deputy Head of Unit) of the Directorate-General for Communication of the Commission designated *ad personam* and Ms Victoria Gil Casado, Head of Unit in the Central Financial Service in the Directorate-General for Budget.

6 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

make the way the work is organised clear for all parties involved, including the persons or entities subject to an exclusion procedure. These rules implement and supplement the rules of Article 143 of the Financial Regulation.

2.2. Role of the Panel

Pursuant to the Financial Regulation[7], in the absence of a final national judgment – or, where applicable, in the absence of a final administrative decision – authorising officers who envisage to exclude and/or fine unreliable persons and entities must first request a recommendation of the Panel. The grounds for exclusion that require a Panel recommendation are the following[8]:

- 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 belongs, 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;

- irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95[9] and;

- two additional grounds for exclusion added in the Financial Regulation in 2018: (i) the creation of entities in a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligations in the jurisdiction of its registered office, central administration or principal place of business; (ii) the existence of such entities themselves.

In general, each case is examined by the Panel in two meetings[10]. In the first meeting, the Panel examines the facts and findings and the preliminary qualification of these facts and findings in law. The Panel ensures the right to be heard by sending a letter to the entity or

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the Council (OJ L 226, 7.9.2018, p. 7), amended by Commission Decision (EU) 2021/1081 of 28 June 2021 (OJ L 234, 2.7.2021, pp. 99-101).

7 See Article 136 Financial Regulation.

8 See Article 136(2) Financial Regulation.

9 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.'

10 In the current COVID-19 situation, these meetings are mostly held by videoconference.

person concerned, in which the entity or person concerned is given the possibility of submitting observations in writing. In the second meeting, the Panel examines the written observations, if there are any, and adopts its recommendation, which is addressed to the requesting authorising officer. Because of the COVID-19 pandemic, the Panel proceedings mostly took place remotely and through written procedures in 2020 and the first half of 2021. In carrying out its work remotely, the Panel has taken particular care to comply with its obligations, in particular obligations to uphold the right of defence of the persons and entities concerned and the conditions surrounding the Panel's deliberations.

As a general rule, the Panel must adopt its recommendation within 3 months of the date the chair verifies the readiness of the file, after requesting additional measures of verification or examination, where applicable. This period may be extended by the chair for several reasons. Most commonly, the period is extended to ensure that the right to be heard is upheld. However, in urgent and important cases, if the fundamental right to be heard is fully upheld, the Panel is flexible and can act more swiftly. For instance, there could be cases when a lengthy procedure could result in difficulties for the administrative operation of the Commission, institution or EU body concerned. For this reason, the requests of recommendation addressed to the Panel – taking into account other measures needed to allow the Panel to start its proceedings – are not necessarily processed in the order in which they are submitted through the Panel secretariat.

As a general rule, the person or entity concerned by the procedure is granted 3 weeks to submit observations. In exceptional cases, following a reasoned request by the person or entity concerned, the deadline may be extended by no more than half the period initially granted. In practice, the Panel takes particular care to ensure observance of the right to be heard. This also allows the Panel to adopt fully informed recommendations and to strike a balance between incriminating and exonerating circumstances.

The recommendation of the Panel includes a preliminary classification in law of the conduct referred to above with regard to established facts or other findings. It is important to recall that the Panel has no investigative powers. It therefore principally relies on:

a) facts established through audits or investigations carried out by: (i) in future, the European Public Prosecutor's Office (EPPO)[11] ; (ii) the European Court of Auditors; (iii) OLAF; (iv) internal audit; 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[12];

d) information sent by entities implementing EU funds under shared management with Member States; and

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

[12] 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 State administrations.

e) decisions of: (i) the Commission on the infringement of the EU's competition rules; or (ii) a national competent authority on the infringement of EU or national competition law.

Where the Panel considers that the person or entity concerned should be excluded and/or that a financial penalty should be imposed on that person or entity, the Panel's recommendation contains the facts or findings and the preliminary classification of these facts or findings in law. In such cases, the Panel's recommendation also includes one or several of the following assessments:

a) the need to exclude the person or entity concerned and, in that case, the recommended duration of such an exclusion;

b) the need to publish the information related to the person or entity concerned that is excluded and/or subject to a financial penalty;

c) the possibility of imposing – and the need to impose – a financial penalty and the amount of this penalty and;

d) the remedial measures taken by the economic operator, if any (if the misconduct is not related to fraud, corruption, criminal organisations, money laundering, terrorist financing or offences, child labour, or other offences concerning trafficking in human beings).

All of these assessments are made in the light of the principle of proportionality as recalled in Article 136(3) of the Financial Regulation, so as to duly consider aggravating and/or mitigating circumstances. In giving grounds for its recommendations, the Panel systematically weighs all these circumstances.

In addition, after an assessment of the remedial measures taken, if there were any, by the entity or person concerned, the Panel may decide to recommend imposing no sanctions. This discretion is based on the Procurement Directives[13] and makes it possible to avoid exclusion altogether, where the economic operator has 'cleaned up' its situation. The adoption and implementation of the non-exhaustive list of measures referred to in Article 136(7) of the Financial Regulation must be sufficient to demonstrate the reliability of the person or entity for receiving and spending EU funds in the future. In addition, for the less serious cases of exclusion, excluded persons or entities can take remedial measures after being excluded and/or fined. In such cases, the competent authorising officer shall *ex officio* – or on request from that person or entity – refer a case to the Panel. The Panel can then revise its former recommendation, if it concludes that the newly submitted elements demonstrate that the reason for the original exclusion situation no longer exists. In such cases, the burden of proof is reversed, and the person or entity concerned must demonstrate to the Panel that: (i) the measures taken are sufficient to ensure the recovered reliability of that person or entity; and (ii) the grounds for exclusion no longer apply.

[13] 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).

2.3. Recommendations of the Panel

In the light of the principle of proportionality[14], and taking into account the remedial measures – if any – taken by the person or entity concerned[15], the Panel can recommend the penalties set out in the following three bullet points.

- Firstly, the Panel can recommend the exclusion of the person or entity concerned for up to 3 years (up to 5 years for fraud, corruption and any similar activities punishable under criminal law) from participation in all or part of funding procedures governed by the EU budget, in line with the Financial Regulation and award procedures governed by the EDF.

- Secondly, the Panel can recommend the imposition of a financial penalty[16] of a maximum of 10% of the total value of the contract on a person or entity that has attempted to obtain access to EU funds by participating or requesting to participate in a procurement procedure, while being, without having declared it, in one of the exclusion situations. This penalty can be issued:

  (i) either as an alternative to a decision to exclude the person or entity, where such an exclusion would be disproportionate; or

  (ii) in addition to an exclusion which is necessary to protect the EU's financial interests, where the person or entity has adopted systemic and recurrent conduct with the intention of unduly obtaining EU funds[17].

- Thirdly, to strengthen the deterrent effect of the exclusion and/or financial penalty, the Panel can recommend the publication of information related to the exclusion and, where applicable, the financial penalty on the Commission's website[18].

With due respect to the administrative autonomy of the EU institutions and other EU bodies, the recommendations of the Panel have a quasi-binding effect. These recommendations are also significant because of the composition of the Panel and the recognised authority of its high-level independent chair. This significance is further evidenced by the fact that if the authorising officer, who is also a member of the Panel, decides not to follow a recommendation of the Panel, he must inform the Panel of the reasons that have led him/her to take a different decision. This explains why, since the creation of EDES in 2016, authorising officers have up to now strictly followed the Panel recommendations and no deviations from these recommendations have been recorded.

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14 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.

15 Where remedial measures demonstrate the recovered reliability of the economic operator, no sanctions can be imposed on it.

16 Article 138 of the Financial Regulation.

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

18 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.

3. THE PUBLICATION OF SANCTIONS IMPOSED ON PERSONS AND ENTITIES

The publication of the sanctions is a powerful tool to ensure a deterrent effect and to prevent misuse of EU funds. Currently, there are five sanctions published on the Europa website: EDES database | European Commission (europa.eu).

There are three reasons why only a limited number of sanctions can be found on the website of the Commission.

Firstly, any decision to publish must comply with the protection of personal-data rules and be necessary to ensure the deterrent effect. Therefore, publication is only recommended in serious cases with aggravating factors, for instance the refusal to cooperate with investigations or audits, or the recurrence of a type of conduct.

Secondly, publication can only occur 3 months[19] after the decision has been taken by the authorising officer, by which time the decision may have been challenged before the General Court. Still in many cases[20], the exclusion can only be published after the judgment of the General Court (or the judgment of the Court of Justice if there has been an appeal) has been delivered if the last judgment upholds the decision of the authorising officer. Following this rule, the period of exclusion (and publication of this period) might have elapsed already by the time a final judgment is rendered by the EU courts. 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.

Finally, the time of publication of an exclusion is strictly limited to the duration of the exclusion. This is why, even if new entities are included over time, other entries are removed as soon as the exclusion period is over.

4. COOPERATION WITH OLAF

The use of information from OLAF investigations and reports is key to the exclusion system and successfully protecting the EU's financial interests.

In the light of the OLAF Regulation[21], 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 then use these reports and other information in the context of EDES procedures.

Information cannot be disclosed if it 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) in future, investigations by the

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

20 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 its notification to the person or entity concerned, notwithstanding the lodging of an action contesting the decision. This means that the deferral of the publication of cases should gradually disappear over time.

21 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).

European Public Prosecutor's Office. This means that, in compliance with the principles of the rights of defence and that of 'equality of arms', during administrative proceedings, and in line with Article 13 of the Rules of Procedure of the Panel, only documents that the person or entity concerned has been able to examine are taken into account by: (i) the Panel in its recommendation on sanctions; and (ii) the competent authorising officer in the ensuing administrative decision. This means that the information communicated to the person or entity concerned during the adversarial procedure may be redacted[22]. If it is redacted, the Panel will only take into consideration the redacted version of the OLAF report. In each case, the expunction is strictly limited to those parts of the report that might affect the rights mentioned above.

This rule will apply *mutatis mutandis* for information stemming from the European Public Prosecutor's Office, since it started on 1 June 2021 to assume the investigative and prosecutorial tasks conferred upon it. The same principle also applies to all documents used by the Panel, in particular audit reports.

5. TERM OF THE MANDATE OF THE PANEL'S CHAIR[23]

The Chair and the Deputy Chair of the Panel are appointed for a non-renewable term of 5 years. The Panel began operations in 2016, after the 2015 amendment to the Financial Regulation that set it up. Since 2016, 51 recommendations to exclude or not to exclude were issued by the Panel[24], and 47 entities were excluded from EU financing following those recommendations and ensuing decisions. Out of those cases, 13 are still open (exclusion ongoing), while the period of exclusion of the others has elapsed.

Overall, the composition of – and the mission conferred to – the Panel by the Financial Regulation have proved appropriate and effective. In particular, the Panel's balanced composition is ensured by the high-level independent chair, and the other two permanent members representing jointly the Commission as owner of the EDES system. Additionally, in each case, a different member with specific subject knowledge represents the referring authorising officer. This mixed and balanced nature of the composition of the Panel, and the procedural guarantees which govern its operations, have been essential to the workings of the Panel. They have ensured a thorough and fair assessment of both: (i) the facts and findings referred to it; and (ii) the preliminary classification in law of these facts and findings[25].

Like any newly established body, the Panel has had to face several challenges throughout its first mandate. In particular, this is because of:

- the Panel's very specific features, previously unknown in EU administrative law;

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22 In practice, most OLAF reports and information must be redacted.

23 The rules applicable to the appointment, termination of appointment, and dismissal of the Chair must also apply to his/her deputy.

24 In a number of cases, instead of making recommendations, the Panel replied to requests of authorising officers. This is particularly the case where the Panel considers that, on the basis of the examination of the file submitted to it and before any adversarial proceedings, the adoption of administrative sanctions cannot be contemplated.

25 The legal classification is preliminary in the sense that, except for serious contractual breaches, it does not prejudge the content of the final decisions of the final judgements to be adopted by the competent authorities.

- the novel, complex and varying nature of the conduct referred to the Panel and the context in which this conduct took place;

- the need to interpret correctly the wide and dense new set of rules on exclusion enshrined in the Financial Regulation;

- the number of other legal rules and general principles of law to be taken into account, which lie at the intersection of EU administrative and financial law, business law, contractual law, and criminal law;

- the need to gain thorough knowledge of various EU policies and the way they are funded under direct and indirect management rules;

- the fact that the Panel could not base its recommendations on precedents[26] (however, on the other hand, the absence of case-law and of past references have enabled the Panel to draw out strong principles, which pave the way for the coherent and effective application of the system of administrative sanctions against unreliable economic operators).

By way of example, it is worth mentioning some of the salient issues dealt with by the Panel.

Firstly, on the legal side, there is the need to apply the appropriate version(s) of the Financial Regulation, whose rules on exclusion have been updated a number of times over the years (applicable law *ratione temporis*). In particular, the Panel has attached great importance to upholding Article 49 of the Charter of Fundamental Rights, according to which the more lenient rule must apply. This has led the Panel to find that some situations could not legally be sanctioned. For example, misconduct committed in the context of indirect management could not be sanctioned for facts that occurred before 2016. Similarly, fraud and corruption could not be sanctioned on the basis of a recommendation by the Panel for facts that occurred before 2016. Similarly, where facts occur over a number of years, the Panel needs to assess these facts in the light of different provisions throughout different versions of the Financial Regulation.

Secondly, the Panel has frequently faced questions about the reliability of the sources of information supporting the establishment of the facts and findings it has to classify in law. Since the Panel has no investigative powers, it has attached the greatest importance to the adversarial process with the entities concerned. In particular, the Panel has ensured in each case that entities' right to be heard is fully upheld.

Thirdly, and as already stated in the previous report, the Panel has faced a number of instances where entities and persons have avoided the notification of adversarial letters addressed to them. In line with the case-law of the European Court of Justice[27], the Panel had to verify in each case whether the entity and/or person concerned acknowledged express receipt of communications made to them through different means and attempts.

[26] The domain of administrative sanctions was widely uncharted before 2016, since by then only a few authorising officers had taken administrative sanctions. These sanctions were isolated and taken by the authorising officers on their own.

[27] Case T-280/17, GE.CO. P. Generale Costruzioni e Progettazioni SpA, v. European Commission (§62-63).

This has been especially challenging during the COVID-19 crisis, where no alternate means of notification (i.e. post or express delivery courier) could be ensured.

This is only a limited snapshot of the kind of issues the Panel faces. Overall, over the past 5 years, the impact of the system of administrative sanctions on the protection of the EU's financial interests has been positive. The central and coherent assessment of exclusion situations through recommendations of the Panel has contributed to a higher level of protection. This higher level of protection can be seen in both a 'curative' side (exclusions) and a preventive side (publication of exclusions, which has a deterrent effect now that the system is better known by entities managing EU funds). The soundness of the exclusion system, as acknowledged by the Court of Justice[28], 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 awareness-raising activities carried out to increase the system's visibility).

On the spending areas most covered through cases submitted to the Panel in recent years, the Panel has dealt with cases 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;
- programmes funded with the EDF;
- other programmes implemented by third entities 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, communication activities, or technical support to Member States) have also been at the centre of exclusion procedures. However, it should be stressed that: (i) the grounds for exclusion in these cases are not exclusively related to the implementation of EU funds; and (ii) the potential impact on the budget is significant because these unreliable entities would implement EU funds if they are not excluded. This is the case, for example, of economic operatorsfined at national level for breaching competition rules, and where EU funds are not always at play.

Amongst the various sources of information at the origin of Panel cases, OLAF investigations[29] have already been discussed. However, it is important to also highlight the work carried out by the different authorising officers in detecting misconduct, which is essential for the work of the Panel and the adoption of the relevant recommendations.

[28] Case T-290/18, Agmin Italy v. European Commission.

[29] Half (54) of the cases were referred following an OLAF investigation.

Some of the OLAF reports were launched following an audit carried out at the request of – or following a notification from – the authorising officer. However, 15 cases started following an audit report carried out at the request of – or directly by – the authorising officer. Furthermore, most cases were referred to the Panel following an inquiry by the authorising officer due to their close monitoring of ongoing legal commitments (grants or contracts mainly), or during the award procedure. During the award procedures, other less typical sources (such as whistle-blowers' information, or national/international decisions) triggered Panel cases.

6. ASSESSMENT OF REMEDIAL MEASURES

According to the Financial Regulation[30], the Panel must assess whether the remedial measures adopted by the said person or entity are sufficient to lift the exclusion or not. The Panel does not have any other power to alter its previous recommendation[31]. This assessment can be made *ex officio* by the Panel or following a request to the authorising officer responsible by the person or entity concerned. The Panel must carry out a discretional assessment, and therefore has to precisely state the reasons for its recommendation. Article 136(7) of the Financial Regulation presents a non-exhaustive list of possible remedial measures that economic operators can adopt. However, the definition of the measures is quite vague, and leaves to the discretion of the Panel (and of the authorising officer if appropriate) the assessment as to whether the person or entity concerned has taken remedial measures 'to an extent that [are] sufficient to demonstrate its reliability'[32].

In 2020, the Panel received the first cases referred by authorising officers requesting an assessment of remedial measures adopted by an economic operator. The Panel specified that, even if an entity has adopted measures that have the potential effect of preventing future wrongdoing as part of strong internal-control systems, it is indispensable that the entity also takes: (i) all the concrete technical and personnel measures appropriate to correct the conduct and prevent its further occurrence; or (ii) measures to address the underlying problems raised in the decision of exclusion. In other words, the person or entity concerned must be able to convince the Panel, and the authorising officer responsible, that the remedial measures are effective, well implemented, and – where entities are concerned – embedded in the corporate culture of the company. Because of this, the Panel, which does not have any investigative powers, attaches great importance to assessments made by external and independent professional third parties. Such assessments may be accepted as showing that remedial measures are sufficient, insofar as they give a reasonable assurance that: (i) the remedial measures would prevent future occurrences of similar misconduct; and (ii) if the misconduct occurred again, it would be rapidly identified and corrected by the company.

The remedial measures are not only assessed after an exclusion decision has been adopted. Where they are submitted by an economic operator as part of an adversarial procedure as part of an exclusion situation, remedial measures are already assessed by the Panel. If those measures are deemed sufficient by the Panel to prevent the recurrence of the misconduct, they are likely to prevent the exclusion of the entity[33] and the

30 Articles 136(8) and 143(7).

31 For instance, the Panel cannot recommend a reduction in the length of the exclusion.

32 Article 136(6) of the Financial Regulation.

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

recommendation of the Panel will state the reasons for its assessment[34]. 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 the reliability of the company; and (ii) there is strong evidence that the entity was substantially improving its corporate governance and therefore the likelihood of recurrence of the misconduct is low.

In harmonising administrative sanctions against unreliable companies, the Panel plays an important role in ensuring that businesses are sound from a professional and ethical perspective.

7. CHANGES IN WORKING METHODS DUE TO COVID-19

As stated above, the COVID-19 pandemic induced a change in the Panel's working methods. The meetings held in Brussels every 6 weeks were replaced by regular meetings by videoconference. This situation continued during the whole of 2020 and it is still the rule during the first half of 2021.

The arrangements proposed by the chair and agreed by the Panel members have allowed the Panel to cope with a steady increase in its workload. In this situation, the Panel kept to its usual schedule of preparatory and Panel meetings. Although this new system was implemented to face the situation created by COVID-19, it cannot be ruled out that the Panel will continue with regular remote meetings even if face-to-face meetings are reinstated.

The main challenges raised by the remote working methods were addressed through technical solutions and – sometimes – the good faith of economic operators. In this regard, the acknowledgement of receipt of adversarial letters by targeted persons or entities (not by all but by most) has allowed the Panel to complete Panel procedures without having to send the documents by regular mail or courier service. Sending documents by regular mail or courier would have complicated the work of the Panel due to teleworking arrangements and the impossibility of accessing certain buildings decided by the European Commission.

In any case, the most pressing concern of the Panel when following a written procedure is to uphold the right of defence of the persons and entities concerned and the conditions surrounding the Panel's own deliberations. To this end, the general use of qualified electronic signature by EU staff has made it possible to exchange information among institutions through encrypted mails, ensuring the integrity and security of the information shared. The same system of electronic signatures will also make it possible to sign adversarial letters and recommendations electronically, and to store electronically certified documents.

In general, the Panel has been able to cope with the main difficulties caused by COVID-19, and so far it has not received any complaint or appeal founded on the new working methods adopted.

[34] Article 143(6)(e) of the Financial Regulation.

8. OVERVIEW OF THE CASES

In 2020, 20 referrals to the Panel were made through its permanent secretariat by authorising officers. In addition, 3 cases sent to the permanent secretariat in 2019 are considered in the present report, since these cases were, once the respective files had been completed, dealt with by the Panel in 2020.

Out of these referrals, 3 concerned the revision of prior recommendations, following the adoption by the entity of remedial measures. The Panel issued 10 recommendations, of which 3 covered the cases of remedial measures cases mentioned before. Of these 3, 2 recommended the revision of the exclusion decision because of the adoption of remedial measures and in application of the principle of proportionality, while the other considered that the measures were not yet sufficient to warrant revision. From the rest of the cases (18 from 2020 and 3 from 2019) the Panel recommended the exclusion of 4 economic operators. This was based on various legal grounds, including corruption, fraud, grave professional misconduct, and significant breaches in complying with the main obligations in implementing a contract.

The Panel recommended not to exclude the entities in 2 cases in application of the principle of proportionality and in another case due to a lack of evidence.

In 5 cases, the Panel did not adopt recommendations, mostly because the cases were definitively or temporarily inadmissible for – somewhat complex – legal reasons.

In 1 case, the requesting authorising officers withdrew the referral. Three cases referred in 2020 are ongoing.

On the recommendations to exclude entities adopted so far, all of these recommendations have been taken by the authorising officers concerned, fully following the corresponding recommendation of the Panel.

In addition, out of the 4 recommendations to exclude entities, the Panel recommended in all cases[35] that the sanctions be published. The publication was justified by: (i) the inherent gravity of the violations; and (ii) the high impact of the violations 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 2020 and in the first half of 2021. 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 sanction and the date of this sanction; and (iv) information on whether publication on the website of the Commission was recommended. The cases have been anonymised.

Full judicial review at EU level: decisions taken by the EU institution/agency/body on the basis of the Panel recommendation may be contested before the EU Court of Justice.

[35] Up to now, 1 out of these 4 cases has already been published.

Annex 1 - Summary of anonymised cases referred to the Panel under Article 143 of the Financial Regulation[36]

Case number	Alleged and/or established facts	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended sanctions	Recommended publication	Date of decision of the authorising officer
2019/12	Bribery of high-ranked officials in the public administration of a non-EU country	Corruption and grave professional misconduct	3.7.2020	Exclusion for a four-year period	Yes	20.7.2020
2019/14	Several grave and significant violations of contractual provisions	Significant deficiencies in complying with the main obligations in the performance of contracts financed by the budget of the European Union	29.9.2020	Exclusion for a three-year period	Yes	4.5.2020
2019/20	Non-final decision of a national competition authority according to which the entity entered into an agreement with other companies with the aim of distorting competition	Grave professional misconduct	29.5.2020	No exclusion	No	No
2018/08/R	Assessment of remedial measures taken: Frequent use of false information to disguise the criminal nature of the operator's activities in exchange for economic benefits	Grave professional misconduct	18.12.2020	Revision of the prior recommendation of exclusion		22.12.2020

[36] Only finalised cases are included.

Case number	Alleged and/or established facts	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended sanctions	Recommended publication	Date of decision of the authorising officer
2019/03/R	Assessment of remedial measures taken: violation of rules governing procurement procedures by obtaining information conferring upon it undue advantage in the award procedure. Misrepresentation of information to the Contracting Authority as to the presence of a conflict-of-interest situation.	Grave professional misconduct	26.6.2020	No revision of a prior recommendation of exclusion	Publication of the exclusion. The publication is considered justified due to: (i) the seriousness of the misconduct; and (ii) the impact on the image and reputation of the European Union.	No
2019/03/R2	Assessment of remedial measures taken: violation of rules governing the procurement procedures by obtaining information conferring upon it undue advantage in the award procedure. Misrepresentation of information to the Contracting Authority as to the presence of a conflict-of-interest situation.	Grave professional misconduct	30.11.2020	Revision of a prior recommendation of exclusion		No

Case number	Alleged and/or established facts	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended sanctions	Recommended publication	Date of decision of the authorising officer
2020/01	Non-final decision of a national competition authority according to which the entity entered into an agreement with other companies with the aim of distorting competition. The entity on whose capacity the candidate or tenderer intended to rely is in an exclusion situation.	None	**None:** Panel reply instead	No exclusion	No	No
2020/2	Grave violation of several main contractual provisions; conflict of interest, unethical behaviour	Grave professional misconduct. Significant deficiencies in complying with contractual obligations.	2.7.2021	Exclusion for a three-year period and registration of persons of interest	Yes	No
2020/03	Colluding with civil servants to obtain confidential tender information and use it to gain competitive advantage	Grave professional misconduct	11.1.2021	Exclusion for 18 months	Yes	19.2.2021
2020/04	Illegal hiring of civil servants/members of the administration of a non-EU country to implement a project funded by the EU	None	11.2.2021	No exclusion	No	No

Case number	Alleged and/or established facts	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended sanctions	Recommended publication	Date of decision of the authorising officer
2020/05	Alleged payment of the illegally hired civil servants/members of a non-EU country administration to implement an EU-funded project	None	**None**: Panel reply instead	No exclusion	No	No
2020/06	Manipulation of tender procedure	None	**None**: Panel reply instead	No exclusion	No	No
2020/07	Unlawful agreement with the aim of distorting competition	None	**None**: Panel reply instead	No exclusion	No	No
2020/08	Unlawful agreement with the aim of distorting competition	None	**None**: Panel reply instead	No exclusion	No	No
2020/09	Misrepresentation of information; fraud; conduct related to a criminal organisation; human trafficking	None	**None**	No exclusion	No	No
2020/10	Conflict of interest; false declaration; overcharging of costs	Serious breach of the obligations of the grant agreement and misrepresentation of information	2.7.2021	Exclusion for a three-year period and registration of a person of interest	Yes	No

Case number	Alleged and/or established facts	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended sanctions	Recommended publication	Date of decision of the authorising officer
2020/11	Final judgment on person with powers of representation and decision over an entity	NA	7.4.2021	No exclusion	No	No
2020/13	Non-final decision of a national competition authority according to which the entity entered into an agreement with other companies with the aim of distorting competition	Grave professional misconduct	1.7.2021	No exclusion	No	No
2020/14	False declaration during a tender procedure		**None**: case withdrawn	No exclusion	No	No
2021/01	Unlawful agreement with the aim of distorting competition	Grave professional misconduct	2.7.2021	Exclusion for 18 months	Yes	No