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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**

**33rd Annual Report on the protection of the European Union's financial interests and  
the fight against fraud - 2021**

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## 1. INTRODUCTION

EDES stands for the Early-Detection and Exclusion System. It was set up in 2016 by the European Commission and rooted in the Financial Regulation applicable to the EU budget, whose latest revision took place in 2018 (Articles 135 to 145)<sup>1</sup>.

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 exclusion of such persons and entities from receiving EU funds and/or European Development Funds (EDF). In this context, EDES provides for a broad range of prohibited practices that need to be sanctioned for the sake of the protection of the EU financial interests.

The system 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 key responsibility of the Panel is to issue recommendations on which administrative sanctions to impose (*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<sup>2</sup> of any of the EU institutions, agencies, offices and bodies. The Panel addresses these recommendations to the requesting authorising officers who remain solely competent to take the decision to exclude persons or entities and/or to impose a financial penalty on them and, where appropriate, to publish the relevant information on these sanctions. Finally, pursuant to Article 93 of the Financial Regulation, the Panel is also responsible for assessing cases of internal financial irregularities committed by the EU staff. When dealing with such cases, the Panel is composed of three 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 or body concerned).

This Staff Working Document presents the sixth year of activity of the EDES Panel and also covers the first half of 2022.

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<sup>1</sup> 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.

<sup>2</sup> 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.

## **2. THE PANEL**

The Panel ensures the coherent operation of the exclusion system at EU level, while protecting the fundamental rights of the persons and entities concerned, in particular their right to be heard.

### **2.1. The composition of the Panel**

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

- 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<sup>3</sup>, and are independent in performing their duties<sup>4</sup>. They are chosen from among former members of the Court of Auditors, the Court of Justice of the European Union, 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 that of his/her Deputy is 5 years. During the greater part of the period covered by this report, the Chair was Mr Christian Pennera, former Jurisconsult of the European Parliament, and his Deputy was Ms Maria Isabel Rofes i Pujol, former Judge of the Civil Service Tribunal at the Court of Justice of the European Union. Both Mr Pennera and Ms Rofes i Pujol, who had been appointed in 2016, completed in November 2021<sup>5</sup> their non-renewable mandates as first Panel Chair and Deputy Chair respectively. The Commission considers that due to their respective high level previous experience in the service of EU institutions, their outstanding legal and economic competences and untiring commitment, they greatly contributed to the development of the new system, and paved the way for the further improvement of its operation.

On 17 November 2021, following a call for expression of interest and a selection procedure, the Commission appointed Ms Maria Isabel Rofes i Pujol, and Mr Igors Ludboržs, former Member of the European Court of Auditors, as Chair and Deputy Chair of the Panel respectively<sup>6</sup>, for a non-renewable term of office of 5 years. The two permanent Members of the Panel representing the Commission are Mr Hubert Szlaszewski, a Principal Adviser in the Secretariat General of the Commission

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<sup>3</sup> The rules applicable to the Deputy Chair are to be found in the Rules of Procedure of the Panel. These rules also apply to the Chair.

<sup>4</sup> Article 144(3) of the Financial Regulation.

<sup>5</sup> Their term of office was to end on 4 July 2021. However, for reasons of continuity of service, in accordance with the Rules of Procedure of the Panel, they remained in office until the appointment of their replacements.

<sup>6</sup> See appointment published in OJ, C 8, 7.1.2022, p. 1.

designated *ad personam*, and Mr Olivier Waelbroeck, Director of the Central Financial Service in the Directorate-General for Budget<sup>7</sup>.

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 EU institution, agency, office or body concerned.

The Panel may be assisted by observers, and in all cases by a representative of the Commission's Legal Service. The observers do not take part in the adoption of the recommendations. When cases are referred to the Panel on the basis of a report of the European Anti-fraud Office ("OLAF"), OLAF shall designate an observer to participate in the Panel meetings. The Panel and OLAF have agreed practical working arrangements allowing the Panel to be informed of: (i) the facts and findings resulting from OLAF investigations; (ii) the estimated financial impact of these facts or findings; (iii) the procedural guarantees accorded to the persons and entities concerned; and (iv) 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 internal rules, which are laid down by Commission Decision 2018/1220<sup>8</sup>. These rules aim to: (i) govern the way the Panel organises its work; and (ii) clarify, for the benefit of all parties involved, including those in a situation of exclusion, the applicable procedure. These rules implement and supplement those of Article 143 of the Financial Regulation. In 2021, the Commission amended Decision 2018/1220<sup>9</sup>, with the purpose of:

- defining the practical arrangements for close cooperation between the Panel and the European Public Prosecutor's Office ("EPPO")<sup>10</sup>;
- ensuring the continuity of the functioning of the Panel at the end of the Chair's term of office and, consequently, the continued protection of the Union's financial interests; and
- harmonising the designation of deputies to the Commission permanent members of the Panel.

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<sup>7</sup> Deputies of the Permanent Members are, respectively, Mr René 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.

<sup>8</sup> Commission Decision (EU) 2018/1220 of 6 September 2018 on the rules of procedure of the panel referred to in Article 143 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 226, 7.9.2018, p. 7),.

<sup>9</sup> Decision (EU) 2021/1081 of 28 June 2021 (OJ L 234, 2.7.2021, p. 99).

<sup>10</sup> The Commission determined 1 June 2021 as the date on which the EPPO assumed the investigative and prosecutorial tasks conferred on it by Council Regulation (EU) 2017/1939.

## 2.2. Role of the Panel

Pursuant to the Financial Regulation<sup>11</sup>, 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 impose a financial penalty on unreliable persons and entities must first request a recommendation of the Panel. The grounds for exclusion that require a Panel recommendation are the following<sup>12</sup>:

- grave professional misconduct resulting from: (i) the violation of applicable laws or regulations or ethical standards of the profession to which the person or entity 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;
- irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95<sup>13</sup> and;
- being a shell company or creating a shell company 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.

In general, each case is examined by the Panel in two phases. In the first phase, the Panel examines the facts and findings and performs a preliminary qualification in law of these facts. The Panel ensures the right to be heard by sending a letter to the entity or person concerned, in which the entity or person concerned receives all the required information and is given the possibility of submitting observations in writing. In the second phase, the Panel examines the received written observations and proceeds to adopt a recommendation, which is addressed to the requesting authorising officer. During the COVID-19 pandemic, the Panel proceedings mostly took place remotely<sup>14</sup> and through written procedures in 2020 and 2021. In carrying out its work in this way, the Panel has taken particular care to comply with its obligations, in particular to uphold the right of

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<sup>11</sup> See Article 136 of the Financial Regulation.

<sup>12</sup> See Article 136(2) of the Financial Regulation.

<sup>13</sup> 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.'

<sup>14</sup> By videoconference.

defence of the persons and entities concerned and to ensure the confidentiality and objectivity of the Panel's deliberations. Though the pandemic restrictions do not require it anymore, the Panel has continued to work remotely most of the time, since this way of working has proved to be efficient and satisfactory.

As a general rule, the Panel must complete the adversarial procedure and adopt its recommendation within three months of the opening of the case. The person or entity concerned is granted three 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 aggravating and mitigating circumstances.

Nevertheless, without prejudice to the right of defence of the person or entity concerned, the Panel strives to act swiftly where the nature or the circumstances of the case require it to be dealt with urgency (e.g. business continuity, pending procurement procedures).

Prior to adopting a recommendation, the Panel performs an assessment of the facts and findings established against the person or entity. 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 checks, audits or controls 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<sup>15</sup>;
- d) information sent by entities implementing EU funds under shared management with Member States; and
- 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 preliminary classification in law of the misconduct, including a legal assessment of the administrative sanction proposed in relation to the respect of the proportionality principle<sup>16</sup>. More specifically, the Panel's recommendation may include one or several of the following assessments:

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<sup>15</sup> 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.

<sup>16</sup> Article 136(3) of the Financial Regulation.

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

When remedial measures have been taken by the person or entity so as to address the negative consequences of the misconduct, the Panel may decide to recommend imposing no sanctions. This is in line with Articles 136(6)(a) and Article 136(7) of the Financial Regulation, which mirror Article 57(6) of the Public Procurement Directive<sup>17</sup>, and makes possible for the person or entity concerned to avoid the exclusion altogether, where remedial measures adopted are sufficient to demonstrate its reliability. In addition, for the less serious cases of exclusion, excluded persons or entities can take remedial measures after being sanctioned. 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 reliably demonstrate that the reasons for the original exclusion situation no longer exist. 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.

### **2.3. Recommendations of the Panel**

In the light of the principle of proportionality<sup>18</sup>, and taking into account the remedial measures – if any – taken by the person or entity concerned<sup>19</sup>, the Panel can recommend the following administrative sanctions:

- the exclusion of the person or entity concerned for a maximum of 3 years or 5 years in the case of the most serious misconducts<sup>20</sup>, from participating in award procedures funded under the EU budget and/or EDF;

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<sup>17</sup> 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).

<sup>18</sup> 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.

<sup>19</sup> Where remedial measures demonstrate the recovered reliability of the economic operator, no sanctions can be imposed on it.



- the imposition of a financial penalty which shall not exceed 10% of the total value of the legal commitment<sup>21</sup>. 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<sup>22</sup>.
- the publication of the exclusion and/or financial penalty on the Commission's website to strengthen the deterrent effect of the sanction<sup>23</sup>.

Without prejudice to the administrative autonomy of the EU institutions and other EU bodies, the recommendations of the Panel are appreciated and considered very seriously by the authorising officers. These recommendations carry a significant weight also in light of its composition and the recognised authority of its standing, high-level, independent Chair. The authorising officer decides freely about following or not the recommendation. In the latter case, the authorising officer must simply inform the Panel, explaining the reasons for not following the recommendation. In this regard, it is noted that since the introduction of EDES in 2016, the Panel recommendations have always been followed by the authorising officers of all the Union institutions and bodies concerned.

#### **2.4 The publication of sanctions imposed on persons and entities**

The publication of the administrative sanctions is a powerful tool to ensure a deterrent effect and to prevent misuse of EU funds. Currently, there are six decisions of exclusion published on the Europa website: [EDES database | European Commission \(europa.eu\)](https://eudes.europa.eu/).

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

First, the publication can only occur three months after the decision of the authorising officer<sup>24</sup> and is often deferred when a case is filed before the Court of Justice to have the

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<sup>20</sup> Exclusions 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.

<sup>21</sup> Article 138 of the Financial Regulation.

<sup>22</sup> This possibility is not applicable to cases where the conduct consists of significant deficiencies in complying with the main obligations of a contract.

<sup>23</sup> 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.

<sup>24</sup> Article 140(1), subparagraph 3 of the Financial Regulation.

decision annulled. In such instances<sup>25</sup>, the publication can occur only after a judgment confirming the decision has been delivered. This means running the risks that the period of exclusion (and the timeframe for the publication) has already elapsed by the time the Court of Justice passes judgment<sup>26</sup>.

Second, the timeframe for the publication of the sanction 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.

### **3. COOPERATION WITH OLAF**

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

In the light of the OLAF Regulation<sup>27</sup>, the Financial Regulation and the Rules of Procedure of the Panel, the responsible authorising officers follow up on OLAF reports, recommendations on actions to be taken, 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 carried out by EPPO. This is why the information communicated to the person or entity concerned during the adversarial procedure must often be redacted before it is submitted to the Panel. In each case, the expunction is strictly limited to those parts of the report that might affect the right of defence<sup>28</sup> and the principle of 'equality of arms'.

In compliance with the right of defence and the principle of 'equality of arms', only documents that the person or entity concerned has been able to examine can be taken into account by: (i) the Panel in its recommendation on administrative sanctions; and (ii) the competent authorising officer when adopting the subsequent decision. The respect of the right to be heard, which is a key component of the right of defence and is enshrined in Article 41, paragraph 2, of the Charter of Fundamental Rights of the European Union as part of the right to good administration, is ensured by Article 13 of the Rules of Procedure of the Panel.

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<sup>25</sup> This depends on the legislation applicable at the time the misconduct occurred. For facts that took place from 2016 onwards, publication occurs three 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 information on sanctions imposed should gradually disappear over time.

<sup>26</sup> 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.

<sup>27</sup> 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).

<sup>28</sup> 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.

This rule applies *mutatis mutandis* to information stemming from the European Public Prosecutor's Office after it started 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.

#### **4. THE FIRST MANDATE OF THE PANEL**

The Chair and the Deputy Chair of the Panel are appointed for a non-renewable term of five years<sup>29</sup>. The Panel began operations in 2016, after the 2015 amendment to the Financial Regulation that set it up. Since 2016, 62 recommendations to exclude or not to exclude were issued by the Panel<sup>30</sup>, and 40 entities were excluded from EU financing following those recommendations and ensuing decisions. Out of those cases, 11 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 proven 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 operation, 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<sup>31</sup>.

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

- the Panel's very specific features, previously unknown in EU administrative law;
- the novel, complex and varying nature of the conducts referred to the Panel and the context in which these conducts took place;
- the need to interpret correctly and apply *ratione temporis* the wide and dense set of rules on exclusion listed in the several versions of 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;

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<sup>29</sup> The rules applicable to the appointment, termination of appointment, and dismissal of the Chair also apply to his/her deputy.

<sup>30</sup> In a number of cases, instead of making recommendations, the Panel replied to requests of authorising officers. This was particularly the case where the Panel considered, following the examination of the file and before any adversarial proceedings had taken place that the adoption of administrative sanctions could not be recommended.

<sup>31</sup> The legal classification is preliminary in the sense that, except for serious contractual breaches, it does not prejudice the content of the final decision of the final judgement to be adopted by the competent authorities.

- 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<sup>32</sup>. However, 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 persons and entities.

By way of example, it is worth mentioning some of the salient issues dealt with by the Panel since it started its operation in 2016.

Firstly, in accordance with the principle of legality on substance, the Panel has to apply the version(s) of the Financial Regulation in force at the time of the facts. In this regard, 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 – as regrettable as they may have been - 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 to which it has to give a preliminary classification in law. Since the Panel has no investigative powers, it has attached a great importance to the adversarial procedure followed with the entities concerned. In particular, the Panel has ensured in each case that the entity's right to be heard is fully upheld.

Thirdly, and as already stated in the previous reports, in a number of cases, the Panel has not been able to recommend that a sanction be imposed because the person or entity intentionally avoided to acknowledge receipt of the notification of the letter in the context of the adversarial procedure. In line with the case-law of the Court of Justice of the European Union<sup>33</sup>, the Panel has to verify in each case whether the person or entity concerned acknowledged receipt of the communication made to them through different means (e.g. electronic mail, regular post or courier service). This has been especially challenging during the COVID-19 crisis, when communications to official addresses were disrupted. It should be noted that this issue is currently being addressed by the Commission in the context of its ongoing proposal to revise the Financial Regulation.<sup>34</sup>

This is only a limited snapshot of the kind of issues the Panel faces. Overall, between 2016 and 2021, the impact of the system of administrative sanctions on the protection of the EU's financial interests has been very positive. The central and coherent assessment

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<sup>32</sup> 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 accord.

<sup>33</sup> Case T-280/17, GE.CO. P. Generale Costruzioni e Progettazioni SpA, v. European Commission (§62-63).

<sup>34</sup> COM(2022)223 of 16 May 2022.

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 corrective 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<sup>35</sup>, 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);
- 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 under the European Development Funds (EDF)<sup>36</sup>;
- 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. 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 were not excluded. This is the case, for example, of entities sanctioned at national level for breaching competition rules, and where EU funds are not always at play but could otherwise be if the entities were allowed to participate in EU-funded award procedures and succeeded in being granted a contract.

Amongst the various sources of information at the origin of Panel cases, OLAF investigations have already been discussed<sup>37</sup>. However, it is important to also highlight the work carried out by the various authorising officers in detecting misconducts. This element is essential for the work of the Panel and the adoption of the relevant recommendations. The greatest part of the cases referred to the Panel stemmed from an OLAF investigation launched as a follow-up to a notification of the authorising officer,

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<sup>35</sup> Case T-290/18, *Agmin Italy v. European Commission*.

<sup>36</sup> Where legally possible, the recommendations of exclusion from the EU award procedures extend to EDF procedures. Conversely, recommendations on exclusion from EDF award procedures cannot generally be extended for legal reasons attached to the design of the EDF rules, to the EU award procedures.

<sup>37</sup> Half of the cases (54) were referred following an OLAF investigation.

or from an audit carried out at the request of – or directly by – the authorising officer. Ultimately, the checks performed by the authorising officer in the context of the implementation of a legal commitment or during the award procedure proves to be of essence in order to identify possible exclusion cases.

## **5. ASSESSMENT OF REMEDIAL MEASURES**

According to the Financial Regulation<sup>38</sup>, a person or entity should not be subject to a decision on exclusion when it has taken remedial measures, thus demonstrating its reliability. That possibility should not apply in cases of the most severe criminal activities. Therefore, the Panel is also called to perform an assessment of remedial measures where adopted by the person or entity, prior to issuing its recommendation.

Article 136(7) of the Financial Regulation presents a non-exhaustive list of possible remedial measures that the person or entity can adopt. However, the assessment as to whether the person or entity concerned has taken remedial measures ‘to an extent that [are] sufficient to demonstrate its reliability’ is left to the discretion of the Panel (and/or the authorizing officer)<sup>39</sup>.

In 2021, the Panel received one case with a request by the referring authorising officer to assess the remedial measures adopted by an economic operator. On that occasion, the Panel clarified again that the remedial measures submitted to its assessment must be unequivocally incorporated in the corporate culture and daily operation of the entity concerned and this must be borne out with enough evidence.

The remedial measures may be submitted by the person or entity during the exclusion procedure or after an exclusion decision has been adopted. If those measures are deemed sufficient by the Panel to address the misconduct and prevent its recurrence, they are likely to rule out the exclusion of the entity altogether<sup>40</sup>. In such case, the recommendation of the Panel will state the detailed reasons for its assessment<sup>41</sup>. 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 to a sufficient degree 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 entities, the Panel plays an important role ensuring that businesses that aim at participating in award procedures governed by the Financial Regulation or from being selected for implementing European Union funds, are sound from a professional and ethical perspective.

## **6. OVERVIEW OF THE CASES**

In 2021, the Panel received 19 referrals by the relevant authorising officers.

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<sup>38</sup> Articles 136(8) and 143(7) of the Financial Regulation.

<sup>39</sup> Article 136(6) of the Financial Regulation.

<sup>40</sup> Article 136(6)(a) of the Financial Regulation.

<sup>41</sup> Article 143(6)(e) of the Financial Regulation.

Throughout the reporting period<sup>42</sup>, the Panel issued 12 recommendations, one concerning the assessment of remedial measures submitted by an entity already excluded. In such case, the Panel considered that the measures were not yet sufficient to lift the sanction and, thus, did not revise the recommendation of exclusion.

In three cases, the Panel recommended the exclusion of the entity concerned. This was based on various legal grounds, including, grave professional misconduct, significant breaches in complying with the main obligations in implementing a contract and misrepresentation of information. In addition, the Panel recommended 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.

In two cases, the Panel recommended not to exclude the entities concerned, respectively, for reasons of proportionality and lack of sufficient evidence.

In six cases, the Panel did not adopt a recommendation, mostly because the cases were definitively or temporarily inadmissible for various legal reasons.

In two cases, the requesting authorising officers withdrew the referral.

Where the Panel recommended to exclude the entity concerned, an exclusion decision adopted by the authorising officer by delegation has followed.

The following table presents an overview of the above-mentioned cases where the Panel issued a recommendation in 2021 and in the first half of 2022. 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<sup>43</sup>.

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<sup>42</sup> Annex I to this document presents the cases treated in the sixth year of activity of the Panel (2021) and also covers the first half of 2022.

<sup>43</sup> For what concerns the present reporting period, only two decisions of exclusion were contested before the EU Court of Justice, *i.e.* 2020/03 (case T-175-21) and 2021/01 (case T-614/21).

## SWD REPORT ACTIVITY 2021

### Annex 1 - Summary of anonymised cases referred to the Panel under Article 143 of the Financial Regulation<sup>44</sup>

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2019/21	Non-contribution to the project implementation without returning the received pre-financing.	Serious breach of contractual obligations	28/01/2022	Not to exclude – limitation period for excluding and/or imposing a financial penalty elapsed.	Not applicable	Not applicable
2019/22/PIF	Supplying of critical information on EU programmes and/or in an attempt to influence an act or a decision.	Member of staff, financial irregularity	01/07/2021	Financial irregularity committed.	Not applicable	Not applicable
2019/23/PIF	Involvement in financial management and control of transactions.	Member of staff, financial irregularity	02/07/2022	No financial irregularity committed.	Not applicable	15/07/2021
2020/02	Gross violation of several contractual provisions, including on social security obligations and correct performance of the tasks; misrepresentation of information; breach of conflict of interest provisions; unethical behaviour.	Serious breach of contractual obligations. Grave professional misconduct	02/07/2021	Exclusion for a 3 years period, registration as person of interest.	Yes	01/09/2021

<sup>44</sup> Only finalised cases are included.



## SWD REPORT ACTIVITY 2021

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2020/03	Businesspersons colluding with EU staff to obtain confidential tender information and use it to gain competitive advantage for companies as well as inappropriate hiring of experts during the implementation of projects.	Grave professional misconduct	11/01/2021	Exclusion for an 18 months period.	Yes	22/02/2021
2020/03/R	Revision of the recommendation.	Assessment of the sufficiency of the remedial measures taken	29/10/2021	No need to revise the recommendation.	Not applicable	Not applicable
2020/04	Obtaining confidential information and getting awarded EU funded contracts with the ultimate result of distorting competition. Not disclosing information of close business and/or personal relationships with members of the evaluation committee.	Grave professional misconduct	11/02/2021	Not to exclude – absence of established facts.	Not applicable	Not applicable
2020/05	Illegally hiring civil servants/members of the administration for the implementation of the project.	Grave professional misconduct	<b>None:</b> Panel reply sent on 12/02/2022	Not applicable – case closed because of the lack of sufficient evidence.	Not applicable	Not applicable
2020/06	Indications of illicit access to the Terms of Reference, through a company contracted by 2020/06, conferring upon 2020/06 an undue advantage in the procurement procedure.	Grave professional misconduct Ibid.	<b>None:</b> Panel reply sent on 18/05/2021	Not applicable - case closed because of the limitation period for excluding and/or imposing financial penalties has elapsed.	Not applicable	Not applicable

## SWD REPORT ACTIVITY 2021

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2020/07	A family link and shared professional interests existed between the companies 2020/07 and 2020/08 during a procurement procedure launched by an EU Delegation. An illegal alliance was formed between the two entities with the aim of distorting the competition.	Grave professional misconduct	<b>None:</b> Panel reply sent on 07/04/2021	Not applicable - case closed because of absence of established facts and lack of sufficient evidences.	Not applicable	Not applicable
2020/08	A family link and shared professional interests existed between the companies 2020/07 and 2020/08 during a procurement procedure launched by an EU Delegation. An illegal alliance was formed between the two entities with the aim of distorting the competition.	Grave professional misconduct	<b>None:</b> Panel reply sent on 07/04/2021	Not applicable- case closed because of absence of established facts and lack of sufficient evidences.	Not applicable	Not applicable
2020/10	Serious breach of contractual obligations consisting in conflict of interest and biased procurement, overcharging of personnel costs, undue profit margins as a result of sales commissions and intentional overcharging of equipment price in the CNECT/CIP projects. False declarations / misrepresentation of information by the beneficiary in its grant applications.	Serious breach of contract False declarations Misrepresentation of information.	02/07/2021	Exclusion for a 3 years period, registration as person of interest.	Yes	06/09/2021

## SWD REPORT ACTIVITY 2021

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2020/11	The owner and legal representative was sentenced by the Supreme Court, with a 3-year deferral to: (i) 1 year prison, (ii) a pecuniary fine of 1.000 € and (iii) the prohibition for a period of 5 years to become administrator/ manager/director of companies either directly or through third parties. Moreover, the Court of Appeal ruled to confiscate an amount of 123.541 EUR	Grave professional misconduct. Fraud, corruption, criminal activities. Serious breach of contract. Irregularities. Creation of shell companies. Shell companies.	<b>None:</b> Panel reply sent: 07/04/2021	Not applicable- the case was closed since excluding and/or imposing financial penalties would have been disproportionate.	Not applicable	Not applicable
2020/12	Overcharging of the staff costs and ineligible subcontracting of the work in relation to the two EASME contracts. Misappropriation of funds, obstruction of OLAF investigation, submitting false documents in order to obtain grants and misappropriate EU funds in relation to the other projects.	Serious breach of contractual obligations	14/02/2022	Not to exclude - the limitation period for excluding and/or imposing financial penalties has elapsed.	Not applicable	Not applicable

## SWD REPORT ACTIVITY 2021

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2020/13	The entity was sanctioned by a Member State competition authority on grounds of violation of competition rules. The competition authority found that the entity had entered into agreements with other entities with the aim of distorting competition in the framework of several public procurement procedures, for several years. According to the competition authority, the entity played a role of instigator of the infringements and it participated actively in conducts related to all calls for tenders that were investigated at national level.	Grave professional misconduct	02/07/2021	Not to exclude - sufficient remedial measures and the existence of mitigating circumstances.	Not applicable	Not applicable
2020/14	Anticompetitive behaviour in the IT sector.	Grave professional misconduct	<b>None:</b> case withdrawn by the Authorising officer	Not applicable	Not applicable	Not applicable
2020/15/PIF	Financial irregularities in service procurement contracts in his capacity as the Head of the Cooperation section at the EU Office	Financial irregularities	<b>None:</b> case withdrawn by the Authorising officer.	Not applicable	Not applicable	Not applicable
2020/16	Double-funding of projects, reached by concealing information and denying the similarity of projects for a period of over three years. Denying knowledge of the loss of an essential IP asset.	Serious breach of contractual obligations	28/04/2022	Not to exclude– the entity has adopted measures sufficient to demonstrate its reliability.	Not applicable	Not applicable

## SWD REPORT ACTIVITY 2021

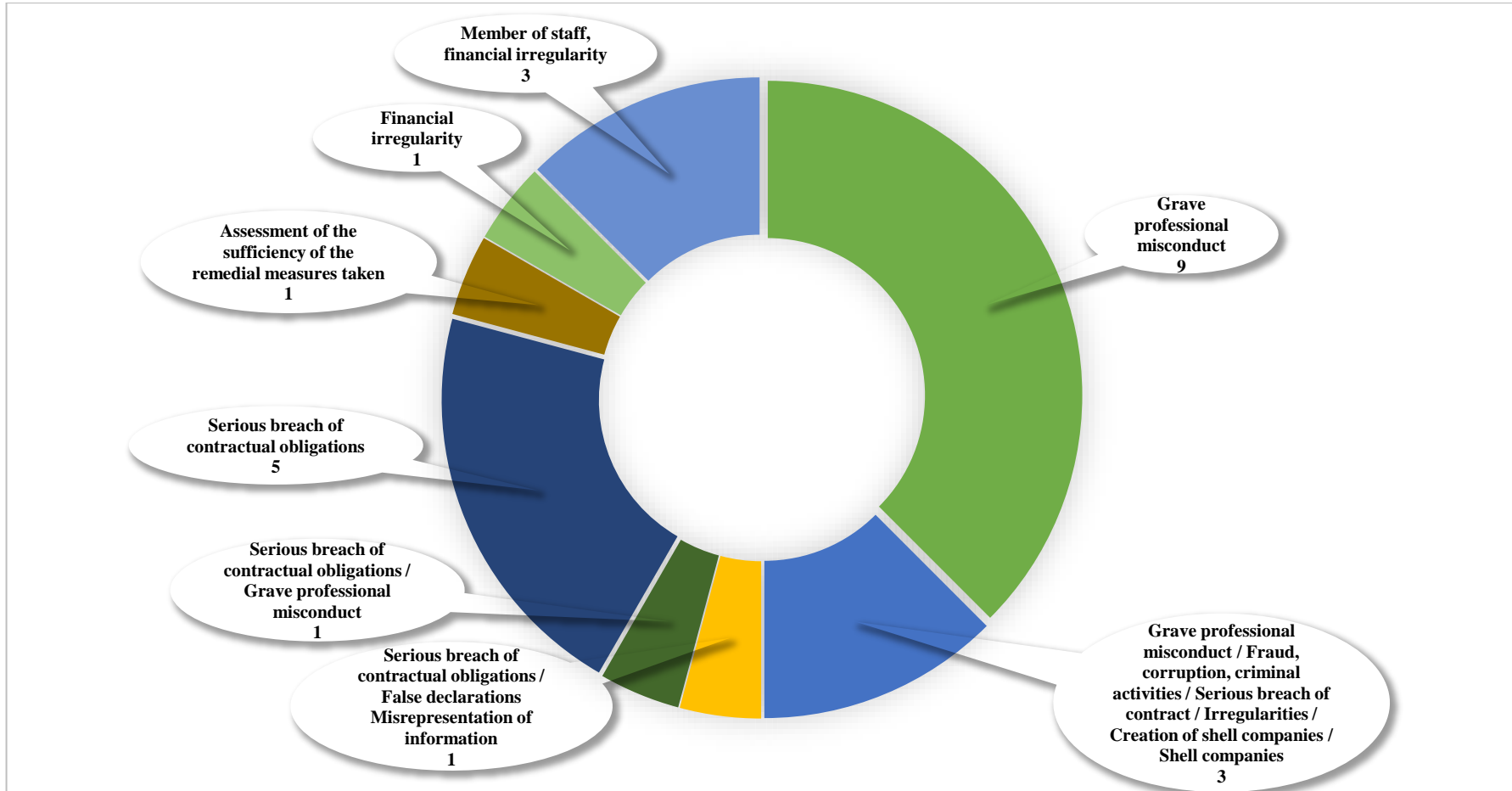
Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2020/17	Intentionally used and presented fraudulent invoices for the provision of travel and accommodation services organised in two Member States.	Grave professional misconduct. Fraud, corruption, criminal activities. Serious breach of contract. Irregularities. Creation of shell companies. Shell companies.	23/02/2022	Not to exclude – the degree of negligence does not meet the minimum legal requirements for being classified as a misconduct in accordance with the applicable financial rules.	Not applicable	Not applicable
2020/18	2020/18 produced fraudulent invoices for the provision of travel and accommodation services organised in two Member States.	Grave professional misconduct. Fraud, corruption, criminal activities. Serious breach of contract. Irregularities. Creation of shell companies. Shell companies.	<b>None:</b> case inadmissible - the entity concerned was considered to be outside of EDES' scope – subcontractor of a grantee.	Not applicable	Not applicable	Not applicable
2021/01	The Italian Competition Authority (AGCM) imposed a financial penalty on several entities on the entity for entering into an agreement with other entities aiming at restricting competition in the framework of a public procurement procedure for the provision of auditing services in the implementation of EU funds. The misconduct included concerted practices in order to influence the outcome of a tender by eliminating reciprocal competition and allocating lots.	Grave professional misconduct	02/07/2021	Exclusion for an 18 month period.	Yes	13/07/2021

## SWD REPORT ACTIVITY 2021

Case number	Facts and findings	Classification in law (exclusion grounds)	Date of the Panel recommendation	Recommended Sanctions	Recommended Publication	Date of decision of the Authorising Officer
2021/06	A Research Foundation sanctioned the person concerned for breach of research integrity in a research project funded by the same Foundation.	Grave professional misconduct	06/05/2022	Not to exclude – lack of sufficiently established facts and findings.	Not applicable	Not applicable
2021/10	Unauthorized delegation of tasks to third parties and non-payment of salaries and social security contributions to staff under the contract.	Serious breach of contractual obligations	03/06/2022	Not to exclude - lack of sufficiently established facts and findings.	Not applicable	Not applicable
2021/11	Unauthorized delegation of tasks to third parties and non-payment of salaries and social security contributions to staff under the contract.	Serious breach of contractual obligations	04/06/2022	Not to exclude - lack of sufficiently established facts and findings.	Not applicable	Not applicable
2021/13	In a tender procedure, the entity indicated in its declaration on honour that it had been established in a final judgement in 2018 that it was guilty of grave professional misconduct, and was excluded from public procurement procedures for three years.	Grave professional misconduct	28/01/2022	Not to exclude - the time remaining before the period of exclusion set by the national court would expire before the completion of the administrative procedure before the Panel.	Not applicable	Not applicable
2021/16/PIF	Corrupt behaviour of EU staff, breaches of Staff Regulations rules such as conflict of interest rules.	Member of staff, financial irregularity	03/06/2022	Financial irregularity committed.	Not applicable	Not applicable

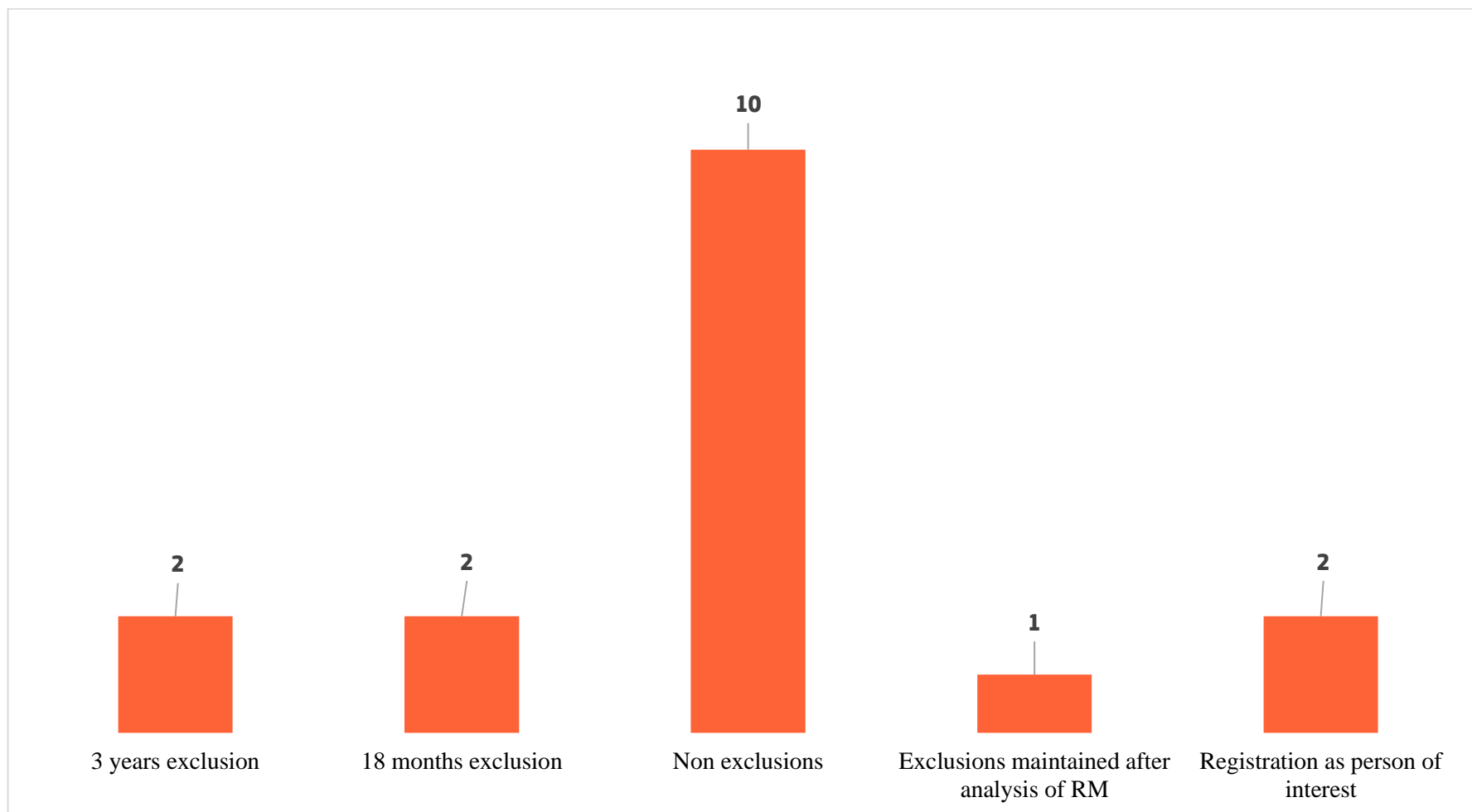
ANNEX 2 – CHARTS

1. Classification in law of Panel Recommendations (cases presented to the Panel in the period 2021 - June 2022)



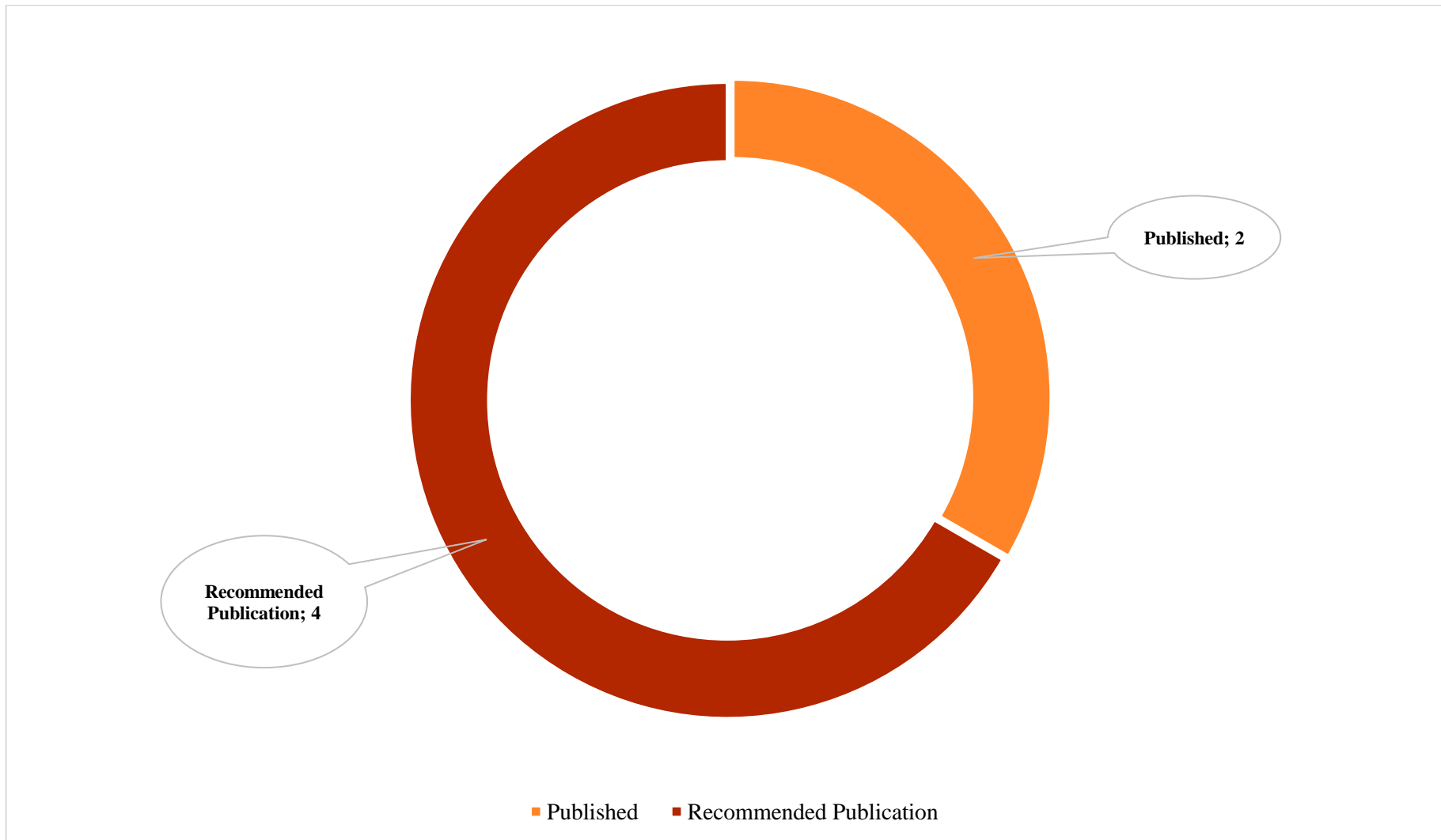
## SWD REPORT ACTIVITY 2021

### 2. Sanctions Recommended by the Panel (cases presented to the Panel in the period 2021 - June 2022)



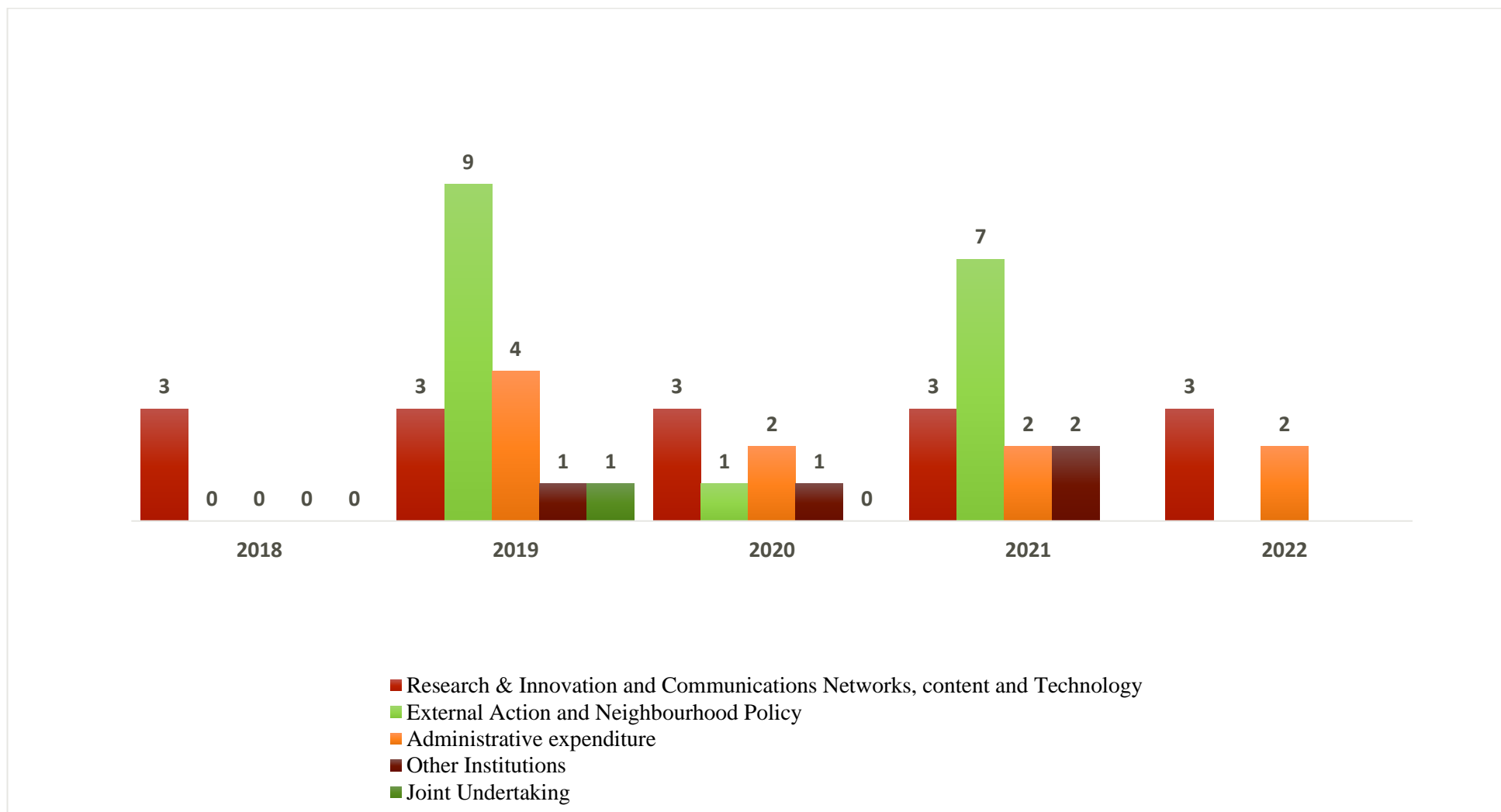


3. Recommended Publication (cases presented to the Panel in the period 2021 - June 2022)



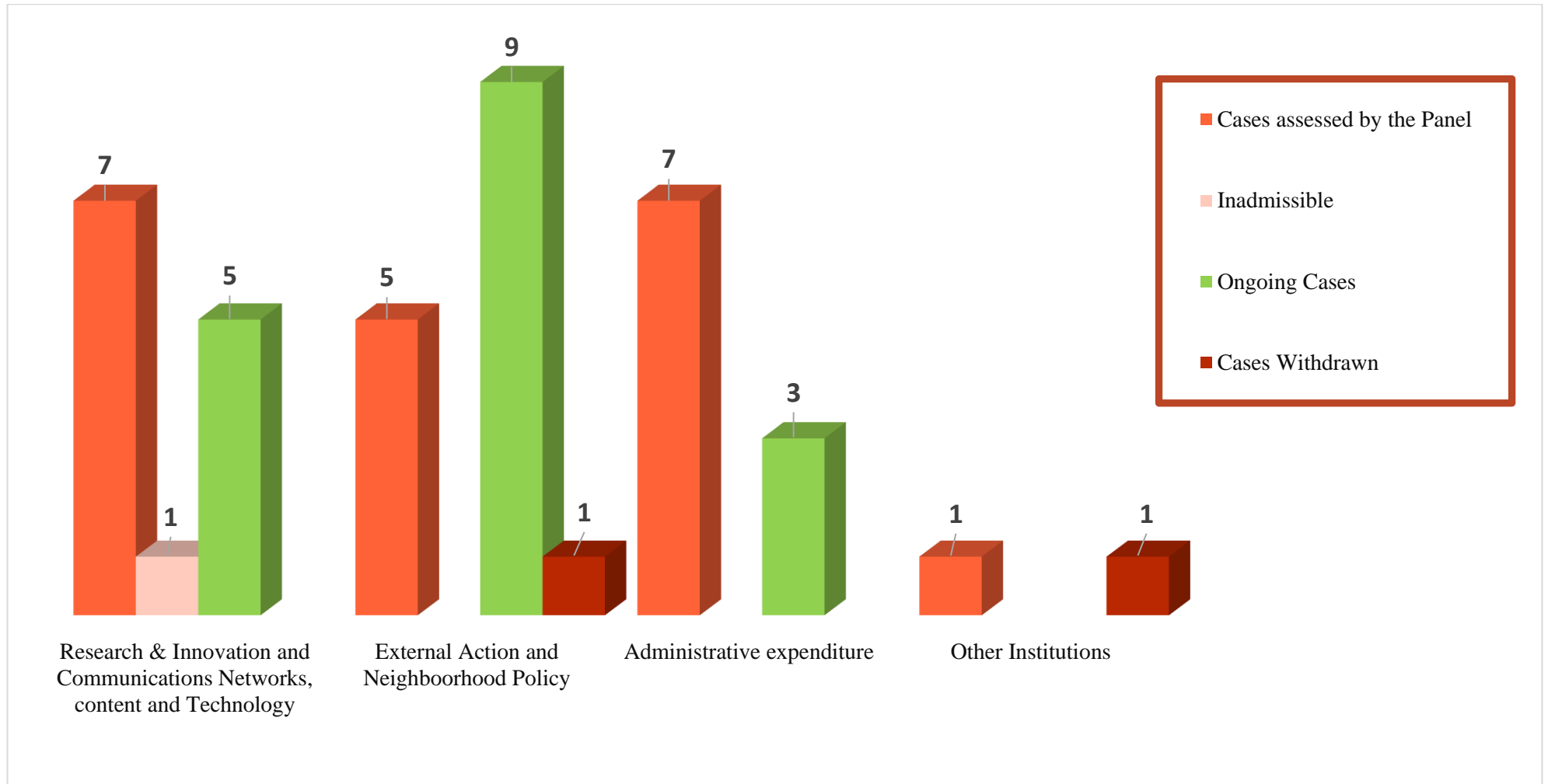
## SWD REPORT ACTIVITY 2021

### 4. Summary of Cases by programme per Year of filing (number of cases presented to the Panel during 2021 - June 2022)

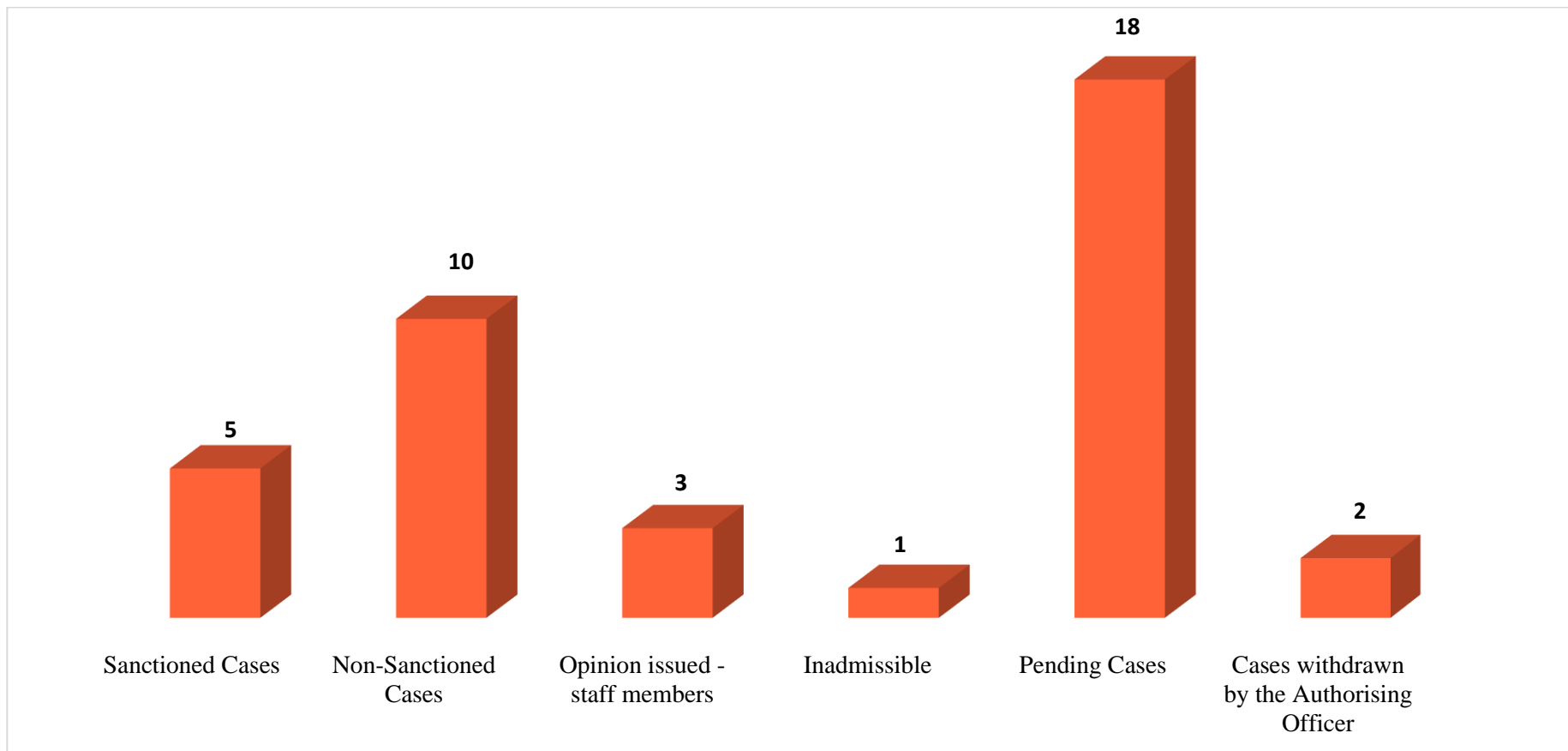


## SWD REPORT ACTIVITY 2021

### 5. Summary of Case Status by programme (number of cases presented to the Panel during 2021 - June 2022)



6. Summary of Case Status (cases presented to the Panel during 2021 - June 2022)



7. Sources of referral during the period 2021 - June 2022

