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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Budget Committee
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Subject:	Financial Regulations (recast): Amendments related to the Early-Detection and Exclusion System (EDES) (Fiche No 8)

Delegations will find attached a revised version of the Commission's Fiche No 8 regarding the amendments related to the Early-Detection and Exclusion System (EDES). The changes mainly concern Articles 131 and 134(4). The other changes are minors ones (e.g. changes in formatting or correction of cross references).

Financial Regulation recast

(COM(2022)223 final)

Amendments related to the Early-Detection and Exclusion System (EDES)

This fiche presents the proposals for a **targeted and proportionate extension of the Early-Detection and Exclusion System's scope**, both *ratione materiae* and *ratione personae*, to further enhance the protection of the EU financial interests in light of the lessons learnt over the first years of activity of the EDES Panel which is in place since 2016.

The following amendments are considered necessary to enhance the effectiveness of the system:

1. Reinforcement of the exclusion system at EU level under, on the one hand, shared management and, on the other hand, direct management where funds are disbursed as financial contributions to Member States, e.g. under the Recovery and Resilience Facility;
2. Introduction of an expedited procedure, where the nature or the circumstances of the case requires it;
3. Possibility to exclude beneficial owners and affiliated entities, when the requirements to impute liability are considered fulfilled;
4. Introduction of a new non exhaustive list of misconduct under the existing ground of exclusion for grave professional misconduct, including for (i) the breach of conflict of interest provisions and (ii) the incitement to discrimination and hatred; and a new autonomous ground of exclusion for (iii) the refusal to cooperate in investigations, checks or audits carried out by an authorizing officer, OLAF, EPPO or the Court of Auditors;

Finally, the following amendments are also proposed as they would improve the EDES system from a technical/procedural point of view in light of the case practice and judgement of the Court of Justice, and to ensure consistency in the Financial Regulation (FR) by updating legal reference:

5. Exclusion of unreliable guarantors;
6. Establishment of a legal presumption of notification of adversarial letter and administrative decisions (expiry of period for collection by the postal office or automatic receipt reply of the transmission by email);
7. Proof of remedial measures (independent audit or decision of a European/national authority);
8. Vice-Chair of the Panel (introduction in the FR and voting right);
9. Clarification on the composition of the Panel in the case of financial irregularities on the part of a staff member;
10. Update of legal references in respect of terrorist offences or offences linked to terrorist activities;
11. Update of legal references in respect of data protection.

¹ This fiche is a non-paper prepared by the responsible Commission department to facilitate the decision making process. Fragments of the Commission proposal have been inserted in Annex for ease of reference only. The authentic text of the proposal is the one published in the [Official Journal](#) of the European Union.

² This version contains minor additions/corrections in the Annex as compared to the version of 25 May 2022.

A. EDES and shared management

1. Scene setter

The Early-Detection and Exclusion System (EDES) is a system operated by the Commission in order to protect the Union's financial interests.

Currently, EDES only applies directly and mandatorily to direct and indirect management (see list of persons and entities concerned in Article 135(2) FR). However, roughly 75% of the EU funds are disbursed under shared management. The Commission remains ultimately responsible for budget implementation in accordance with Article 317 TFEU, including under shared management.

The current legal framework

The current legal framework at national and EU level does not fully address certain challenges as regards exclusion from EU funds :

- Member States do not have the obligation to set up a fully-fledged exclusion system (blacklisting) at national level.
- Pursuant to Article 57 of the Public Procurement Directive 2014/24/EU, contracting authorities must exclude economic operators in case of serious misconduct (e.g. corruption, fraud, conflict of interest, money laundering, terrorism). However, one exclusion does not bind other contracting authorities in the same Member State and there is no database. Furthermore, Member States do not have the competence to take exclusion decisions at EU level.
- Under Directive (EU) 2017/1371 on fight against fraud to the Union's financial interests by means of criminal law, Member States may exclude legal persons "from entitlement to public benefits or aid" or temporarily or permanently "from public tenders procedures" in case of criminal offences listed under the Directive (See Article 9 (a) and (b)). As above, these exclusions are not listed in a database.
- Under the current EDES rules, the Member States' authorities in shared management, when awarding contracts, need to merely take into account EU exclusion decisions '*as appropriate and on their own responsibility*' (Article 142(5) FR)
- Against this background, entities involved in a serious misconduct might apply for and receive EU funding in other Member States and under other programmes/management modes.

Comparison with the exclusion rules in Indirect Management

It should also be recalled that EDES rules are already applicable in the context of indirect management with entrusted entities or beneficiary/partner countries. While the differences between the management modes are acknowledged, shared and indirect management are comparable for the purposes of exclusion from EU funding as there is no direct (contractual) relationship between the Commission and the beneficiaries.

Under indirect management, where the Commission is not the contracting authority, the partners entrusted with the implementation of the Union budget shall inform the Commission when an entity is in a situation of exclusion. This information can be used by the Commission to impose administrative sanctions according to the EDES rules. The obligation for the implementing partners to inform the Commission is detailed in the general conditions of the contribution agreement or financing agreement.

Moreover, in the latest version of the financing agreements, where a beneficiary/partner country becomes aware of an exclusion situation, it shall, under the conditions of its national legislation, impose upon the entity or person, an administrative sanction that may be either an exclusion from its future procurement or grant award procedures and/or a financial penalty proportional to the value of the contract concerned.

For what concerns indirect management with entrusted entities, the Commission is not bound by exclusion decisions which the entrusted entity adopts pursuant to its internal rules. It may however take into account the facts referred to in such decisions as established facts and findings, based on which it may refer the case to the EDES Panel.

Finally, according to the current Financial Regulation, the Commission shall operate according to its own rules and may refer the case to the EDES Panel despite the fact that it has no contractual relationship with the person or entity concerned. In such cases, the responsibility to exclude lies with the Commission's authorising officer. The preliminary classification in law of the facts must be then carried out by the EDES Panel.

A similar approach may well apply *mutatis mutandis* to shared management too.

Example of an EDES case in indirect management

In 2019-2020, a DG referred a case to the EDES Panel concerning facts and findings established in an OLAF report against the entity (X) implementing funds in indirect management in the partner country (Y).

More specifically, two contracts were awarded to (X) under an external action instrument. Both contracts were signed between (X) and the Ministry of Finance of (Y). The EU contribution paid under the contracts was of a significant amount.

The referral to the EDES Panel was made on the grounds of (a) corruption and (b) grave professional misconduct based on findings contained in an OLAF report.

The entity was excluded from ongoing and future procurement and award procedures for 4 years. Aggravating circumstances such as the seriousness of the misconduct and the duration were taken into account by the EDES Panel.

The EU contribution paid under the contracts was declared ineligible by the Commission. The partner country (Y) was anyhow entitled to recover the money directly from (X).

In 2021, (X) has been found guilty of active corruption by a national court. The final judgment in first instance confirmed the preliminary classification in law made by the Panel.

2. Proposed modifications in the Financial Regulation

In light of the above, it is proposed to reinforce EDES in shared management. One of the main topics of this targeted amendment of the Financial Regulation is precisely the enhanced protection of the Union's financial interests.

The new exclusion rules

The reinforcement of EDES in shared management would concern only the following **exhaustive** list of the most serious misconduct: fraud, corruption, criminal organisation, money laundering, terrorism, child labour/human trafficking, conflict of interests. The extension would not target the other grounds of exclusion: grave professional misconduct, serious breach of contracts, shell companies, and any other form of non-fraudulent irregularities.

In particular, the proposal identifies three situations and the relevant actors:

(i) Exclusion on the basis of **a conviction with a sanction determining the duration of the exclusion**:

- The Member State shall notify the Commission via the Irregularity Management System (IMS);
- On the basis of such information, the Commission (DG BUDG) will take the exclusion decision and notify it to the person or entity concerned;
- The exclusion of the person or entity concerned and the information thereof would be registered in the EDES database;

(ii) Exclusion on the basis **a conviction without a sanction determining the duration of the exclusion**:

- The Member State shall notify the Commission via IMS;
- The Commission's authorising officer shall refer the case to the Panel prior to taking an exclusion decision;
- In the context of an *expedited procedure*, the Panel carries out the contradictory procedure with the entity and sets the duration of the sanction in compliance with the principle of proportionality;
- The Commission will take the exclusion decision and notify it to the person or entity concerned;

(iii) Exclusion on the basis of **findings at EU level** (e.g. OLAF reports, EPPO investigations, ECA/EU audits):

- Once the Commission's authorising officer becomes aware of such findings, it shall immediately refer the case to the Panel;
- The Panel carries out the contradictory procedure with the person/entity and – where necessary – liaises with the relevant Member State;
- The Panel issues a recommendation of exclusion and address it to the authorising officer;

- The Commission will take the exclusion decision, having regard to the recommendation of the Panel, and notify it to the person or entity concerned;
- The exclusion decision is reviewed if and as soon as a competent Member State's authority has issued a final judicial or administrative decision;

As shown above, both the Member State and the responsible authorising officer would have the obligation to act depending on the type of exclusion.

The EDES Panel, prior to making a preliminary classification in law, would carry out (i) a contradictory procedure with the person or entity and, where necessary, (ii) a consultation with the Member State. The EDES Panel will also take into consideration any measure already adopted by the Member State against the person or entity, as well as any other mitigating or aggravating circumstance pursuant to the principle of proportionality. Although the authorising officer is a member of the EDES Panel, the collegiality of the procedure ensures a correspondent reduction of the overall administrative burden.

The exclusion would be included in the EDES database as every other exclusion under the current legal framework. The Member States' authorities would then have the obligation to take the exclusion into account by rejecting persons or entities from being selected to implement EU funds (i.e. to enforce the exclusion decision).

Finally, the new rules would apply also in the case of unreliable persons or entities receiving Union funds through financial contributions to Member States (e.g. RRF funds).

Other measures

The proposal is without prejudice to Article 63 FR whereby it is for the Member States to take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, including by preventing, detecting and correcting irregularities and fraud. Member States "shall also recover funds unduly paid and bring legal proceedings where necessary in that regard" and "shall impose effective, dissuasive and proportionate penalties on recipients where provided for in sector-specific rules or in specific provisions of national law" (Article 63(2) second and third subparagraph).

Considering the current measures of financial corrections carried out by Member States and the Commission, the proposal also provides for an additional measure whereby Member States would be informed by the Commission that it will not reimburse payment claims related to an entity that is excluded and listed in the EDES Database.

The Member State's authorities would have the obligation to consult the EDES database and take into account the information therein on exclusion decisions prior to awarding EU funds.

Impact on number of cases

Concerns as to the administrative burden have been duly taken into account.

It is expected that the main source for exclusion cases under shared management would be OLAF reports. At this stage, it is difficult to predict what would be the impact of the EPPO's investigations. EU audits *per se* will not serve as a basis for a preliminary classification in law on those misconducts having criminal elements, so they will mainly be used as a source of findings in respect of conflict of interests.

In terms of identified serious misconduct, currently, there is an average of 25 judicial recommendations per year sent by OLAF to the competent authorities of the Member States in the context of shared management (figures of the last 5 years are presented in the table below). If these trends remain stable these figures are a reasonable proxy for the estimated extent of the Commission's future intervention.

OLAF judicial recommendations issued by year and current result in shared management cases*
information provided by OLAF on 12 October 2021

Issue year	No result yet	Indictment	Dismissal	Total
2016	15	10	12	37
2017	13	7	17	37
2018	12	2	7	21
2019	15	1	4	20
2020	28	1	1	30
Total	83	21	41	145

3. Details of the proposal

Case scenario - Application of the revised EDES rules to shared management

Case scenario: an OLAF investigation concludes that an entity in a Member State has misrepresented information and forged CVs of experts during a procurement procedure, with respect to EU regional funds awarded under shared management.

Under the current rules:

The Commission may take measures to protect the EU budget:

- Ask the Member State authorities to suspend the submission of payment requests relative to the companies in question;
- Suspend payments if such requests are submitted;
- Based on the final audit report, after a contradictory procedure with the Member State authorities, impose financial corrections;

The effects of the audit conclusions and of the measures to protect the EU budget are limited to the Member State in question and to the companies established there.

Under the proposed EDES rules:

- EDES would apply to beneficiaries under shared management involved in fraud as per the facts and findings established in the OLAF report
- Fraud is one of the most serious misconduct as per Article 139(1)(d);
- When the authorising officer responsible becomes aware of the conclusion of the OLAF report, it should refer the entity for exclusion before the EDES Panel;
- The EDES Panel could recommend and the Commission can exclude the entity from EU funded procedures, at EU level.

A new Article 131 should be added to extend the exclusion system to shared management. A new paragraph should be added under (new) Article 139 to set out the targeted and proportionate conditions for the exclusion in the context of shared management.

B. EDES in the context of direct management with contributions to Member States

1. Scene setter

Currently, EDES applies mandatorily to direct management where persons or entities are the applicants or recipients of EU funds (see Article 135(2) FR).

The system should be strengthened in order to apply also in the context of direct management in respect of Union funds disbursed to the Member States, such as those under Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, where the Commission has residual responsibilities. This is another measure aiming at even better protection of the Union's financial interests.

2. Proposed modifications

In order to respect the *sui generis* nature of such funds, the extension of EDES should be kept targeted and proportionate. Therefore, the obligation for the responsible authorising officer to refer a case to the EDES Panel for the purpose of exclusion should only apply in the case he or she becomes aware of serious misconducts through final judgments and administrative decisions or facts and findings established in the context of audits or investigations carried out concerning those funds by European Anti-fraud Office (OLAF), European Public Prosecutor Office (EPPO), the European Court of Auditors (ECA) or any other check, audit or control performed under the responsibility of the authorising officer.

Without prejudice to this residual responsibility of the Commission, the Member State remains responsible to verify the information on decisions of exclusion registered in the EDES database, and to enforce such decisions and to ensure that no payment application is submitted related to a person or entity that is in such an exclusion situation.

3. Details of the proposal

The proposed rules and targeted conditions concerning the extension of EDES to shared management (point A above) would apply also in the case of unreliable persons or entities receiving Union funds through financial contributions to Member States (e.g. RRF funds).

C. Expedited procedure

1. Scene setter

Currently, the procedure for imposing administrative sanctions under the Financial Regulation does not provide for an expedited procedure where the nature of the case requires a swift treatment. More specifically, in case of (i) a final judgment or a final administrative decision of a third country; (b) a final judgment or a final administrative decision of a Member State that does not set the duration of exclusion, or (c) an administrative sanction of another international organization, where the facts are established and a classification in law has already been made, the regular administrative procedure before the EDES Panel, needs to take place, with the plausible risk of putting the Union interests at risk, due to the inherent length of that procedure. In some cases, this might even lead to impunity (e.g. by virtue of rules on time-limitation).

The above calls for the introduction of an expedited procedure:

- (i) to uphold and enforce final judgments or final administrative decisions of third countries fulfilling certain conditions related to the respect of due process and rule of law;
- (ii) to uphold and enforce the sanctioning decisions issued by organisations that have in place an equivalent sanction mechanism (including the full respect of the rights of defence) and a common set of definitions of misconducts;
- (iii) to allow the authorising officer responsible to adopt, as soon as possible, an exclusion decision against the person or entity when the facts and findings related to the misconduct are already established;

2. Proposed modifications

At the request of the authorising officer, the EDES Panel may decide that a recommendation should be issued in an expedited procedure, where the nature of the case requires it, and in particular where

- a final judgment or a final administrative decision has been issued by a Member State's authority and the case must therefore be submitted to the Panel for the determination of the length of the exclusion, in application of the principle of proportionality;
- a final judgment or a final administrative decision has been issued in a third country which is subject to the jurisdiction of the European Court of Human Rights and which provides sufficient guarantees as regards effective and efficient protection of the rule of law;
- a sanction has been already imposed on the person or entity by virtue of a decision of (i) international organisations or their agencies, (ii) EIB, (iii) EIF, where these organisations have been considered to apply equivalent sanction procedures under Article 154 FR

Such cases would benefit of a fast-track assessment, subject to the holding of a simplified contradictory procedure that would be limited to the essential points of law raised by the referral.

3. Details of the proposal

The amendment would consist in the addition of a new paragraph under (new) Article 139.

D. Beneficial owners and natural persons

1. Scene setter

The current legal framework does not foresee the possibility to exclude (or even flag as early detection cases) parent or sister companies of an excluded entity, or their beneficial owners. The application of the EDES rules in practice, however, demonstrated this weakness of the system, given the possibility for excluded persons or entities of circumventing the law by applying for EU funds through “alter-egos”.

As the legal framework is silent on the issue, companies controlled by the same parent or having the same beneficial ownership can apply for EU funding instead of (*i.e.* replacing) the excluded entity. This has proved to be an area of growing risk insofar as cases submitted to the EDES Panel over the last years often concern (i) findings against interlinked companies, set up by the same manager, where the affiliate is just used to facilitate the misconduct of the primary entity (e.g. by paying the expert hired in breach of conflict of interest provisions; by gathering confidential information on the relevant tender, and so forth); (ii) judgments or administrative decisions issued against large corporates where the parent company of the excluded entity had an active or passive involvement in the primary entity's wrongdoing. In the cases above, the authorising officer does not have any legal basis to exclude the affiliate that is not already a recipient or participant under direct or indirect management.

Once again, the consequences of such limitation is that a person or entity that has been excluded from being selected to implement Union's funds could continue to participate in procurement and award procedures, through a new company or existing affiliated entities.

Against this background, there is therefore a need to increase the effectiveness of EDES by tackling the 'alter-egos' of the primary sanctioned economic operator which might continue to bid for public contracts and ultimately obtain EU funds. The rationale justifying the exclusion of affiliated entities and/or beneficial owners is essentially the same as for the system of sanctions that applies to the primary excluded entity. Where the administrative sanctions exist for policy and financial reasons such as protecting the Union's budget, addressing fraud and corruption, increasing transparency amongst stakeholders, the sanctioning of affiliated entities and beneficial owners will avoid contracting with an unreliable supplier and the entities related to it.

The possibility to exclude beneficial owners and affiliated entities may also be intended to secure equal treatment of contractors and increase transparency in public procurement.

For instance, the US and the World Bank Group follow a similar approach, although in their system the disqualification of a parent company is not based on the parent's participation/knowledge of the misconduct but is a matter of objective assessment once it is established that the parent wields the required control over the subsidiary.

In addition, the current EDES legal framework does not allow for the possibility to impose a sanction on natural persons that have been involved in the misconduct of the excluded company. The provisions imputing the conduct of a company to a natural person are intended to prevent persons who have participated in sanctionable practices or have powers of control or management over the company from escaping the consequences of their actions by hiding behind the corporate veil.

The approach is to sanction the natural persons who are deemed responsible for the misconduct in a company, so that they are unable to obtain public contracts either in a personal capacity or through a new corporate identity. This would enhance the effectiveness of the EDES system as a whole.

2. Proposed modifications

The proposed improvements would first and foremost entail the amendment of (new) Article 138(2) FR to include in the scope of the EDES rules also beneficial owners, affiliated entities and natural persons with powers of control or management over an entity.

The definition of beneficial owners stems from point (6) of Article 3 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

The notion "affiliated entities" refers to any legal or natural person that controls, is controlled by, or is under common control with, the person or entity in the exclusion situation.

Article 136(2) FR would also be revised in order to allow for the exclusion of entities in the absence of final decisions in cases of Article 136(4) FR, and a new paragraph should be added after Article 136(4) FR to adapt the language to the inclusion of beneficial owners, affiliated entities and 'persons of interest' and non-final decisions.

While the sanctioning of beneficial owners, affiliated entities and persons of interest is intended to increase the effectiveness of the measure, the administrative procedure must be conducted in a way that is proportionate and does not result in punishing companies and their employees for offences that they have not committed. That is why the respect of due process and the right of defence have to be ensured at all times.

As regards the criteria to impute liability to the beneficial owners or to the affiliates, it is suggested to differentiate, for instance based on the degree of control. Exceptions may be introduced in case e.g. the excluded entity has a functional independence from its parent and from the beneficial owner. In other words, if it can be demonstrated that the excluded entity is independent from its parent or that the misconduct of the controlled entity is not due to a failure to supervise or maintain adequate controls, it should not be excluded. Similarly, where it is proven that the controlled entity has taken a commercial decision without the influence of the parent company or the beneficial owner, we could envisage an ad hoc exception to these new rules, i.e. beneficial owners or affiliated companies would not be affected (see the concepts on “single economic entity” and/or “parent liability” in competition law).

In light of the above, two amendments are proposed:

- The first would extend the possibility to recommend the exclusion also of beneficial owners and affiliated entities related to the sanctioned economic operator from participating into procurement and award procedures funded under the EU budget.
- The second would include within the scope of EDES sanctioning also the natural persons with power of control or management being in an exclusion situation.

3. Details of the proposal

The amendment consist in adding the above-mentioned categories under (new) Article 138(2). A paragraph is also added under Article 139 to lay down the conditions for exclusion of the beneficial owners and affiliated entities.

E. Conflict of interests as separate ground for exclusion: alignment with the EU Public Procurement Directive

1. Scene setter

All grounds for exclusion under EDES are listed under Article 136(1) FR and “conflict of interests” is not an explicit exclusion ground. Situations of conflict of interests can currently be covered under the exclusion ground of grave professional misconduct that is broadly defined and covers various situations (Article 136(1)(c) FR).

This insertion would align the FR with the EU Procurement Directive where the conflict of interest is explicitly listed as a (non-automatic) ground for exclusion under Article 57(4)(e). As any other exclusion, the exclusion for reasons of conflict of interests will be made on the basis of a recommendation of the EDES Panel. It would be an autonomous but (as all other grounds) non-automatic ground for exclusion.

2. Proposed modifications

The proposed modification would provide for a targeted reference to those situations in which the person or entity has influenced or attempted to influence the decision-making process of procurement and award procedures, through misrepresentation, of a conflict of interest involving any financial actors or other persons referred to in paragraph 1 of Article 61.

3. Details of the proposal

The introduction of a new indent under (new) Article 139(1)(c) FR.

F. Refusal to cooperate in an investigation, check or audit carried out by the EU bodies as an explicit ground for exclusion

1. Scene setter

The grounds for exclusion under EDES are listed under Article 136(1) FR and the refusal to cooperate in the context of investigations, checks or audits carried out by an authorising officer, OLAF, EPPO or the Court of Auditors is not explicitly listed therein. Such misconduct can currently be covered under the concept of grave professional misconduct or significant deficiencies in the compliance of contractual obligations, laid down, respectively, in Article 136(1)(c) and (e) FR. The Commission considers that an autonomous ground with an appropriate penalty range, consistent with the seriousness of the misconduct, should be added. In fact, the deliberate or sometimes even reckless failure to cooperate may have severe implications on the protection of the Union's financial interests. Thus, the sanction for such misconduct should be up to 5 years.

2. Proposed modifications

The modification would entail the explicit introduction of an additional ground in the case where the a person or entity has resisted an investigation, check or audit carried out by an authorising officer or its representative or auditor, OLAF, EPPO, or the Court of Auditors.

The maximum length of exclusion for such ground would be 5 years.

3. Details of the proposal

The amendment would be made in:

- (new) Article 139(1) FR; and,
- (new) Article 142 for what concerns the duration of the exclusion.

G. Incitement to discrimination, hatred or violence

1. Scene setter

The current exclusion rules do not provide for a specific exclusion ground in the case of wrongful conduct that is incompatible with the values enshrined in Article 2 of the Treaty on European Union and the Charter of fundamental rights of the EU, such as incitement to discrimination, hatred or violence against a group of persons or a member of a group, where the conduct may negatively affect the performance of the contract.

It is therefore proposed to introduce such ground to enhance the effectiveness of the EDES system.

2. Proposed modifications

The new exclusion ground should fall into the broader notion of grave professional misconduct (Article 139(1)(c)) and be linked to concrete wrongdoings that can have an impact on the entity's professional credibility and reliability when implementing EU funds.

3. Details of the proposal

A new indent should be added under Article 139(1)(c) to reflect the proposal of a new ground.

H. Engaging in illegal trade practices

1. Scene setter

The current exclusion rules do not explicitly refer to exclusion based on acts condemned in international trade law. For transparency, it should be clarified that such misconduct can be sanctioned *via* the ground of grave professional misconduct.

2. Proposed modifications

It is therefore proposed to refer in the recital concerning the grounds of exclusion under EDES to unreasonably injurious acts condemned in international trade law where they involve grave professional misconduct. This is a mere clarification that does not need to be replicated in the corresponding provisions.

3. Details of the proposal

The relevant wording is added in recital (112).

I. Exclusion of unreliable guarantors

1. Scene setter

The proposed modification extends the scope of exclusion from EU financing to unreliable guarantors, and prevents them from lodging guarantees.

It is first necessary to clarify that unreliable guarantors which do not to meet their professional or contractual obligations have to be sanctioned. This is all the more important since this situation bears the additional risk of collusion between some guarantors and unreliable economic operators. In particular, the latter may obtain for a cheaper price fake guarantees placing them in a more financially advantageous position than their competitors for EU funds.

The established case-by-case interpretation of the existing FR rules as allowing the exclusion from EU financing of unreliable guarantors lodging ‘on demand’ guarantees should be duly reflected in the FR. Moreover, the exclusion of unreliable guarantors lodging ‘at first call’ guarantees is not possible currently (see case T-672/19 where the General Court upheld the exclusion decision adopted by the Commission against a guarantor).

Furthermore, because the business of those unreliable entities does not normally call for or rely significantly on EU financing, their exclusion from EU funds is not deterrent enough. Therefore, unreliable guarantors should also be barred from covering operations related to EU financing-.

This is a technical amendment that aligns with the current interpretation of the EDES rules confirmed by the case-law of the European Court of Justice.

2. Proposed modifications

The proposed modifications will clarify that the scope of EDES covers also guarantors of EU funds' beneficiaries.

3. Details of the proposal

The category of guarantors is added under (new) Articles 138(2).

J. Presumption of notification of adversarial letter and administrative decisions

1. Scene setter

Currently, there is no provision on notifications to the entities concerned in the context of EDES. This is used by unreliable entities which regularly engineer the absence of notification to elude possible adverse consequences of their misbehaviours. This is also the reason for the only annulment of an EDES case and according to settled case-law (see case C-326/16 P), it is not possible to make a reference to national law for establishing presumption of notification. The proposal therefore provides for such a presumption under EU law.

2. Proposed modifications

The proposal includes (i) the establishment of a legal presumption that the act has been notified or that an automatic receipt reply by email of the transmission of such acts can constitute proof; (ii) the obligation for the participant to inform the Authorising Officer of any change in their postal or electronic address; (iii) the extension of the use of electronic exchange systems in the context of administrative procedures.

3. Details of the proposal

The amendment consists in:

- the introduction of a new Article (now Article 147);
- the addition of a paragraph under Article 134;
- the addition of a paragraph under (new) Articles 152 and 153.

K. Proof of remedial measures

1. Scene setter

Persons or entities excluded can submit remedial measures for the review of an exclusion decision or Panel recommendation. There is a case-by-case evaluation as to whether remedial measures are sufficient. The EDES Panel or authorising officers are not well equipped for the primary assessment of the remedial measures submitted. More rigorous and structured evidence should therefore be provided.

2. Proposed modifications

It is proposed that the remedial measures submitted are based on an external independent audit and/or the decision of a competent national or EU authority concluding that such measures are sufficient.

3. Details of the proposal

The amendment is made in (new) Article 139(10) FR.

L. Panel's vice-chair role

1. Scene setter

Article 143 FR lays down the composition of the Panel with, currently, a standing high level independent Chair, two permanent members representing the Commission, and one representative of the responsible authorising officer. Given its key role, the vice-chair should be listed in the relevant Article and not just in the rules of procedure of the Panel.

2. Proposed modifications

The amendment -consists in including the vice-chair in the list of permanent members of the EDES Panel.

3. Details of the proposal

The amendment is made in (new) Article 146(2) FR.

M. Update of legal references in relation to terrorist offences/offences linked to terrorist activities

1. Scene setter

The grounds for exclusion in relation to terrorist offences or activities in Article 136(1) FR refer to Council Framework Decision 2002/475/JHA. This Council Decision is no longer in force and has been replaced by Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism (OJ L 88, 31.3.2017, p. 6–21).

2. Proposed modifications

This amendment is a pure technical update.

3. Details of the proposal

The reference in the (new) Article 139(1) FR is updated to Directive (EU) 2017/541.

N. Clarification on the composition of the Panel in the case of financial irregularities on the part of a staff member

1. Scene setter

The composition of the Panel referred to in Article 143 of the Financial Regulation, where it gives the opinion referred to in Article 93(1), should be up-dated as far as the additional members referred to in Article 93(4) are concerned.

Where the case is referred to by the appointing authority in charge of disciplinary matters, it should be made clear that the authorising officer cannot be a member of the Panel, since, in most cases,

he/she may not have any longer any budgetary or legal links with the member of staff concerned at the time of the referral. Even if this is already the only reasonable interpretation of the current rules, this should be expressly specified for reasons of legal certainty.

Conversely, where the case is referred to by the authorising officer responsible, the appointing authority in charge of disciplinary matters should not be a member of the panel, since such a request is not made in the context of a disciplinary procedure.

In addition, this clarification and this amendment would allow to discard any possible asymmetry in the number of votes cast by the members of the Panel, depending on whether an authorising officer is a member of the Panel or not.

If these changes are adopted, the Commission would amend the rules of procedure of the Panel to allow, where a case is referred to by the appointing authority in charge of disciplinary matters, the authorising officer responsible to be an observer, and vice versa, where a case is referred to by an authorising officer.

2. Proposed modifications

It is proposed to replace the participation as a member of the Panel of the appointing authority in charge of disciplinary matters by the participation of the authorising officer responsible, where the latter refers the request for opinion to the Panel.

3. Details of the proposal

This amendment is included under Article 93(4).

O. Update of the legal reference in relation to data protection

1. Scene setter

Article 140 FR refers to Regulation (EC) No 45/2001 which is no longer in force and has been replaced by Regulation (EU) 2018/1725.

2. Proposed modifications

This is a pure technical update of a legal reference.

3. Details of the proposal

It is proposed to update the reference under the (new) Article 143 and 152(2)(h) FR to Regulation (EU) 2018/1725.

Annex: Relevant parts of the proposal

No. Art	Current FR	Proposed change	Comments/ Explanations
Recital 103		<p>In order to enhance the protection of the Union financial interests the early detection and exclusion system should be reinforced. It is important to avoid that a person or entity in an exclusion situation is able to apply to, or to be selected for implementing funds, or to receive such funds under a programme in shared management. Where there is a final judgment or a final administrative decision, the authorising officer responsible should be able to exclude a person or entity, provided that the latter is in an exclusion situation and deemed as not reliable by having engaged in certain serious misconducts referred to in Article 139(1). In the absence of a final judgment or a final administrative decision, the authorising officer responsible should be able to exclude, on the basis of a preliminary classification in law made by the Panel referred to in Article 146, having regard to facts and findings established in the context of audits or investigations carried out by European Anti-fraud Office (OLAF), European Public Prosecutor Office (EPPO), the European Court of Auditors (ECA) or any other check, audit or control performed under the responsibility of the authorising officer. Such exclusion should be registered in the early-detection and exclusion system database established under Article 138(1). Member States' authorities should take it into account by rejecting such persons or entities from receiving or from being selected to implement Union funds or from receiving such funds. Payment applications from Member States under shared management, including expenditure related to a person or entity that has been excluded, should not be reimbursed. Where funds are disbursed to Member States under performance-based frameworks, specific rules shall apply, as set out in sector-specific legislation.</p>	Point A of the fiche
Recital 104		<p>It is important to underline that the EDES system should</p>	Point B of the

		<p>only apply in respect of Union funds disbursed to the Member States under direct management, such as those under Regulation (EU) 2021/241 of the European Parliament and of the Council ³, where Member States have the responsibility to take all the appropriate measures to protect the financial interests of the Union, to the extent that the Commission has relevant responsibilities under the respective legal framework and with due regard to the sui generis nature of the funds. Therefore, the responsibilities of the Commission should be limited to the obligation to refer a case to the panel for the purpose of excluding a person or entity if the authorising officer becomes aware of serious misconducts through final judgments and administrative decisions or facts and findings established in the context of audits or investigations carried out concerning those funds by the European Anti-fraud Office (OLAF), the European Public Prosecutor Office (EPPO), the European Court of Auditors (ECA) or any other check, audit, or control performed under the responsibility of the authorising officer. Without prejudice to these responsibilities of the Commission, the Member States remain responsible to verify the information on decisions of exclusion registered in the EDES database, to enforce such decisions and to ensure that no payment application is submitted related to a person or entity that is in such an exclusion situation.</p>	fiche
Recital 108		<p>In order to align the early detection and exclusion system to public procurement rules and to enhance its effectiveness, attempting to influence the award of Union funds or unduly obtaining Union funds including in relation to conflicts of interests should be explicitly included as a specific situation of exclusion under the ground of grave professional misconduct with a proportionate penalty, consistent with the seriousness of the misconduct.</p>	Point E of the fiche

³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).

Recital 109		Having due regard to the principle of proportionality, the authorising officer responsible should exclude a person or entity when it has shown lack of integrity by having engaged in any wrongful conduct that is incompatible with the values enshrined in Article 2 of the Treaty on European Union and the Charter of fundamental rights of the European Union, such as incitement to discrimination, hatred or violence against a group of persons or a member of a group, where the conduct may negatively affect the performance of the contract.	Point G of the fiche
Recital 110		An autonomous ground of exclusion with a proportionate penalty, consistent with the seriousness of the misconduct, should be added in the case of unjustified lack of cooperation in the context of investigations, checks or audits carried out by an authorising officer, OLAF, EPPO or the European Court of Auditors as this may have severe implications on the protection of the Union's financial interests.	Point F of the fiche
Recital 112	A person or entity should be excluded by the authorising officer responsible where it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct, of non-compliance, whether intentional or not, with the obligations relating to the payment of social security contributions or taxes, of the creation of an entity in a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligations, of fraud affecting the budget, of corruption, of conduct related to a criminal organisation, of money laundering or terrorist financing, of terrorist offences or offences linked to terrorist activities, of child labour or other offences concerning trafficking in human beings or of the commitment of an irregularity. A person or entity should also be excluded in the event of a serious breach of a legal commitment or of bankruptcy.	A person or entity should be excluded by the authorising officer responsible where it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct, of non-compliance, whether intentional or not, with the obligations relating to the payment of social security contributions or taxes, of the creation of an entity in a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligations, of fraud affecting the budget, of corruption, of conduct related to a criminal organisation, of money laundering or terrorist financing, of terrorist offences or offences linked to terrorist activities, of child labour or other offences concerning trafficking in human beings or of the commitment of an irregularity. A person or entity should also be excluded in the event of a serious breach of a legal commitment or of bankruptcy or in cases of refusal to cooperate in investigations, checks or audits. In assessing these grounds for exclusion, unreasonably injurious acts condemned in international trade law could be considered a relevant factor, where they involve grave professional	Point H of the fiche

		misconduct.	
Recital 115		In order to further enhance the protection of the Union's financial interests, it should be possible for the authorising officer to exclude or impose a financial penalty on beneficial owners and affiliated entities of the excluded entity that were involved in the misconduct of the excluded entity. The possibility to exclude beneficial owners and affiliated entities is intended to prevent that a person or entity that has been excluded from being selected to implement Union's funds could continue to participate in procurement and award procedures, through a new company or existing affiliated entities.	Point D of the fiche
Recital 116		In order to increase its effectiveness, the early-detection and exclusion system should also apply to natural persons who are deemed responsible for the misconduct of an entity, so that they are unable to participate in award procedures or selected to implement Union funds either in a personal capacity or through a new corporate identity, without prejudice to the right to be heard.	Point D of the fiche
Recital 117		At the request of the authorising officer, the panel of the early-detection and exclusion system should have the ability to issue its recommendations by means of an expedited procedure, without prejudice to the right to be heard. Such procedure should be used when the circumstances or the nature of the case requires so, for instance where a final judgment or a final administrative decision has been issued by a Member State's authority but the duration of the exclusion is not set; or a final judgment or a final administrative decision has been issued by a third country; or a sanction equivalent to an exclusion has been already imposed on the person or entity by virtue of a decision of international organisations.	Point C of the fiche
Recital 130		In order to address attempts by entities to elude possible adverse consequences of their misconduct, rules of notification should be established under precise conditions in the context of early detection and exclusion procedures. Furthermore, the use of electronic exchanges system should apply to such procedures.	Point J of the fiche

Art. 93(4)	<p>Where the panel gives the opinion referred to in paragraph 1 of this Article, it shall be composed of the members referred to in Article 143(2) as well as the following three additional members, which shall be appointed taking into account the need for avoiding any conflicts of interests:</p> <p>(a) a representative of the appointing authority in charge of disciplinary matters of the Union institution, Union body, European office or body or person concerned;</p> <p>[...]</p>	<p>Where the panel gives the opinion referred to in paragraph 1 of this Article, it shall be composed of the members referred to in Article 146, subparagraph (1) point (a) and (b), as well as the following three additional members, which shall be appointed taking into account the need for avoiding any conflicts of interests:</p> <p>(a) a representative of the appointing authority in charge of disciplinary matters of the Union institution, Union body, European office or body or person concerned when the case in referred in accordance with Article paragraph 1(a) or a representative of the authorising officer responsible when the case is referred in accordance with paragraph (1)(b);</p>	Point N of the fiche
Art. 131 (new)		<p>Partial applicability of the exclusion system to shared management</p> <p>The exclusion system shall be applicable in the context of Union funds disbursed pursuant to Article 62(1)(b), with regards to any person or entity applying for or receiving these Union funds, under the conditions set out in Article 139(2) of Section 2 of Chapter 2 of Title V.</p>	Point A of the fiche
Art. 134(4)		<p>Record-keeping and updating of postal and electronic addresses by recipients</p> <p>4. Recipients shall inform the Authorising Officer of any change in their postal and electronic addresses. This obligation shall continue to apply in the period of five years following the payment of the balance or, in the absence of such payment, the transaction. This period shall be three years where the funding is of an amount lower than or equal to EUR 60 000.</p>	Point J of the fiche
Art. 138(2)		2. In direct and indirect management, the early-detection and	Point A of the

		<p>exclusion system shall apply to :</p> <p>[...]</p> <p>(i) any person or entity receiving funds through any forms, including non-repayable financial support or loans or both, where the budget is implemented pursuant to Article 62(1), first subparagraph, point (a), with Member States. In such case, Article 139(2) shall apply.</p> <p>For the purpose of the first subparagraph, point (i), persons or entities receiving funds shall include final recipients of funds, contractors, sub-contractors and the beneficial owners.</p> <p>This is without prejudice of Article 158(7) and the rules laid down in contribution agreements, financing agreements and guarantee agreements, in the case of persons or entities receiving Union funds where the budget is implemented pursuant to Article 62(1), first subparagraph, point (c).</p> <p>In shared management, the exclusion system shall apply to:</p> <p>(j) any person or entity applying for funding under a programme in shared management, selected for such funding, or receiving such funding;</p> <p>(k) entities on whose capacity the person or entity referred to in point (j) intends to rely, or subcontractors of such person or entity;</p> <p>(l) beneficial owners and affiliated entities of the person or entity referred to in point (j).</p>	fiche
Art. 138(2) – (d)	(d) any person or entity receiving Union funds under financial instruments exceptionally implemented in accordance with point (a) of the first subparagraph of Article 62(1);	(d) — any person or entity receiving Union funds under financial instruments exceptionally implemented in accordance with point (a) of the first subparagraph of Article 62(1);	Point I of the fiche

		(d) guarantors;	
Art. 138(2) – new (h) and (i)	The early-detection and exclusion system shall apply to: [...]	(g) beneficial owners and any affiliate of the person or entity excluded as referred to in Article 139(6); (h) natural persons as referred to in Article 139(5), points (a) to (c);	Point D of the fiche
Art. 139(1)	The authorising officer responsible shall exclude a person or entity referred to in Article 135(2) from participating in award procedures governed by this Regulation or from being selected for implementing Union funds where that person or entity is in one or more of the following exclusion situations:	The authorising officer responsible shall exclude a person or entity referred to in Article 138 (2) from participating in award procedures governed by this Regulation or from being selected for implementing Union funds where that person or entity is in one or more of the following exclusion situations:	Point A of the fiche
Art. 139(1)(c)(iv)	The authorising officer responsible shall exclude a person or entity ...where that person or entity is in one or more of the following exclusion situations: ... (c) it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct ... including, in particular, any of the following: (iv) attempting to influence the decision making of the authorising officer responsible during the award procedure.	The authorising officer responsible shall exclude a person or entity ...where that person or entity is in one or more of the following exclusion situations: ... (c) it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct ... including, in particular, any of the following: (iv) unduly influence or attempting to unduly influence the decision making of the authorising officer responsible during the award procedure process to obtain Union funds by taking advantage, through misrepresentation, of a conflict of interest involving any financial actors or other persons referred to in paragraph 1 of Article 61.	Point E of the fiche
Art. 139(1)(c)- new (vi)		The authorising officer responsible shall exclude a person or entity ...where that person or entity is in one or more of the following exclusion situations: ... (c) it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct ... including, in particular, any of the following: (vi) incitement to discrimination, hatred or violence against a group of persons or a member of a group where such misconduct has an impact on the person or entity's integrity which negatively affects or concretely risks affecting the performance of the legal commitment.	Point G of the fiche

<p>Art. 139(1)(d)(v)</p>	<p>1) (...)</p> <p>(d) (...)</p> <p>(v) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA(7), respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision</p> <p>Footnote (7)</p> <p>Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).</p>	<p>(1) (...)</p> <p>(d) (...)</p> <p>(v) terrorist offences or offences linkedrelated to terrorist activities, as defined in Articles— 3 and 12 of Council Framework Decision 2002/475/JHA(7) Directive (EU) 2017/541 of the European Parliament and of the Council⁴, respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 14 of that Decisionthe Directive.</p> <p>Footnote (83)</p> <p>Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6–21).</p>	<p>Point N of the fiche</p>
<p>Article 139(1) - new (i)</p>		<p>(i) the entity or person has resisted an investigation, check or audit carried out by an authorising officer or its representative or auditor, OLAF, EPPO, or the Court of Auditors. It shall be considered that the person or entity resists an investigation, check or audit when it carries out actions with the goal or effect of preventing, hindering or delaying the conduct of any of the activities needed to perform the investigation, check or audit. In particular, among others, when it intentionally and without proper justification refuses to grant the necessary access to its premises or any other areas used for business purposes, conceals or refuses to disclose information or provides false information.</p>	<p>Point F of the fiche</p>

Article 139(2)		<p>The authorising officer responsible shall exclude a person or entity referred to in Article 138(2)(i), (j), (k) and (l) where that person or entity is in one or more of the exclusion situations referred to in point (iv) of Article 139(1)(c) or points (d) of Article 139(1). In the absence of a final judgment or a final administrative decision, the decision shall be taken on the basis of a preliminary classification in law of a conduct as referred to in those points, having regard to the established facts and findings under Article 139, paragraph 2, fourth subparagraph, points (a) and (d) contained in the recommendation of the panel referred to in Article 146.</p> <p>Before making the preliminary classification in law, the panel referred to in Article 146 shall give the Member State the opportunity to submit observations.</p> <p>Without prejudice to Article 63(2), the Member State shall ensure that payments applications related to a person or entity that is in an exclusion situation, established in accordance with Article 139(1), point (a), are not submitted to the Commission for reimbursement.</p>	Point A of the fiche
Art. 139(3)	In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d), (f), (g) and (h) of paragraph 1 of this Article or in the case referred to in point (e) of paragraph 1 of this Article, the authorising officer responsible shall exclude a person or entity referred to in Article 135(2) on the basis of a preliminary classification in law of a conduct as referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 143.	In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d), (f), (g) and (h) of paragraph 1 of this Article, or in the case referred to in points (e) and (i) of paragraph 1 of this Article, the authorising officer responsible shall exclude a person or entity referred to in Article 138(2) on the basis of a preliminary classification in law of a conduct as referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 146.	Point F of the fiche
Art. 139(3)(d)	Information transmitted in accordance with point (d) of Article 142(2) by entities implementing Union funds pursuant to point (b) of the first subparagraph of Article 62(1).	(d) information transmitted in accordance with point (d) of Article 145 142(2), point (d) , as well as facts and findings established in the context of administrative or judicial proceedings at national level as to the presence of the exclusion situations referred to in point (iv) of Article 139(1), point (c), or Article 139(1), points (d), by entities	Point A of the fiche

		implementing Union funds pursuant to point (b) of the first subparagraph of Article 62(1), first subparagraph, point (b).	
Art. 139(4)(f) - new (iii)		the measures taken by the Member State against the person or entity pursuant to Article 63(2).	Point A of the fiche
Article 139(5)	<p>The authorising officer responsible shall exclude a person or entity referred to in Article 136(2) where:</p> <p>(a) a natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 135(2), or who has powers of representation, decision or control with regard to that person or entity, is in one or more of the situations referred to in points (c) to (h) of paragraph 1 of this Article;</p> <p>[...]</p> <p>(c) a natural person who is essential for the award or for the implementation of the legal commitment is in one or more of the situations referred to in points (c) to (h) of paragraph 1 of this Article .</p>	<p>The authorising officer responsible shall exclude a person or entity referred to in Article 138(2) where:</p> <p>(a) a natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 138(2), or who has powers of representation, decision or control with regard to that person or entity, is in one or more of the situations referred to in points (c) to (h) (i) of paragraph 1 of this Article;</p> <p>[...]</p> <p>(c) a natural person who is essential for the award or for the implementation of the legal commitment is in one or more of the situations referred to in points (c) to (h) (i) of paragraph 1 of this Article.</p>	Point F of the fiche
Art. 139(5)	<p>The authorising officer responsible shall exclude a person or entity referred to in Article 138(2) where:</p> <p>(a) natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 135(2), or who has powers of representation, decision or control with regard to that person or entity, is in one or more of the situations referred to in points (c) to (h) of paragraph 1 of this Article;</p> <p>(b) a natural or legal person that assumes unlimited liability for the debts of the person or entity referred to in Article 135(2) is in one or more of the situations referred to in point (a) or (b) of paragraph 1 of this Article;</p> <p>(c) a natural person who is essential for the award or for the implementation of the legal commitment is in one or more of</p>	<p>The authorising officer responsible shall exclude a person or entity referred to in Article 138(2) where:</p> <p>(a) natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 135(2), or who has powers of representation, decision or control with regard to that person or entity, is in one or more of the situations referred to in points (c) to (h) of paragraph 1 of this Article;</p> <p>(b) a natural or legal person that assumes unlimited liability for the debts of the person or entity referred to in Article 135(2) is in one or more of the situations referred to in point (a) or (b) of paragraph 1 of this Article;</p> <p>(c) a natural person who is essential for the award or for the implementation of the legal commitment is in one or more of</p>	Point D of the fiche

	the situations referred to in points (c) to (h) of paragraph 1 of this Article.	the situations referred to in points (c) to (h) of paragraph 1 of this Article. The authorising officer responsible shall ensure that the natural person that is in one or more of the situations referred to in the first subparagraph, is excluded.	
Art. 139(6)		When a person or entity referred to in Article 138(2), points (a) to (f) and (h) to (k), is excluded, the authorising officer responsible may also exclude or impose a financial penalty on the beneficial owner or any affiliate of the excluded entity. Any decision of the authorising officer responsible or, where applicable, any recommendation of the panel referred to in Article 146, shall take into consideration whether (i) the excluded entity has a functional independence from its affiliate and from the beneficial owner; (ii) the misconduct of the excluded entity is not due to a failure to supervise or to maintain adequate controls; (iii) the excluded entity has taken a commercial decision without the influence of any affiliate or of the beneficial owner.	Point D of the fiche
Art. 139(8)		At the request of the authorising officer, and where the nature or the circumstances of the case requires it, a referral for a recommendation of the panel referred in Article 146 may be treated by means of expedited procedure, without prejudice to the right to be heard of the person or entity concerned.	Point C of the fiche
Art. 139(10)	The remedial measures referred to in point (a) of the first subparagraph of paragraph 6 shall include, in particular: (a) measures to identify the origin of the situations giving rise to exclusion and concrete technical, organisational and personnel measures within the relevant business or activity area of the person or entity referred to in Article 135(2), appropriate to correct the conduct and prevent its further occurrence; (b) proof that the person or entity referred to in Article 135(2) has undertaken measures to compensate or redress the damage	The remedial measures referred to in point (a) of the first subparagraph of paragraph 6 shall include, in particular: [...] In order to comply with the requirements of paragraph 6 of this Article, the person or entity shall submit remedial measures that have been assessed by an external independent auditor or be considered sufficient by a	Point K of the fiche

	<p>or harm caused to the financial interests of the Union by the underlying facts giving rise to the exclusion situation;</p> <p>(c) proof that the person or entity referred to in Article 135(2) has paid or secured the payment of any fine imposed by the competent authority or of any taxes or social security contributions referred to in point (b) of paragraph 1 of this Article</p>	decision of a national or \union authority. This is without prejudice to the assessment of the panel referred to in Article 146.	
Article 142(1)(b)	<p>The duration of exclusion shall not exceed any of the following:</p> <p>[...]</p> <p>(b) in the absence of a final judgment or a final administrative decision:</p> <p>(i) five years for the cases referred to in point (d) of Article 136(1)</p>	<p>The duration of exclusion shall not exceed any of the following:</p> <p>[...]</p> <p>(b) in the absence of a final judgment or a final administrative decision:</p> <p>(i) five years for the cases referred to in Article 139(1), points (d) and (i) ;</p>	Point F of the fiche
Art. 143(1)	<p>Where personal data are concerned, the authorising officer responsible shall in accordance with Regulation (EC) No 45/2001 inform the person or entity concerned, as referred to in Article 135(2) of this Regulation, of their rights under the applicable data protection rules and of the procedures available for exercising those rights</p> <p>(2)(c) where a natural person is concerned, unless the publication of personal data is justified by exceptional circumstances, inter alia, by the seriousness of the conduct or its impact on the financial interests of the Union. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001.</p>	<p>Where personal data are concerned, the authorising officer responsible shall in accordance with Regulation (EC) No 45/2001 (EU) 2018/1725 (EC) No 45/2001 inform the person or entity concerned, as referred to in Article 135(2) of this Regulation, of their rights under the applicable data protection rules and of the procedures available for exercising those rights</p> <p>(2)(c) where a natural person is concerned, unless the publication of personal data is justified by exceptional circumstances, inter alia, by the seriousness of the conduct or its impact on the financial interests of the Union. In such cases, the decision to publish the information shall duly take into consideration the right to privacy and other rights provided for in Regulation (EC) No 45/2001 (EU) 2018/1725.</p>	Point O of the fiche
Art. 145(5)	All persons and entities involved in budget implementation in accordance with Article 62 shall be granted access by the Commission to the information on decisions on exclusion pursuant to Article 136 to enable them to verify whether there	All persons and entities involved in budget implementation in accordance with Article 62 shall be granted access by the Commission to the information on decisions on exclusion pursuant to Article 139 136 to enable them to verify whether	Point A and B of the fiche

	is an exclusion in the system with a view to taking this information into account, as appropriate and on their own responsibility, when awarding contracts in budget implementation.	there is an exclusion in the system with a view to taking this information into account, as appropriate and on their own responsibility, when awarding contracts in budget implementation. Except where the budget is entrusted to persons or entities in Article 62, paragraph 1, point (c), according to the modalities referred to in Article 158(4), all persons and entities involved in budget implementation shall enforce such decisions with regards to the person or entity applying for, selected or receiving Union funds.	
Art. 146(2)	The panel shall be composed of: (a) a standing high-level independent chair appointed by the Commission; [...]	The panel shall be composed of: (a) a standing high-level independent chair appointed by the Commission; (b) a standing high-level independent vice-chair appointed by the Commission, who shall deputise for the chair; [...]	Point L of the fiche
Art. 147		“Communication in the context of early detection and exclusion procedures” 1. All communication, in particular notification of decisions, letters, documents or information related to early detection or exclusion procedures shall be made in writing in paper or electronic format. 2. Notifications for communications which create legal effects or trigger time limits shall be made on paper by registered post with acknowledgement of receipt or by courier service with proof of delivery, though a secure electronic exchange system pursuant to Article 152, or by email or other electronic means. 3. Communications shall: a) When made on paper, be considered notified when	Point J of the fiche

		<p>they have been delivered to the latest available postal address indicated by the recipient party. Notifications by registered post with acknowledgement of receipt or by courier service with proof of delivery shall be considered to have been received either on the delivery date registered by the postal service or by courier service or after the time limit for collection at the post office, or, in the absence of such time limit, three weeks after the attempted delivery, provided that the notification has been sent a second time and announced electronically to the latest available e-mail address indicated by the recipient party.</p> <p>b) When made through a secure electronic exchange system referred to in Article 152 , be considered to have been notified on the date and time they are accessed, as indicated by the time logs in the system. Notifications that have not been accessed within 10 days after sending, shall be presumed to have been accessed.</p> <p>c) When made by email or other electronic means, be deemed to be notified on the day of dispatch of the e-mail, provided that it is sent to the latest available e-mail address indicated by the recipient party and the sending party does not receive a non-delivery report.</p> <p>Where the addressee can demonstrate that he or she has been prevented by circumstances outside his or her control from accessing a communication, the legal effects of the communication shall start running from the moment on which the addressee can demonstrate that he or she has gained access to its content.</p>	
Art. 152(1) and (3)	<p>Electronic exchange systems</p> <p>1. All exchanges with recipients, including the entering into</p>	<p>1. All exchanges with recipients and participants, including the entering into legal commitments and any amendments</p>	Point J of the fiche

	<p>legal commitments and any amendments thereto, may be done through electronic exchange systems.</p> <p>[...]</p>	<p>thereto, may be done through electronic exchange systems.</p> <p>[...]</p> <p>3. The electronic exchange system may also be used by the authorising officer responsible to communicate with participants, recipients or other persons or entities set out in Article 138(2):</p> <p>(a) of their inclusion in the early detection and exclusion system database in the cases referred to in Article 138(1), point (a);</p> <p>(b) the content of adversarial letters and other information or requests issued by the Panel referred to in Article 146, in order to safeguard the rights referred to in Article 146(5), and in the exercise of the competences under this Regulation;</p> <p>(c) the content of decisions and other information or requests by the authorising officer responsible, in the exercise of the competencies under Articles 138 to 148 of this Regulation.</p> <p>[...]</p>	
Art. 152(2)(h)	(h) the protection of personal data in accordance with Regulation (EC) No 45/2001 is ensured.	(h) the protection of personal data in accordance with Regulation (EC) No 45/2001 (EU) 2018/1725 is ensured.	Point O of the fiche
Article 153(7)		<p>[...]</p> <p>7. Participants or recipients or any other persons or entities included in Article 138(2), accept to receive notifications in the terms of the specific legal commitment or concession contract, including any notification</p>	Point J of the fiche

		<p>concerning the application of any of the measures referred to in Article 138(1). Where persons or entities referred to in Article 138(2), point (b), are concerned, the applicant shall be responsible for communicating to the contracting authority the address of the entity concerned.</p> <p>Unless exchanges are made through the electronic exchange system referred to in Article 152, where the person or entity has been notified by electronic means to the address indicated in the application, and failing the express acknowledgement of receipt of the electronic notification, it shall be presumed that the person or entity has been put in a position to take cognisance of the content of the exchange and therefore it shall be considered as notified.</p> <p>[...]”.</p>	
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