 **Overview of the EU Early Detection and Exclusion System (EDES)**

**(King’s College, London - GWU Law School Annual Symposium: Exclusion and Debarment - 18 March 2019)**

Purpose and scope of EDES

* Established in 2016 to protect the EU budget from unreliable/fraudulent economic operators
* Common to all EU Institutions (Parliament, Council, Commission, Court of Auditors and Court of Justice), EU agencies and other EU bodies
* Applies to economic operators receiving funds directly (representing 24% of the EU Budget, around 33 billion €) as well as, from 02 August 2018, to the end recipients of EU funds indirectly via implementing partners (e.g. international organisations, third countries)

Types of measures

* **Early detection**: information on suspicion; enhanced contract monitoring (no adverse effect)
* **Exclusion**: prohibition to obtain EU funds for a determined period (max 3 to 5 years)
* **Financial penalty**: proportional to the value of the contract (max 10%) but rarely used (in addition or as alternative to the exclusion)
* **Publication** of most severe cases (obstructions to investigations, to audits or to first demand guarantees; use of fake guarantees)<http://ec.europa.eu/budget/edes/index_en.cfm>
* **Central** **EDES Database:** accessible to all financial actors of the EU budget**;** possibility to identify the individual who has powers of representation/decision/control over the economic operator.

Grounds of exclusion

**Broad list** of mandatory exclusion grounds covering both **integrity** and **bad performance** (inspired from the 2014/24/EU Procurement Directive)

* **Grave professional misconduct**: violation of applicable laws or ethical standards of the profession, or wrongful conduct which has an impact on professional credibility where such conduct denotes wrongful intent or gross negligence, including, e.g:
  + fraudulently or negligently misrepresenting information when applying for EU funds
  + agreement with other economic operators distorting competition
  + violating intellectual property rights
  + attempt to influence the procurement procedure, obtain confidential information
* **fraud**, **corruption**, other forms of **criminal behaviors**
* **serious breach of contract** (bad performance)
* **irregularity**: any infringement of Community law prejudicing the EU budget
* **letter box company** (new): creation of an entity to circumventing fiscal or social obligations
* non-payment of **taxes** or **social security contributions**
* **bankruptcy** and similar situations (insolvency)

Sources of information

* **Final** and **non-final** judgment or administrative decisions of a Member State
* **Facts and findings from the Anti-fraud Office** of the Commission (OLAF), **Court of Auditors,** **audits** or any other checks or controls performed by the **EU Institutions**, bodies and agencies
* **EPPO** (European Public Prosecutor Office) **findings** (the EPPO is envisaged to take up its functions by the end of 2020)
* **Judgments** of third countries and **decisions** of other International Organisations (as facts)
* **Fraud** or **irregularity** notified by other partners implementing the EU budget (Member States, other International Organisations such as the World bank, third countries, etc.)

Remedial measures – self cleaning

**No exclusion** where the economic operator has taken **remedial measures** sufficient to correct the situation (except in the case of fraud):

* concrete technical, organisational and personnel measures to correct the conduct
* measures to compensate or redress the damage or harm caused to the Union's budget
* payment of any fine imposed by the competent authority

Proportionality principle – mitigating/aggravating circumstances

**Duration** of the exclusion, **amount** of the financial penalty or **need for publication** depend on

* seriousness of the situation, including the impact on the financial interests
* time elapsed since the conduct, duration of the conduct and recurrence
* intentionality or degree of negligence
* degree of collaboration of the economic operator in the investigation
* disclosure of the exclusion situation

Exclusion procedure

Obligation to refer the case to **a high-level inter-institutional Panel** (independent Chair) in charge of the **adversarial procedure** with the economic operator (rights of defense) that:

* acts in the absence of final judgment or final administrative decision,
* has no investigative powers: the Panel looks at established facts or findings and makes a preliminary qualification in law (not binding for the Member States which remain competent for criminal matters),
* adopts a **recommendation** taking into account possible remedial measures and the proportionality principle.

**The EU Institution takes the final decision** to exclude based on the recommendation of the EDES Panel – decision different from the EDES Panel recommendation must be justified

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

The Court of Justice has upheld the validity of EDES system established in 2016 both concerning the early detection (Judgment of the General Court of 24 October 2018 in Case T-477/16, Epsilon International SA v European Commission[[1]](#footnote-1)) and the exclusion part (Judgment of the General Court of 8 November 2018 in Case T-454/17, “Pro NGO!” v Commission). A number of appeals have been dismissed as inadmissible[[2]](#footnote-2).

Two other cases have allowed – without questioning the validity of the EDES – to clarify certain procedural issues, such as the retroactive application of the more lenient law in favor of the economic operator despite the existence of a stricter substantive law in force at the time of the facts[[3]](#footnote-3) and the non admissibility of electronic proof of receipt as evidence that the economic operator has effectively become aware of the notification.[[4]](#footnote-4)

**Examples of application of the EDES**

1. *Successful tenderer pleaded guilty of a bribery scheme*, case recorded in a Non-Prosecution Agreement (NPA) in the US Department of Justice. These factual elements led under EU rules to 2 years of exclusion for grave professional misconduct – parallel to debarment period (legislation applicable at the time of the facts did not allow the qualification of corruption if legal proceedings were outside the EU jurisdiction).
2. *Grant beneficiary chairperson used fraudulent means to justify activities that had not taken place*. The facts established in the final judgment of a third country and the findings of the OLAF report were concurring evidence that the company had fraudulently misappropriated important amounts of EU funds. 3 years of exclusion and publication.
3. *Analysis of facts and measures taken under a settlement agreement with the WB by a company participating in EU tender procedure*. Company agreed to give the European Commission access to the settlement agreement and WB informed about positive assessment of remedial measures and continued compliance. These elements were taken into consideration as “facts” under the EU rules. Company was allowed for bidding given the measures effectively taken and the time elapsed since the facts (proportionality principle).
4. *Contract awarded based on false information/documentation presented in the tender*. Continuous false statements about the actual conditions of the equipment delivered, which originated from sources other than those indicated in the tender. 3 years of exclusion for fraud and publication.
5. *Serious breach of contract taken place in a third country* – delay and partial implementation of works, high financial impact, refusal of *the guarantor to honor the guarantee*, risk of harming the EU reputation in a third country. 3 years of exclusion with a publication.
6. *Irregularities, false declarations of research beneficiary* – misappropriation of EU funds – non transfer EU funding to the partners of the consortium. Authorities of a Member State opened national investigations based on EU Anti-Fraud Office (OLAF) findings. Adversarial EDES Panel procedure postponed to safeguard the confidentiality of national investigations.
7. *A company member of a consortium subject to an administrative financial fine by an Anti-trust Authority*. The company challenged the case before a national Court and obtained the annulment of the decision of the Anti-trust Authority. By way of consequence, the situation of exclusion of the company was no longer borne out by sustainable legal evidence (case dismissed).
8. *Irregularities in personnel and subcontracting costs failure to comply with its contractual obligation*s. Difficulties to locate and notify the letter opening the exclusion procedure. Use of parallel means to prove receipt and effective notification of the economic operator (respect of the right of defense): registered mail with acknowledgement of receipt and in parallel the services of a bailiff.

1. See in particular paragraphs [↑](#footnote-ref-1)
2. See i.a. Orders of the General Court of 28 September 2017, in Case T-207/16, Aristoteleio Panepistimio Thessalonikis v European Commissions and of 18 September 2018 in Case T-664/17, eSlovensko/Commission [↑](#footnote-ref-2)
3. Judgment of the General Court of 27 June 2017 in Case T-151/16, NC v Commission [↑](#footnote-ref-3)
4. Judgment of the General Court of 7 December 2018 in Case T-280/17, GE.CO.P. v Commission [↑](#footnote-ref-4)