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**Early Detection and Exclusion System (EDES) - Panel referred to in Article 108 of the
Financial Regulation**

Accompanying the document

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

**Protection of the European Union's financial interests - Fight against fraud 2016 Annual
Report**

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1. INTRODUCTION

From 2004 to 2015, the Commission ran an internal early warning system and an exclusion database in order to protect the Union's financial interests. The aim of the system was to warn about potentially unreliable economic operators and to prevent them from obtaining future EU financing by excluding them or imposing a financial penalty on them. The internal early warning system only covered the Commission and its executive agencies. In its judgment in the Planet case¹ the General Court considered that the early warning system was not purely internal since it affected the rights of the economic operators concerned and that it did not properly ensure the operator's right to be heard². The Commission seized the opportunity of this judgment to propose a substantial revision of the system not only in order to fully ensure the respect of the fundamental rights of the economic operators concerned but also to improve the system in terms of centralised assessment of cases, independence and transparency³. As a result a new single Early Detection and Exclusion System (EDES) was put in place as part of the 2015 revision of the Financial Regulation⁴. Articles 105a to 108 provide for rules that centralise the exclusion process for all institutions, EU offices, agencies and bodies. In particular, Article 108(7) establishes a Panel presided over by a standing high-level independent Chair whose role is to issue recommendations on administrative sanctions, *i.e.* exclusion and/or financial penalties and, where applicable, the publication thereof. These recommendations are addressed to the authorising officers of EU institutions, EU offices, agencies and bodies which remain sole competent to take the decision to exclude an economic operator and/or to impose a financial penalty on it.

2016 constitutes the first year of application of this new system, the “EDES” that entered into application on 1 January 2016: the Panel was established and its Chair and Deputy Chair were selected and appointed by the Commission. In parallel, a new IT tool, the EDES Database, was set up. It lists all cases of early detection of risks threatening the EU's financial interests, exclusion of and imposition of financial penalties on unreliable economic operators and is also operational since 1 January 2016. The Commission also launched a public webpage on the Europa website, which lists the most serious cases sanctioned by exclusion and/or a financial penalty decisions. The purpose of publication is to ensure a deterrent effect in order to better protect the Union's financial interests. The publication is subject to strict conditions, including compliance with the protection of personal data.

2. THE PANEL

The coherence of the administrative sanctions (*i.e.* exclusion and/or financial penalties and, where applicable, the publication thereof) procedure is ensured by the newly established Panel.

2.1. The Composition of the Panel

As laid down in Article 108(7) of the Financial Regulation, the Panel is composed of:

¹ C-314/11 P - Commission v Planet.

² The situation was different for the exclusion part of the system which was already open to other actors of implementation of the EU budget and ensured the rights of defence.

³ COM(2014) 358 final of 18.6.2014.

⁴ Regulation (EU, Euratom) No 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ L 286, 30.10.2015, p. 1).

- a standing high-level independent Chair;
- two permanent Member representatives of the Commission as the owner of the system, who express a joint position for the cases submitted to the Panel; and
- one ad-hoc Member representative of the requesting authorising officer.

The Chair of the Panel and his/her Deputy are appointed by the Commission and are independent in the performance of their mandate⁵. They are chosen from among former members of the Court of Auditors, the Court of Justice or former officials who have had at least the rank of Director-General in an institution of the Union other than the Commission. Their term of office is five years and is not renewable. The Chair is Mr Christian Pennera, former Jurisconsult of the European Parliament and his Deputy is Ms Maria Isabel Rofes i Pujol, former Member of the Civil Service Tribunal of the European Union.

The two permanent Members of the Panel designated by the Commission are Mr. Hubert Sztaszewski designated *ad personam*, presently Principal Advisor within the Secretariat General of the Commission, and Mr. Olivier Waelbroeck, Director of the Central Financial Service in the Directorate-General for Budget⁶.

For each case, the additional Member representing the requesting authorising officer is designated in accordance with the rules of procedure and the internal administrative rules of the institution, agency, office or body concerned.

The Panel is assisted by observers and in all cases by a representative of the Legal Service of the Commission. In addition, a representative of OLAF participates in the Panel as observer in the cases referred to the Panel on the basis of an OLAF investigation. This status allows OLAF to present the facts. The active contribution of the Legal Service of the Commission and of OLAF to the work of the Panel has been a key element in providing the Panel with relevant information and allowing it to deliver high quality recommendations in a timely way.

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

2.2. ROLE OF THE PANEL

In the absence of a final national judgment or, where applicable, a final administrative decision, authorising officers who would like to exclude and/or fine an unreliable economic operator⁷ have to first request a recommendation of the Panel. The grounds for excluding economic operators are the following:

⁵ Article 144(1) subparagraph 2 of Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015 amending Delegated Regulation (EU) No 1268/2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

⁶ Deputies of the Permanent Members are: Mr. Olivier Dandoy designated *ad personam* from the Secretariat General of the Commission and Ms. Victoria Gil Casado from the Central Financial Service in the Directorate-General for Budget.

⁷ 'Economic operator' means any natural or legal person, including a public entity, or a group of such persons, which applies for EU and/or EDF funds or has already received such funds.

- grave professional misconduct resulting from the violation of applicable laws or regulations or ethical standards of the profession to which the economic operator concerned belongs, or from the engagement in any wrongful conduct which has an impact on the 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 main obligations in the performance of a contract financed by the budget ('serious breach of obligations'), which has led to its early termination or to the application of liquidated damages or other contractual penalties, or which 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 2988/95⁸.

In general, each case is examined twice by the Panel in two succeeding meetings. In a first session, the Panel examines the facts and findings and their preliminary qualification in law. It ensures the right to be heard by sending a letter to the economic operator in which the latter is requested to submit written observations. In a second session, the Panel examines the written observations, if any, and adopts its recommendation which is addressed to the requesting authorising officer.

The Panel must adopt this recommendation within 45 calendar days from the referral of the case to the Panel. This deadline starts once the request for referral of a case is complete. Pursuant to the Financial Regulation, the economic operator should at least be granted 15 calendar days, *i.e.* 10 working days at the most, to present its observations. In practice, despite the tight constraint of the short deadline of 45 calendar days, the Panel grants more time to the economic operator, *i.e.* at least 11 or 12 working days.

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

- a) facts established in the context of audits or investigations carried out by the Court of Auditors, OLAF or internal audit, or any other check, audit or control performed under the responsibility of the authorising officer;
- b) non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics;

⁸ 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.*"

- c) decisions of the European Central Bank, the European Investment Bank, the European Investment Fund or international organisations;
- d) decisions of the Commission relating to the infringement of the Union's competition rules or of a national competent authority relating to the infringement of Union or national competition law.

Where the Panel considers that the economic operator concerned should be excluded and/or that a financial penalty should be imposed on it, its recommendation contains the facts or findings and their preliminary classification in law as well as one or several of the following elements:

- a) an assessment of the need to impose a financial penalty and its amount;
- b) an assessment of the need to exclude the economic operator concerned and, in that case, the suggested duration of such an exclusion;
- c) an assessment of the need to publish the information related to the economic operator who is excluded and/or subject to a financial penalty;
- d) an assessment of remedial measures taken by the economic operator, if any;
- e) assessment of the proportionality principle as referred to in Article 106(3) of the Financial Regulation so as to retain aggravating or mitigating circumstances.

After an assessment of the remedial measures the Panel may decide to recommend not to impose sanctions on the economic operator. The option to take into account remedial measures was introduced in the 2015 revision of the Financial Regulation, based on the procurement Directives⁹ in order to reduce the sanctions imposed on the economic operator or to avoid its exclusion altogether where the economic operator has taken the necessary corrective measures. For this latter case, the measures listed in Article 106(8) of the Financial Regulation must be sufficient to demonstrate the reliability of the economic operator to receive future Union funds.

2.3. THE RECOMMENDATION OF THE PANEL

In the light of the principle of proportionality enshrined in Articles 49 and 52 of the Charter of Fundamental Rights of the European Union¹⁰ and of remedial measures taken by the economic operator concerned, the Panel can recommend:

- The exclusion of the economic operator concerned for up to 3 years (up to 5 years in the case of fraud) from participation in all or part of funding procedures, governed by the Union budget in line with the Financial

⁹ 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, 28.03.2014, 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, 28.03.2014, p.1).

¹⁰ See also Recital 28 of Regulation (EU, Euratom) 2015/1929 of the European Union and of the Council of 28 October 2015 amending regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union, OJ L 286, 30.10.2015, p. 1.

Regulation and award procedures governed by the European Development Funds;

- The imposition a financial penalty of between 2 % and 10 % of the total value of the contract on an economic operator who has attempted to obtain access to Union funds by participating or requesting to participate in a procurement procedure, without having declared it in one of the following exclusion situations;
 - (ii) as an alternative to a decision to exclude the economic operator, where such an exclusion would be disproportionate;
 - (iii) in addition to an exclusion which is necessary to protect the Union's financial interests, where the economic operator has adopted a systemic and recurrent conduct with the intention of unduly obtaining Union funds¹¹.
- In order to reinforce the deterrent effect of the exclusion and/or financial penalty, the publication on the internet site of the Commission information related to the exclusion and, where applicable, the financial penalty¹².

Even if they have only a non-binding nature, due to the need to respect the administrative autonomy of the Institutions and other EU bodies, the recommendations of the Panel bear a certain weight due to the composition of the Panel and the recognised authority of its high level independent Chair. This is further evidenced by the fact that the Authorising Officer who decides not to follow a recommendation of the Panel in a given case must inform the latter of the reasons which have led him/her to take a different decision.

3. THE PUBLICATION OF SANCTIONS IMPOSED ON ECONOMIC OPERATORS

The publication of the sanctions is a powerful tool to ensure a deterrent effect and to prevent misuse of EU funds. The first publication of information related to sanctions took place on 24 November 2016.

The recommendation to publish must comply with the protection of personal data and be necessary to ensure this deterrent effect. Therefore, the publication will only be recommended in serious cases with aggravating factors. In addition, the publication can only intervene three months after the decision is taken by the economic operator, by which time the decision of the authorising officer may be contested before the General Court. If this is the case then the publication will take place after the judgment of the Court, should the judgment uphold the decision of the Authorising Officer.

¹¹ This possibility is not applicable to cases where the conduct consists of significant deficiencies in complying with main obligations in the performance of a contract.

¹² Information cannot be published in any of the following circumstances:- where it is necessary to preserve the confidentiality of an investigation or of national judicial proceedings;- 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;
- where a natural person is concerned, unless the publication of personal data is exceptionally justified, inter alia, by the seriousness of the conduct or its impact on the Union's financial interests.

4. OVERVIEW OF CASES

The Panel started functioning at the beginning of 2016 and issued its first recommendation on 15 March 2016. Pending the appointment of the standing high-level independent Chair and his Deputy by the Commission, it was presided on an interim basis by the permanent Member with the highest seniority. The Chair of the Panel took office once he had been appointed and presided his first meeting on 24 November 2016.

In 2016, 21 cases relating to 33 economic operators were addressed to the Panel through its permanent secretariat by different authorising services, including 14 from the Commission, five from executive agencies, one from an office and one from a decentralised agency.

As of 30 June 2017, the Panel has issued 17 recommendations, three of which were adopted in 2016. In three recommendations, the Panel concluded that no sanctions should be imposed, in the light of the remedial measures taken by the operator. In addition to the cases for which the Panel issued a recommendation, in one case, the facts presented to the Panel were not established. In two others, the authorising officer withdrew the cases. One case is currently suspended.

In the 13 decisions adopted so far by authorising officers, the recommendations of the Panel have been followed in full and the economic operators have been excluded. In 1 of these cases, a financial penalty was imposed in addition and in 6 of these cases it was decided to publish the sanctions. The publicity was justified by e.g. the refusal of audits or by a misleading depiction of the solvability of the contractor due to the default of its guarantor.

The following table shows an overview of the cases where the Panel issued a recommendation in 2016 and of those cases submitted to the Panel in 2016 and where the recommendation was issued in the first semester of 2017. It contains a summary of facts and findings, their preliminary qualification in law if applicable, the recommended administrative sanction and the date thereof and if a publication on the website of the Commission was recommended. The cases have been anonymised.

Annex 1

Summary of anonymised cases dealt with by the Panel of Article 108 of the Financial Regulation up until 30.06.2017

CASE NUMBER	FACTS	QUALIFICATION IN LAW (exclusion ground)	SANCTIONS	PUBLICATION
<p>Case 2016/1</p> <p>Date of the Panel recommendation: 16.3.2016</p> <p>Date of the decision of the authorising officer: 23.6.2016</p>	<p>The director of a grant beneficiary publicly admitted that he was involved in sharing disreputable information on the director of a competitor entity.</p>	<p>"<i>Grave professional misconduct</i>" that has an impact on the integrity and professional credibility of the economic operator.</p>	<p>Exclusion from specific funding programme for 3 years.</p>	<p>Not recommended.</p>
<p>Case 2016/2</p> <p>Date of the Panel recommendation: 20.4.2016</p> <p>Date of the decision</p>	<p>The manager of a grant beneficiary misappropriated EU funds;</p> <p>In another project, the beneficiary did not perform any work;</p> <p>Prevented the auditors to perform a</p>	<p>"Serious breaches of contractual obligations".</p>	<p>Exclusion of 3 years.</p> <p>Financial penalty of 10 % of the value of one of the project.</p>	<p>Recommended based on refusal of audits.</p> <p>Published on 24 November 2016 on the internet site of the Commission.</p>

of the authorising officer : 19.7.2016	financial audit; Declared ineligible costs.			
Case 2016/3 Date of the Panel recommendation: 15.6. 2016 Date of the decision of the authorising officer: 25.10.2016	A patent allegedly owned by the economic operator concerned did not exist; Alleged existence of another linked entity did not exist.	"Misrepresentation in supplying the information required by the authorising officer".	Exclusion for a period of 3 years.	Not recommended.
Case 2016/4 Case withdrawn on: 20.12.2016	The grant beneficiary received subsidies based on declaration of overestimated unit costs (average v. actual); Declaration of ineligible costs.	Not applicable, case withdrawn by authorising officer.	Not applicable. Case closed due to withdrawal by authorising officer. Application of contractual measures to protect the EU financial interests so that there is no outstanding impact on the EU budget	Not applicable (case withdrawn).

			(including).	
Case 2016/5 Date of the Panel recommendation: 9.1.2017 Date of the decision of the authorising officer: 6.3.2017	Inflation of costs and unreliable recording system of a grant beneficiary; Undeclared subcontracting; Plagiarism.	"Serious breaches of contractual obligations"	Exclusion for a period of 2 years.	Recommended based on the recurrence of the conduct. Published on 14/06/2017 on the internet site of the Commission.
Case 2016/6 (up to 9 economic operators potentially concerned) Panel reply to the requesting authorising officer on 23.6.2016	As part of a procurement procedure, the evaluation Committee identified 2 tenders (consortia) with identical parts in the replies to certain questions; Potential alleged plagiarism made by one of the consortia and/or the companies of this consortium.	Not applicable. Case closed: facts and findings not established.	Not applicable (case inadmissible due to the non-establishment of the facts).	Not applicable (case inadmissible due to the non-establishment of the facts).
Case 2016/7/a	Three beneficiaries of grants were involved in a fraudulent scheme with an intermediary company,	"Serious breaches of contractual obligations".	Recommendation not to exclude by application of remedial	Not applicable (recommendation not to sanction – remedial

<p>Case 2016/7/bis Case 2016/7/ter</p> <p>(3 economic operators concerned)</p> <p>Date of the Panel recommendations: 28.2.2017 (a) 16.3.2017 (bis and ter)</p>	<p>while all of them were owned or controlled by the same natural person.</p> <p>The mechanism resulted in inflated costs claimed in the EU projects.</p>	<p>The legal qualification of fraud has not been retained since the competent national authorities closed the judicial proceedings.</p>	<p>measures sufficient to ensure the economic operators' liability:</p> <ul style="list-style-type: none"> - no financial prejudice remained due to the reimbursement of all funds in the perimeter of the established serious breach of contractual obligations; - no use of the fraudulent scheme since 2007. 	<p>measures).</p>
<p>Case 2016/8/a Case 2016/8/bis</p> <p>(2 economic operators concerned)</p> <p>Date of the Panel</p>	<p>Attempts of 2 economic operators to influence the procurement evaluation procedure.</p>	<p>"Grave professional misconduct"</p>	<p>Exclusion of each of the 2 economic operators for 1 year.</p>	<p>Not recommended.</p>

<p>recommendations (a and bis): 28.3.2017</p> <p>Date of the decision of the authorising officer (a and bis): 11.04.2017</p>				
<p>Case 2016/9</p> <p>Date of the Panel recommendation: 9.1.2017</p> <p>Date of the decision of the authorising officer: 7.3.2017</p>	<p>As part of a contract of works, the contractor concerned did not fulfil its obligations in the deadline set (extended several times), it resulted in the termination of the contract;</p> <p>The contractor submitted a performance guarantee of a guarantor blacklisted by the central national central bank. The guarantor went bankrupt and the contractor did not replace the guarantee, despite being required to do so.</p>	<p>"Serious breaches of contractual obligations".</p>	<p>Exclusion of 2 years.</p>	<p>Recommended based on the misleading depiction of the solvability of the contractor due to the default of its guarantor.</p> <p>Publication postponed due to legal action introduced by the operator.</p>
<p>Case 2016/10a</p> <p>Case 2016/10bis</p>	<p>Submission of report on the implementation of the action which did not reflect reality (by the 1st economic operator concerned only);</p>	<p>"Serious breach of obligations" and "grave professional misconduct" (1st economic operator)</p>	<p>Exclusion for 2 years (1st economic operator)</p>	<p>Recommended for the first economic operator recommended based on two distinct</p>

<p>(2 economic operators concerned)</p> <p>Date of the Panel recommendations:</p> <p>6.2.2017 (a)</p> <p>24.3.2017 (bis)</p> <p>Date of the decision of the authorising officer:</p> <p>24/03/2017 (a)</p> <p>16/05/2017 (bis)</p>	<p>Non-compliant procurement procedure and inflation of staff expenses claimed (by the 1st economic operator concerned only);</p> <p>Submission of fake documents to auditors (2nd economic operator only).</p>	<p>"Grave professional misconduct linked to breach of procurement procedure" (2nd economic operator)</p>	<p>Exclusion for 1 year (2nd economic operator)</p>	<p>grounds of exclusion.</p> <p>Yet to be published on the internet site.</p> <p>Not recommended for the second operator.</p>
<p>Case 2016/11</p> <p>Date of the Panel recommendation:</p> <p>25.1.2017</p>	<p>Auditors prevented to perform a financial audit;</p> <p>Non-completion of work to be performed in the context of a grant agreement and non-participation in the meetings concerning the</p>	<p>"Serious breaches of contractual obligations"</p>	<p>Exclusion for 3 years.</p>	<p>Recommended based on:</p> <p>- serious breaches of contractual obligations in two distinct grant agreements</p>

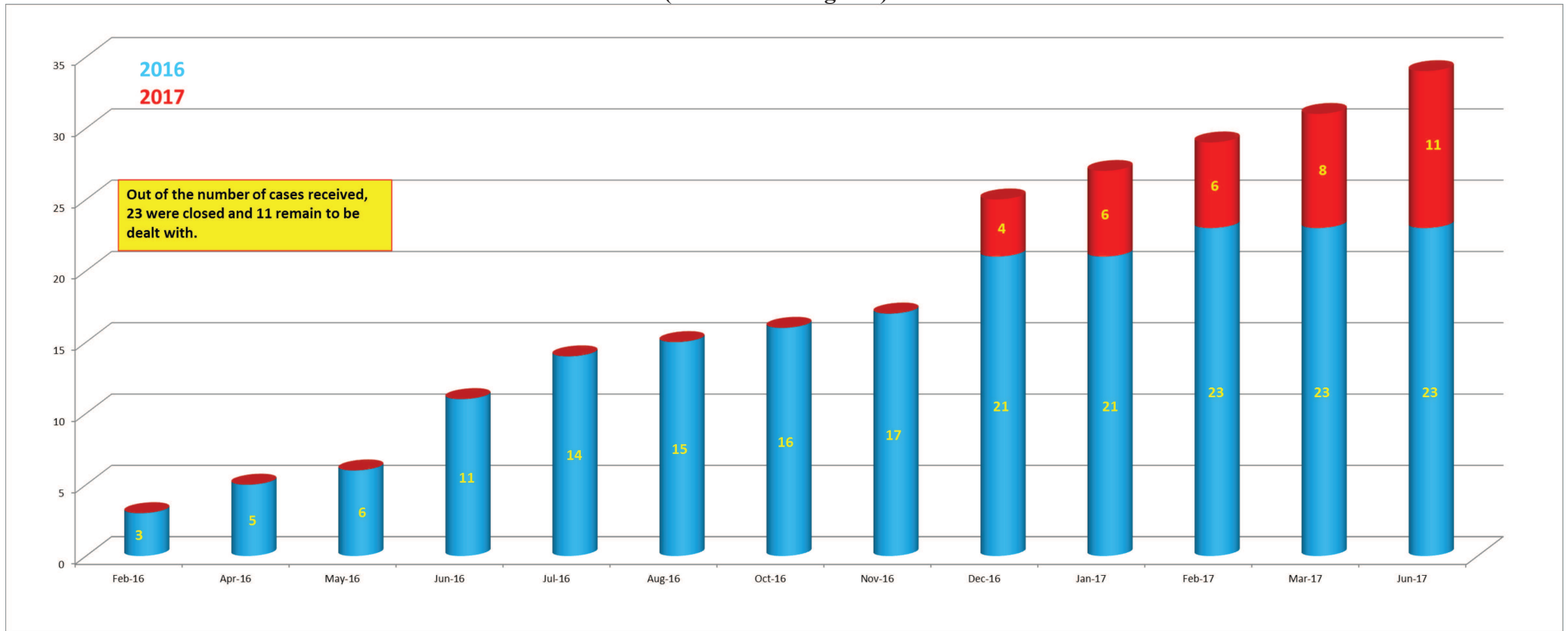
<p>Date of the decision of the authorising officer:</p> <p>05.04.2017</p>	<p>supervision, monitoring and evaluation of the project.</p>			<p>- refusal of audit.</p> <p>Yet to be published on the internet site</p>
<p>Case 2016/12</p> <p>Reply of the Panel to the requesting authorising officer on 2.2.2017</p>	<p>Irregularity consisted in conclusion of a contract with another company for assistance in the preparation of a tender and falsification of document. This company irregularly obtained the Terms of Reference of the Contract prior publication.</p>	<p>"Grave professional misconduct".</p>	<p>State of play on the further implication of the alleged fraudulent scheme and companies involved to be presented.</p>	<p>Not applicable, awaiting state of play of further implication and companies involved.</p>
<p>Case 2016/13</p> <p>Date of the Panel recommendation:</p> <p>24/05/2017</p> <p>Date of the decision of the authorising officer:</p>	<p>Unreliability of the beneficiary's time recording system, declaration of non-incurred costs;</p> <p>Lack of operational capacity;</p> <p>Irregular subcontracting;</p> <p>Unjustified payments to a foreign</p>	<p><i>"serious breaches of contractual obligations and grave professional misconduct"</i></p>	<p>Exclusion for 2,5 years</p>	<p>Not recommended.</p>

29/06/2017	bank account of a company led by the same director.			
Case 2016/14 Panel 30.06.2017 reply:	Unreliability of the beneficiary's time recording system, lack of information in timesheets with regard to non-EU projects; Declaration of non-incurred costs; Identified transactions, with a separate company, to which the operator had transferred a significant part of the pre-financing it had received, raising doubts as to the actual work of the beneficiary in the project.	<i>"serious breaches of contractual obligations"</i>	Case closed: Company dissolved.	Not applicable, company dissolved.
Case 2016/15 Date of the Panel recommendation: 26/04/2017	Inaccurate time recording; Irregular subcontracting; Unreliable travel and subsistence costs;	<i>"serious breaches of contractual obligations"</i>	Exclusion of 2 years	Not recommended.

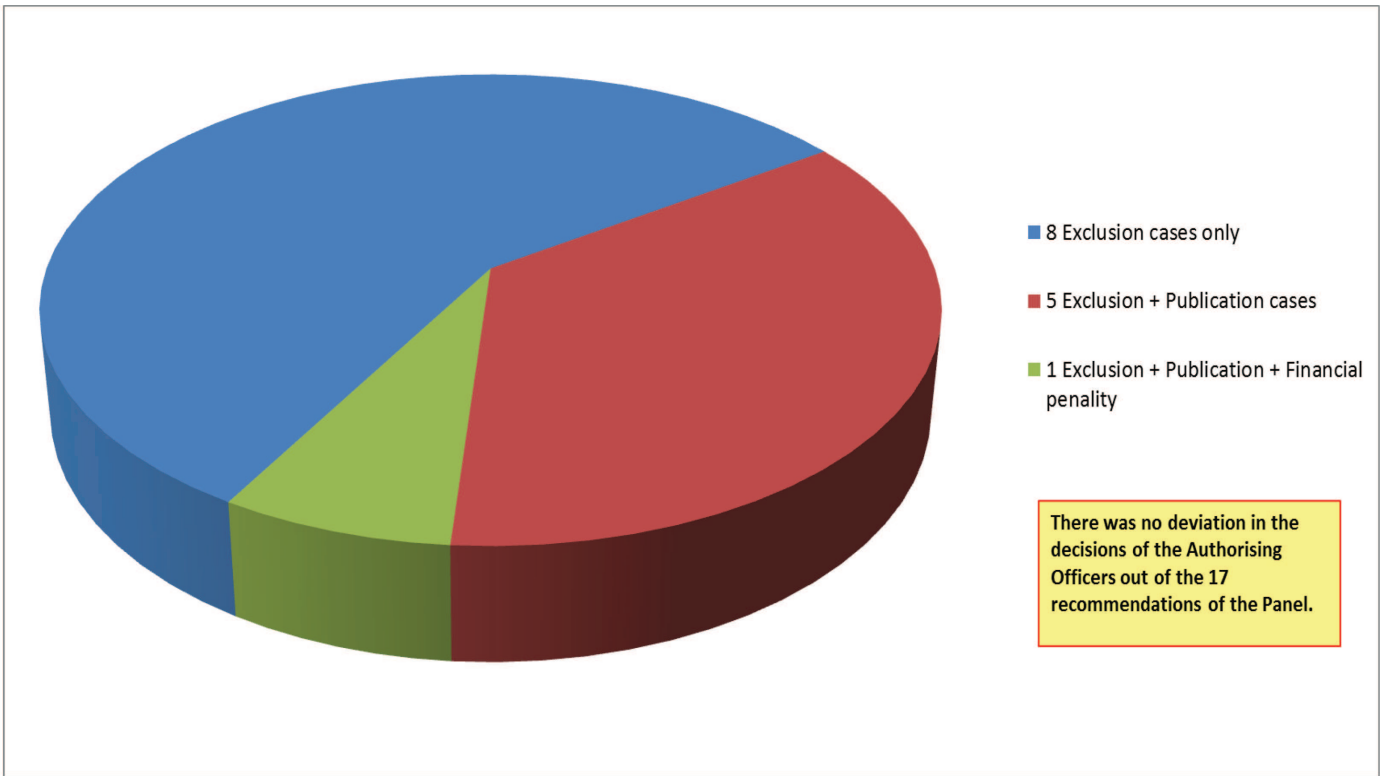
Date of the decision of the authorising officer: 21/06/2017	Personal involvement of the manager			
Case 2016/16 Date of the Panel recommendation: 26/04/2017 Date of the decision of the authorising officer: 15/06/2017	No audit could be performed due to the absence of reply to letter of announcement of audit and several attempt to reach the operator; Contested payment of part of pre-financing by the grant coordinator; proof of payment was submitted and no reply was provided.	<i>"serious breaches of contractual obligations"</i>	Exclusion of 2 years	Recommended based on refusal of audit.
Case 2016/19 Date of the Panel recommendation:	Unreliable time recording system; lack of alternative evidence supporting the claimed personnel costs; Non-compliance with the specific eligibility criteria for in-house	"serious breaches of contractual obligations"	Exclusion of 18 months	Not applicable, facts committed before publication rules entered into force.

28/06/2016	consultants; Absence of costs recorded in the contractor's profit and loss statement.			
Case 2017/02	Final judgement concerning agreement with other operators with the aim of distorting competition Remedial measures.	No preliminary classification: the limitation period lapsed.	No recommendation.	Not applicable.
Case 2017/04	Lack of preventive measures to avoid conflict of interest and late disclosure.	No preliminary classification. Case withdrawn.	No recommendation. Case withdrawn by Authorising Officer based on further analysis.	Not applicable (case withdrawn)

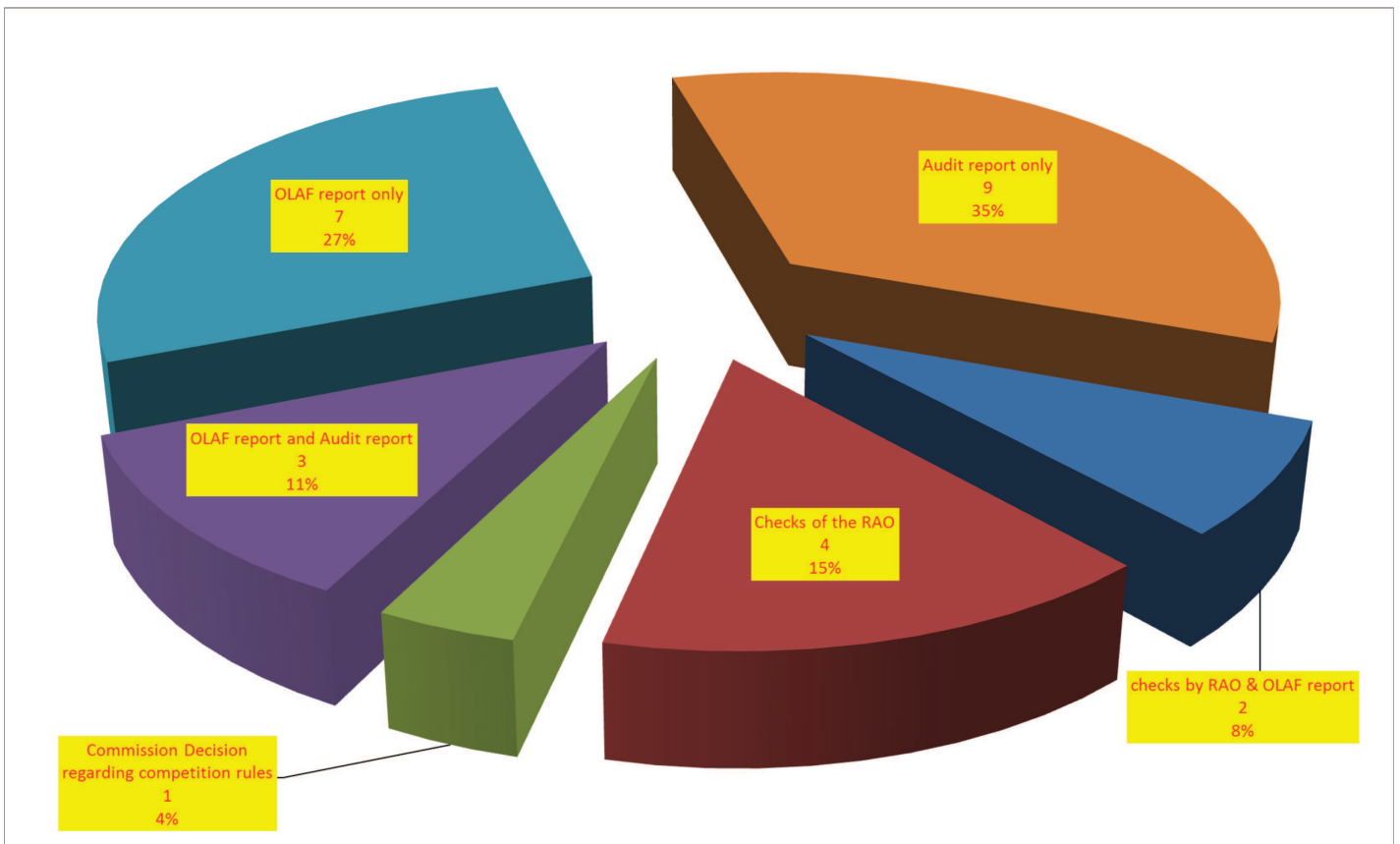
Annex 2
Number of Panel cases received
01/01/2016 - 30/06/2017
(accumulated figures)



Sanctions recommended by the Panel
01/01/2016 - 30/06/2017



Panel cases classified per category of sources
01/01/2016 - 30/06/2017



Panel cases classified per spending area
01/01/2016 - 30/06/2017

