

**REGULATION (EU, Euratom) 2024/2509 OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL of 23 September 2024 on the financial rules applicable to the
general budget of the Union**

FR 2024/2509- ARTICLE 138 EXCLUSION CRITERIA AND DECISION ON EXCLUSIONS

1. The authorising officer responsible shall exclude a person or entity referred to in Article 137(2) from participating in award procedures governed by this Regulation or from implementing Union funds where that person or entity is in one or more of the following exclusion situations:

(a) the person or entity is bankrupt, subject to insolvency or winding-up procedures, its assets are being administered by a liquidator or by a court, it is in an arrangement with creditors, its business activities are suspended, or it is in any analogous situation arising from a similar procedure provided for under Union or national law;

(b) it has been established by a final judgment or a final administrative decision that the person or entity is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the applicable law;

(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 by having violated applicable laws or regulations or ethical standards of the profession to which the person or entity belongs, or by having engaged in any wrongful conduct which has an impact on its professional credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:

(i) fraudulently or negligently misrepresenting information required for the verification of the absence of grounds for exclusion or the fulfilment of eligibility or selection criteria or in the implementation of the legal commitment;

(ii) entering into agreement with other persons or entities with the aim of distorting competition;

(iii) violating intellectual property rights;

(iv) unduly influencing or attempting to unduly influence the decision-making process to obtain Union funds by taking advantage, through misrepresentation, of a conflict of interests involving any financial actors or other persons referred to in Article 61(1);

(v) attempting to obtain confidential information that may confer upon it undue advantages in the award procedure;

(vi) incitement to discrimination, hatred or violence against a group of persons or a member of a group or similar activities that are contrary to the values on which the Union is founded enshrined in Article 2 TEU, 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;

(d) it has been established by a final judgment that the person or entity is guilty of any of the following:

(i) fraud, within the meaning of Article 3 of Directive (EU) 2017/1371 of the European Parliament and of the Council (49) and Article 1 of the Convention on the protection of the European Communities' financial interests, drawn up by the Council Act of 26 July 1995 y risks affecting the performance of the legal commitment;

(ii) corruption, as defined in Article 4(2) of Directive (EU) 2017/1371 or active corruption within the meaning of Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 (51), or conduct referred to in Article 2(1) of Council Framework Decision 2003/568/JHA (52), or corruption as defined in other applicable laws;

(iii) conduct related to a criminal organisation as referred to in Article 2 of Council Framework Decision 2008/841/JHA;

(iv) money laundering or terrorist financing within the meaning of Article 1(3), (4) and (5) of Directive (EU) 2015/849 of the European Parliament and of the Council (54);

(v) terrorist offences or offences related to terrorist activities, as defined in Articles 3 to 12 of Directive (EU) 2017/541 of the European Parliament and of the Council, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 14 of that Directive;

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(vi) child labour or other offences concerning trafficking in human beings as referred to in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council; (e) the person or entity has shown significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the budget which has: (i) led to the early termination of a legal commitment; (ii) led to the application of liquidated damages or other contractual penalties; or (iii) been discovered by an authorising officer, OLAF, the Court of Auditors, or the EPPO following checks, audits or investigations; (f) it has been established by a final judgment or final administrative decision that the person or entity has committed an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95; (g) it has been established by a final judgment or final administrative decision that the person or entity has created an entity in a different jurisdiction with the intent to circumvent fiscal, social or any other legal obligations, including those related to working rights, employment and labour conditions, in the jurisdiction of its registered office, central administration or principal place of business; (h) it has been established by a final judgment or final administrative decision that an entity has been created with the intent referred to in point (g); (i) the entity or person has intentionally and without proper justification resisted an investigation, check or audit carried out by an authorising officer or its representative or auditor, OLAF, the 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. Such actions shall include, in particular, refusing to grant the necessary access to its premises or any other areas used for business purposes, concealing or refusing to disclose information or providing false information.
2. The authorising officer responsible shall exclude a person or entity referred to in Article 137(2), first subparagraph, point (i), and fourth subparagraph, points (a), (b) and (c), where that person or entity is in one or more of the exclusion situations referred to in paragraph 1, points (c)(iv) or (d), of this Article. 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 paragraph 3, fourth subparagraph, points (a) and (d), of this Article contained in the recommendation of the panel referred to in Article 145. Before making the preliminary classification in law, the panel referred to in Article 145 shall give the Member State the opportunity to submit observations with regard to the procedure in paragraph 3 of this Article. 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 paragraph 1 of this Article, are not submitted to the Commission for reimbursement
3. In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in paragraph 1, points (c), (d), (f), (g) and (h), of this Article, or in the case referred to in paragraph 1, points (e) and (i), of this Article, the authorising officer responsible shall exclude a person or entity referred to in Article 137(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 145. The preliminary classification referred to in the first subparagraph of this paragraph does not prejudice the assessment of the conduct of the person or entity referred to in Article 137(2) concerned by the competent authorities of Member States under national law. The authorising officer responsible shall review his or her decision to exclude the person or entity referred to in Article 137(2) and/or to impose a financial penalty on a recipient without delay following the notification of a final judgment or a final administrative decision. In cases where the final judgment or the final administrative decision does not set the duration of the exclusion, the authorising officer responsible shall set that duration on the basis

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of established facts and findings and having regard to the recommendation of the panel referred to in Article 145.

Where such final judgment or final administrative decision holds that the person or entity referred to in Article 137(2) is not guilty of the conduct subject to a preliminary classification in law, on the basis of which that person or entity has been excluded, the authorising officer responsible shall, without delay, bring an end to that exclusion and/or reimburse, as appropriate, any financial penalty imposed.

The facts and findings referred to in the first subparagraph shall include, in particular:

- (a) facts established in the context of audits or investigations carried out by the EPPO in respect of those Member States participating in enhanced cooperation pursuant to Regulation (EU) 2017/1939, the Court of Auditors, OLAF or the internal auditor, 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;
- (c) facts referred to in decisions of persons and entities implementing Union funds pursuant to Article 62(1), first subparagraph, point (c);
- (d) information transmitted in accordance with Article 144(2), point (d), in particular facts and findings established in the context of a final judgment or final administrative decision at national level as to the presence of the exclusion situations referred to in paragraph 1, point (c)(iv) or (d), of this Article, by entities implementing Union funds pursuant to Article 62(1), first subparagraph, point (b);
- (e) decisions of the Commission relating to the infringement of Union competition law or of a national competent authority relating to the infringement of Union or national competition law.

4. Any decision of the authorising officer responsible taken under Articles 137 to 144 or, where applicable, any recommendation of the panel referred to in Article 145, shall be made in compliance with the principle of proportionality, in particular taking into account:

- (a) the seriousness of the situation, including the impact on the financial interests and image of the Union;
- (b) the time which has elapsed since the relevant conduct;
- (c) the duration of the conduct and its recurrence;
- (d) whether the conduct was intentional or the degree of negligence shown;
- (e) in the cases referred to in paragraph 1, point (b), whether a limited amount is at stake;
- (f) any other mitigating circumstances, such as:
 - (i) the degree of collaboration of the person or entity referred to in Article 137(2) concerned with the relevant competent authority and the contribution of that person or entity to the investigation as recognised by the authorising officer responsible; or
 - (ii) the disclosure of the exclusion situation by means of a declaration as referred to in Article 139(1); or
 - (iii) the measures taken by the Member State against the person or entity pursuant to Article 63(2).

5. The authorising officer responsible shall exclude a person or entity referred to in Article 137(2) where:

- (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 137(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 paragraph 1, points (c) to (i), of this Article;

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(b) a natural or legal person that assumes unlimited liability for the debts of the person or entity referred to in Article 137(2) is in one or more of the situations referred to in paragraph 1, point (a) or (b), of this Article;

(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 paragraph 1, points (c) to (i), 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.

6. When a person or entity referred to in Article 137(2), first subparagraph, points (a) to (f) and (h) and (i), 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 145, shall take into consideration whether:

(a) the excluded entity has a functional independence from its affiliate and from the beneficial owner;

(b) the misconduct of the excluded entity is not due to a failure to supervise or to maintain adequate controls;

(c) the excluded entity has taken a commercial decision without the influence of any affiliate or of the beneficial owner.

7. In the cases referred to in paragraph 3 of this Article, the authorising officer responsible may exclude a person or entity referred to in Article 137(2) provisionally without the prior recommendation of the panel referred to in Article 145, where their participation in an award procedure or their selection for implementing Union funds would constitute a serious and imminent threat to the financial interests of the Union. In such cases, the authorising officer responsible shall immediately refer the case to the panel referred to in Article 145 and shall take a final decision no later than 14 days after having received the recommendation of the panel.

8. At the request of the authorising officer, and where the nature or the circumstances of the case so require, a referral for a recommendation of the panel referred in Article 145 may be treated by means of expedited procedure, without prejudice to the right to be heard of the person or entity concerned.

9. The authorising officer responsible, having regard, where applicable, to the recommendation of the panel referred to in Article 145, shall not exclude a person or entity referred to in Article 137(2) from participating in an award procedure or from being selected for implementing Union funds where:

(a) the person or entity has taken remedial measures as specified in paragraph 10 of this Article, to an extent that is sufficient to demonstrate its reliability. This point shall not apply in the case referred to in paragraph 1, point (d), of this Article;

(b) it is indispensable to ensure the continuity of service, for a limited duration and pending the adoption of remedial measures specified in paragraph 7 of this Article;

(c) such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article.

In addition, paragraph 1, point (a), of this Article shall not apply in the case of the purchase of supplies on particularly advantageous terms from either a supplier which is definitively winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under Union or national law.

In the cases of non-exclusion referred to in the first and second subparagraphs of this paragraph, the authorising officer responsible shall specify the reasons for not excluding the person or entity referred to in Article 137(2) and inform the panel referred to in Article 145 of those reasons.

10. The remedial measures referred to in paragraph 9, first subparagraph, point (a), 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

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entity referred to in Article 137(2), appropriate to correct the conduct and prevent its further occurrence;

(b) proof that the person or entity referred to in Article 137(2) has undertaken measures to compensate or redress the damage or harm caused to the financial interests of the Union by the underlying facts giving rise to the exclusion situation;

(c) proof that the person or entity referred to in Article 137(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 paragraph 1, point (b), of this Article.

Without prejudice to the assessment of the authorising officer responsible or of the panel referred to in Article 145, the person or entity shall submit remedial measures that have been assessed by an external independent auditor or have been considered sufficient by a decision of a national or Union authority

11. The authorising officer responsible, having regard, where applicable, to the revised recommendation of the panel referred to in Article 145, shall, without delay, revise its decision to exclude a person or entity referred to in Article 137(2) ex officio or on request from that person or entity, where the latter has taken remedial measures sufficient to demonstrate its reliability or has provided new elements demonstrating that the exclusion situation referred to in paragraph 1 of this Article no longer exists.

12. In the case referred to in Article 137(2), point (b), the authorising officer responsible shall require that the candidate or tenderer replaces an entity or a subcontractor on whose capacity it intends to rely, which is in an exclusion situation referred to in paragraph 1 of this Article.

FR 2024/2509 - ARTICLE 143 – REJECTION FROM AN AWARD PROCEDURE

1. The authorising officer responsible shall reject from an award procedure a participant who:

(a) is in an exclusion situation established in accordance with Article 138;

(b) has misrepresented the information required as a condition for participating in the procedure or has failed to supply that information;

(c) was previously involved in the preparation of documents used in the award procedure where this entails a breach of the principle of equality of treatment, including distortion of competition, that cannot be remedied otherwise;

(d) has professional conflicting interests which may negatively affect the performance of the contract in accordance with point 20.6 of Annex I;

(e) is the addressee of a decision prohibiting the award of the contract for having received foreign subsidies distorting the internal market, adopted by the Commission in accordance with paragraph 3 of this Article.

The authorising officer responsible shall communicate to the other participants in the award procedure the relevant information exchanged in the context of or resulting from the involvement of the participant in the preparation of the award procedure as referred to in the first subparagraph, point (c). Prior to any such rejection the participant shall be given the opportunity to prove that its involvement in preparing the award procedure does not breach the principle of equality of treatment.

2. Article 134(1) shall apply unless the rejection has been justified in accordance with paragraph 1, first subparagraph, point (a), of this Article by a decision concerning exclusion taken with regard to the participant, following an examination of its observations.

3. For the purpose of paragraph 1, point (e), of this Article, Regulation (EU) 2022/2560 and in particular the provisions of its Chapters 1, 2 and 4, including Article 30 thereof, shall apply mutatis mutandis to the preliminary review by the Commission and to the in-depth investigation of any foreign financial contributions obtained in a procurement procedure under this Regulation. For the purpose of the prior notification to the contracting authority, participants in a procurement procedure under this Regulation shall notify any relevant foreign financial contribution to the authorising officer responsible, under the same conditions as set out in

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Articles 28 and 29 of Regulation (EU) 2022/2560 and in the provisions of the implementing acts adopted on the basis of Article 47(1) of that Regulation. In addition, relevant delegated acts adopted on the basis of Article 49 of Regulation (EU) 2022/2560 shall also be applicable to procurement procedures under this Regulation. The relevant provisions of Regulation (EU) 2022/2560, as well as those of the delegated acts adopted on the basis of Article 49 of that Regulation and of the implementing acts adopted on the basis of Article 47(1) of that Regulation shall be implemented in accordance with this Regulation.

In the context of the first subparagraph of this paragraph, the Commission shall be empowered to adopt implementing acts in the form of a decision:

- (a) to make the commitments offered by a participant binding upon that participant within the meaning of Article 11(3) of Regulation (EU) 2022/2560, in the context of this Regulation;
- (b) to raise no objection within the meaning of Article 11(4) of Regulation (EU) 2022/2560, in the context of this Regulation;
- (c) to prohibit the award of the contract to a participant for having received foreign subsidies distorting the internal market within the meaning of Article 31(2) of Regulation (EU) 2022/2560, in the context of this Regulation.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 276(2).

For the purposes of the measures to be taken under this paragraph, where Regulation (EU) 2022/2560 refers to procurement procedures within the meaning of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU of the European Parliament and of the Council, these shall be understood as procurement procedures within the meaning of this Regulation.

The authorising officer responsible shall notify the rejection from an award procedure by a letter addressed to the participant concerned, following the prohibition decision referred to in the second subparagraph, point (c).