

**Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012**

*Article 136*

**Exclusion criteria and decisions on exclusions**

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:

- (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) attempting to influence the decision-making of the authorising officer responsible during the award procedure;
  - (v) attempting to obtain confidential information that may confer upon it undue advantages in the award procedure;

- (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 <sup>(44)</sup> 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 <sup>(45)</sup>;
  - (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 <sup>(46)</sup>, or conduct referred to in Article 2(1) of Council Framework Decision 2003/568/JHA <sup>(47)</sup>, 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 <sup>(48)</sup>;
  - (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 <sup>(49)</sup>;
  - (v) terrorist offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA <sup>(50)</sup>, respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision;
  - (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 <sup>(51)</sup>;
- (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 or the Court of Auditors 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 <sup>(52)</sup>;
- (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 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).

2. 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.

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 135(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 135(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 of established facts and findings and having regard to the recommendation of the panel referred to in Article 143.

Where such final judgment or final administrative decision holds that the person or entity referred to in Article 135(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 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 point (c) of the first subparagraph of Article 62(1);
- (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);
- (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.

3. Any decision of the authorising officer responsible taken under Articles 135 to 142 or, where applicable, any recommendation of the panel referred to in Article 143, 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 point (b) of paragraph 1, 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 135(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 137(1).

4. The authorising officer responsible shall exclude a person or entity referred to in Article 135(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 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;

(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;

(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.

5. In the cases referred to in paragraph 2 of this Article, the authorising officer responsible may exclude a person or entity referred to in Article 135(2) provisionally without the prior recommendation of the panel referred to in Article 143, 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 143 and shall take a final decision no later than 14 days after having received the recommendation of the panel.

6. The authorising officer responsible, having regard, where applicable, to the recommendation of the panel referred to in Article 143, shall not exclude a person or entity referred to in Article 135(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 7 of this Article, to an extent that is sufficient to demonstrate its reliability. This point shall not apply in the case referred to in point (d) of paragraph 1 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, point (a) of paragraph 1 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 135(2) and inform the panel referred to in Article 143 of those reasons.

7. 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 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 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.

8. The authorising officer responsible, having regard, where applicable, to the revised recommendation of the panel referred to in Article 143, shall, without delay, revise its decision to exclude a person or entity referred to in Article 135(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.

9. In the case referred to in point (b) of Article 135(2), 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.

#### *Article 141*

#### **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 136;
- (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.

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 point (c) of the first subparagraph. 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 133(1) shall apply unless the rejection has been justified in accordance with point (a) of the first subparagraph of paragraph 1 of this Article by a decision concerning exclusion taken with regard to the participant, following an examination of its observations.