

COMMISSION DECISION

of 16 December 2008

on the Early Warning System for the use of authorising officers of the Commission and the executive agencies

(2008/969/EC, Euratom)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Euratom) No 1605/2002 on the Financial Regulation, and following the recommendations of the European Data Protection Supervisor ⁽³⁾.

Having regard to the Treaty establishing the European Community,

- (3) Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database ⁽⁴⁾ establishes a database containing the relevant details of third parties who are in a situation of exclusion as regards grant and procurement procedures and gives the institutions, including those listed in Article 1(2) of the Financial Regulation, executive agencies, Community bodies covered by Article 185 of the Financial Regulation as well as authorities of the Member States and third countries, international organisations and other bodies participating in the implementation of the budget, access to this database.

Having regard to the Treaty establishing the European Atomic Energy Community,

Having regard to Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ⁽¹⁾,

- (4) The purpose of the EWS is to ensure, within the Commission and its executive agencies, the circulation of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities.

Having regard to Council Regulation (EC) No 215/2008 of 18 February 2008 on the Financial Regulation applicable to the 10th European Development Fund ⁽²⁾,

Whereas:

- (1) The Commission, which is responsible for executing the general budget of the European Union and any other funds managed by the Communities with due regard to the principle of sound financial management, is under an obligation to counter fraud and any other illegal activities affecting the financial interests of the Communities.
- (2) The current Commission Decision on the Early Warning System (EWS) should be replaced by the present decision following the amendments of Articles 93 to 96 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (the Financial Regulation) and of the corresponding provisions of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC,

- (5) Given that executive agencies have the status of authorising officers by delegation of the Commission for the implementation of operational appropriations, they should have access to the EWS in the same manner as Commission services for the management of the administrative and operational appropriations.
- (6) The European Anti-Fraud Office (OLAF) should have access to the EWS for pursuing its regulatory investigation tasks and its intelligence and fraud prevention activities exercised pursuant to Article 1(2) of Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ⁽⁵⁾ and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) ⁽⁶⁾.

⁽¹⁾ OJ L 248, 16.9.2002, p. 1.

⁽²⁾ OJ L 78, 19.3.2008, p. 1.

⁽³⁾ Opinion of the European Data Protection Supervisor on a notification for Prior Checking received from the Data Protection Officer of the Commission on the Early Warning System, Case 2005/120, 6.12.2006.

⁽⁴⁾ See page 12 of this Official Journal.

⁽⁵⁾ OJ L 136, 31.5.1999, p. 1.

⁽⁶⁾ OJ L 136, 31.5.1999, p. 8.

- (7) The accounting officer should ensure the administration of the EWS. The authorising officer responsible, OLAF and the Internal Audit Service (IAS) should be responsible for requesting entry, modification or removal of warnings. In order to preserve an adequate level of control, such requests should be made at an appropriate hierarchical level.
- (8) Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁽¹⁾ stipulates that the processing of personal data by the Commission must respect the lawful processing requirements and the requirements relating to the transfer of data laid down therein, and that such processing is subject to prior checking by the European Data Protection Supervisor following notification by the Commission Data Protection Officer.
- (9) Data protection provisions should lay down the rights of the persons whose data is or could be introduced in the EWS in line with the opinion of the European Data Protection Supervisor. As regards data introduced in the EWS, the right to be informed should differentiate between third parties who are natural persons benefiting from more extensive data protection rights and the ones of legal persons.
- (10) Certain data protection rights are subject to exceptions laid down in Article 20 of Regulation (EC) No 45/2001, which have to be considered case by case and applied on a temporary basis. Application of these exceptions should lay solely with the service responsible for requesting data entry, modification, including rectification or removal of relevant data.
- (11) Given that exclusions pursuant to Article 94 of the Financial Regulation concern specific procurement/grant procedures, these warnings should not fall under level W5 but under a new category, namely W1d, whereas W5 warnings should indicate exclusively exclusion situations concerning all procurement/grant procedures.
- (12) In order to protect the financial interests of the Communities, the AOD responsible shall, pending a decision of the Commission on the application of Article 96 of the Financial Regulation, request provisional registration of an exclusion warning if the conduct of the third party also constitutes grave professional misconduct within the

meaning of point (c) of Article 93(1) of the Financial Regulation in order to ensure that contracts or grants are not awarded to the third party during the ongoing penalty procedure.

- (13) The Commission must comply with various Council regulations implementing Common Positions adopted on the basis of Article 15 of the Treaty on European Union (Common Foreign and Security Policy — CFSP), under which it is forbidden to make available any funds and economic resources, directly or indirectly, to, or for the benefit of, designated natural or legal persons, groups or entities,

HAS DECIDED AS FOLLOWS:

SECTION 1

GENERAL PROVISIONS

Article 1

Subject matter

This Decision establishes the Early Warning System of the Commission (hereinafter: 'the EWS') as regards the implementation of the general budget of the European Union and any other fund managed by the Communities.

Article 2

Definitions

For the purposes of this Decision, the following definitions shall apply:

— 'third parties' mean candidates, tenderers, contractors, suppliers, service providers and their respective subcontractors as well as grant applicants, grant beneficiaries, contractors of grant beneficiaries and entities receiving financial support from a beneficiary of a Community grant pursuant to Article 120 of the Financial Regulation,

— 'AOD responsible' means authorising officer by delegation of the Commission within the meaning of Article 59 of the Financial Regulation responsible in accordance with the internal rules for the implementation of the general budget of European Communities (hereinafter 'the budget'), including directors of executive agencies, and authorising officer by subdelegation within the meaning of Article 59 of the Financial Regulation exercising the function of director.

⁽¹⁾ OJ L 8, 12.1.2001, p. 1.

*Article 3***EWS warnings**

1. EWS warnings shall contain the following data:

- (a) information identifying third parties which represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities because they committed or are suspected to have committed fraud or serious administrative errors, or are subject to attachment orders or to significant recovery orders, or are excluded in accordance with the Financial Regulation or the CFSP-related financial restrictions;
- (b) information concerning persons with powers of representation, decision-making or control over legal entities which are third parties, when those persons represent themselves a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities for the reasons listed under (a);
- (c) the type of warning and the grounds for which third parties referred to in point (a) or persons referred to in point (b) represent such a threat and, if appropriate, its duration and the warning contact person for that warning.

2. Without prejudice to Articles 1(2) and 1(3) of Regulation (EC, Euratom) No 1302/2008, data contained in the EWS may be used only for the purposes of the implementation of the budget or of any other fund administered by the Communities, including grant and procurement procedures as well as payments to third parties.

European Anti-Fraud Office (OLAF) may use the data for its investigations pursuant to Regulation (EC) No 1073/1999 and Regulation (Euratom) No 1074/1999 as well as for its intelligence and fraud prevention activities, including risk analyses.

*Article 4***Administration of the EWS**

1. The Commission's accounting officer or his subordinate staff to whom he delegated certain tasks pursuant to Article 62 of the Financial Regulation (hereinafter 'the accounting officer') shall ensure the administration of the EWS and make appropriate technical arrangements.

The accounting officer shall enter, modify or remove EWS warnings pursuant to requests by the AOD responsible, OLAF and the Internal Audit Service (IAS).

2. The accounting officer shall adopt implementing measures concerning technical aspects and define associated supporting procedures, including in the field of security.

He shall notify those measures to the Commission services and the executive agencies.

*Article 5***Requests for registration, modification or removal of warnings**

1. All requests for registration of warnings, their modification or removal shall be addressed to the accounting officer.

Only the AOD responsible, the Director General or a director of OLAF or the IAS may submit such requests. For that purpose, they shall use the template set out in the Annex.

2. The service which has established that a third party is in one of the situations described in Article 9 shall send a request for an EWS warning to the accounting officer, with copy to the EWS officer referred to in Article 7, even if the third party is already subject to an EWS warning.

3. In accordance with the procedure described in paragraph 2, the service that requested an EWS warning shall notify to the accounting officer, using the template set out in the Annex:

- (a) any change of the information contained in the EWS warning concerned;
- (b) the removal of that EWS warning once the reason for the warning no longer applies.

However, a change of the warning contact person can be sent by registered note.

4. The service that requested registration of an EWS warning is also responsible for coordinating actions to be taken as regards budget implementation in consequence of such warning in accordance with Articles 15 to 22.

5. Activation of a warning for a person with powers of representation, decision-making or control over given legal person requires an additional request, distinct from that aimed at the legal person concerned.

*Article 6***Access to and the use of the EWS**

1. The Commission services and executive agencies shall have direct access to the data contained in the EWS via the accounting system provided by the Commission (ABAC).

The Commission service or executive agency responsible for a local system may use that system to access the data contained in the EWS, provided that data-consistency between the local system and the ABAC accounting system is guaranteed.

2. The AOD responsible or his staff shall verify whether there is a warning in the EWS concerning third parties at the following stages:

- (a) in the case of individual budgetary commitments, before such commitment is entered;
- (b) in the case of global budgetary commitments, before registering any individual legal commitment to the global commitment;
- (c) in the case of provisional budgetary commitments, before concluding the legal commitment giving rise to an entitlement to subsequent payments.

Where the commitments referred to in point (c) cover the payment of staff and the reimbursement of travel expenditure related to participation in meetings and competitions, the obligation of prior verification of EWS registrations shall not apply.

In the case of procurement or grant award procedures the AOD responsible or his staff shall verify whether there is a warning in the EWS at the latest before the award decision.

However, where the awarding authority limits the number of candidates invited to submit a tender or negotiate in a restricted procedure, competitive dialogue or negotiated procedure following publication of a contract notice, such verifications shall be carried out before the selection of candidates has been completed.

As regards subcontractors submitted for prior approval, the AOD responsible or his staff may, on the basis of his risk analysis, decide not to verify whether there is a warning in the EWS.

3. The AOD responsible or his staff shall verify according to paragraph 2 whether there is a warning in the EWS concerning a person with power of representation, decision-making or control over the third party concerned, in the following situations:

- (a) where the AOD responsible or his staff deems that such verification is necessary on the basis of his risk analysis;
- (b) where the documents requested by the AOD responsible or his staff as evidence that the third party concerned is not in one of the situations described in Article 93(1) of the Financial Regulation, relate to such persons.

4. The specific warning contact person referred to in point (c) of Article 3(1) shall make available all relevant information to the AOD responsible or his staff upon request. As regards exclusion warnings, Article 12 of Regulation (EC, Euratom) No 1302/2008 applies.

5. Paragraphs 2 to 4 shall also apply to imprest accounts for expenditure exceeding EUR 300. In that case, the imprest administrator shall verify whether there is a warning in the EWS, on the basis of information he has been granted, prior to the conclusion of any legal commitment with a third party.

*Article 7***EWS officers**

1. The Director General of OLAF or the IAS and each authorising officer by delegation shall designate at least one official or temporary staff member under his supervision as EWS officer.

He shall notify the list of designated persons and any change thereof to the accounting officer.

2. The EWS officer may consult the list of all third parties, or persons with powers of representation, decision-making or control over third parties, for which an EWS warning is registered. As regards matters concerning the EWS he shall ensure the connection between the service and the accounting officer. He shall also assist the service in the transmission of information on EWS warnings requested by the service and as regards the actions to be taken as consequences of such warnings.

3. The accounting officer shall regularly publish an updated list of all EWS officers on the internal website of the Directorate-General for Budget.

Article 8

Data protection and rights of data subjects

1. In the calls for tender and calls for proposals and, in the absence of calls, before awarding contracts or grants, the AOD responsible or his staff shall inform third parties of the data concerning them that may be included in the EWS and of the entities to which the data may be communicated. Where third parties are legal entities, the AOD responsible or his staff shall also inform the persons who have powers of representation, decision-making or control within these entities.

2. The service that requested the registration of an EWS warning shall be responsible for the relations with the natural or legal person whose data are introduced into the EWS (hereinafter 'the data subject concerned'):

- (a) it shall inform the data subject concerned of the request for activation, updating and removal of any exclusion warning W5a directly concerning it and state the reasons thereof;
- (b) it shall respond to requests from data subjects concerned to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects.

However, the service that requested the registration of the warning may decide that restrictions laid down in Article 20(1) of Regulation (EC) No 45/2001 apply.

3. Without prejudice to the information requirements set out in paragraph 2, a duly identified natural person may request from the accounting officer information on whether he is registered in the EWS.

Subject to the decision of the service that requested the registration of the EWS warning on whether restrictions laid down in Article 20(1) of Regulation (EC) No 45/2001 apply, the accounting officer shall inform the person in writing or by electronic means whether he is registered in the EWS.

If the person is registered, the accounting officer shall attach the data stored in the EWS concerning that person. He shall inform the service that requested registration of the warning concerned thereof.

4. Removed warnings shall be accessible for audit and investigation purposes only and shall not be visible for the users of the EWS.

However, personal data contained in warnings referring to natural persons shall remain accessible to such purposes only for five years after the removal of the warning.

SECTION 2

INFORMATION ENTERED IN THE EWS

Article 9

Categories of warning

Depending on the nature or the seriousness of the facts brought to the knowledge of the service requesting registration, EWS warnings shall be divided into the following five categories:

1. W1, where information gives sufficient reason to believe that findings of fraud or serious administrative errors are likely to be recorded or where precautionary measures should be taken following the exclusion of a third party pursuant to Article 94 of the Financial Regulation;
2. W2, where a third party is subject to findings of serious administrative errors or fraud;
3. W3, where a third party is subject either to pending legal proceedings entailing the notification of an attachment order, or to judicial proceedings for serious administrative errors or fraud;
4. W4, where third parties are subject to recovery orders issued by the Commission exceeding a certain amount and on which payment is significantly overdue;
5. W5, where a third party is excluded in accordance with the Financial Regulation or Council regulations imposing CFSP-related financial restrictions.

Article 10

W1 warnings

1. OLAF shall request the activation of a W1a warning where its investigations at an early stage give sufficient reason to believe that findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds. OLAF shall inform the EWS officer of the service concerned of such requests.

2. OLAF and IAS shall request the activation of a W1b warning where their investigations give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds. They shall inform the EWS officer of the service concerned of such requests.

3. The AOD responsible shall request the activation of a W1c warning where investigations of the Court of Auditors, his Internal Audit Capability (IAC) or any other audit or investigation made under his responsibility or brought to his attention give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds under his responsibility.

4. The AOD responsible shall request the activation of a W1d warning where he excludes a candidate, tenderer or an applicant from the award of a contract or grant in a given procedure in accordance with points (a) or (b) of Article 94 of the Financial Regulation.

Exclusion warnings registered pursuant to Article 10(4) of Regulation (EC, Euratom) No 1302/2008 shall be considered as W1d warnings for the purposes of the EWS.

5. A W1 warning shall remain active for a maximum of six months. It shall be automatically removed. If the EWS warning needs to remain and cannot be replaced with another type of warning within this period, a new request shall be made.

Article 11

W2 warnings

1. OLAF and IAS shall request the activation of a W2a warning where their investigations lead to findings of serious administrative errors or fraud involving third parties, especially those who are benefiting or have benefited from Community funds.

2. The AOD responsible shall request the activation of a W2b warning where the European Court of Auditors, his IAC or any other audit or investigation made under his responsibility or brought to his attention have issued written findings of serious administrative errors or fraud in relation to third parties, especially those who are benefiting or have benefited from Community funds under his responsibility.

3. A W2 warning shall remain active for a maximum of six months. It shall be automatically removed. If the EWS warning needs to remain and cannot be replaced with another type of warning within this period, a new request shall be made.

Article 12

W3 warnings

1. The accounting officer shall enter a W3a warning upon receiving notification by the Secretariat General of an attachment order relating to a third party.

2. The AOD responsible shall request the activation of a W3b warning where third parties, especially those who are benefiting or have benefited from Community funds under his responsibility, are known to be the subject of judicial proceedings for serious administrative errors or fraud.

However, where investigations conducted by OLAF lead to such judicial proceedings or OLAF offers assistance or follows up those proceedings, OLAF shall request the activation of the corresponding W3b warning.

3. A W3 warning shall remain active until a judgment having the force of *res judicata* is rendered or the case has been otherwise settled.

Article 13

W4 warnings

1. The accounting officer shall enter a W4 warning in relation to third parties who are the subject of recovery orders issued by the Commission exceeding a certain amount and on which payment is significantly overdue.

2. The accounting officer shall establish internal guidelines as to the thresholds determining the relevant amounts and the time limit for registration under W4 warnings.

3. Any W4 warning shall remain active as long as the debt is outstanding. The accounting officer shall remove the warning when the debt has been settled.

Article 14

W5 warnings

1. Exclusion warnings registered pursuant to paragraphs 1, 2 and 3 of Article 10 of Regulation (EC, Euratom) No 1302/2008 shall be considered as W5a warnings for the purpose of the EWS.

2. A W5b warning shall be registered at the request of the Commission service responsible for the legislation concerned with regard to natural or legal persons, groups or entities listed in accordance with a Council regulation imposing CFSP-related financial restrictions as long as the designation of the person, group or entity concerned remains valid. The warning shall mention the references of the regulation imposing the restrictions or of the relevant implementing act.

3. Registrations of exclusion warnings are subject to the following rules:

(a) Whenever the AOD responsible envisages to exclude a third party in application of points (a), (b), (c), (d) and (e) of Article 93(1) of the Financial Regulation, he shall give the third party concerned the opportunity to express its views in writing. The third party shall be given at least 14 calendar days to do so. Before excluding the third party in application of point (c) of Article 93(1), the AOD responsible shall consult the Legal Service and the Directorate-General for Budget.

Pending a possible decision by the Commission on the duration of the exclusion, the AOD responsible shall request, in accordance with Article 9(2) of Regulation (EC, Euratom) No 1302/2008, provisional registration of an exclusion warning and refer the case as soon as possible to the Commission. In order to protect the Communities' financial interests, the AOD responsible may request provisional registration of an exclusion warning W5a already before having given the third party concerned the opportunity to express its views. Alternatively, he may request registration of a W2 warning.

(b) Whenever the AOD responsible envisages launching the procedure pursuant to Article 96 of the Financial Regulation, he shall give the third party concerned the opportunity to express its views in writing. The third party shall be given at least 14 calendar days to do so.

After having consulted the Legal Service and the Directorate-General for Budget and pending a possible decision by the Commission on the administrative penalty, the AOD responsible shall request, in accordance with Article 9(2) of Regulation (EC, Euratom) No 1302/2008, provisional registration of an exclusion warning W5a if the conduct of the third party also constitutes grave professional misconduct within the meaning of point (c) of Article 93(1) of the Financial Regulation.

(c) Any request for definitive registration of a W5a warning in accordance with points (b), (c), (e) or (f) of Article 93(1) of the Financial Regulation shall specify the duration of the exclusion decided by the Commission.

SECTION 3

CONSEQUENCES OF EWS WARNINGS AS REGARDS BUDGET IMPLEMENTATION

Article 15

Effect of EWS warnings on budget transactions

1. The accounting officer shall suspend any payment to a beneficiary for whom a W2, W3, W4 or W5 warning has been registered. He shall notify the AOD responsible and

request him to state the reasons why payment should be made despite the existence of EWS warnings of categories W2, W3b and W5a.

2. Except for W5b warnings and W3a warnings following preventive attachment orders, payments proved to be actually due after the verifications made by the AOD responsible when suspending the time limit for payments in accordance with Article 106(4) of Regulation (EC, Euratom) No 2342/2002 or in accordance with the terms of the contract or grant as mentioned in point (b) of Article 18(1) and point (a) of Article 22(1), shall be executed without delay.

However, the accounting officer may only release the suspended payment on receipt of a reasoned confirmation from the AOD responsible that payment due shall be executed. In the absence of that confirmation, the payment shall remain suspended and the payment order shall be, if appropriate, sent back to the AOD responsible.

Where a payment was released by offsetting in compliance with Article 73 of the Financial Regulation and Article 83 of Regulation (EC, Euratom) No 2342/2002 following a W4 warning or where a payment was made following an executive attachment order, the accounting officer shall draw up a duly registered note.

3. No individual budgetary commitment, no registration of an individual legal commitment in the budgetary accounts based on a global commitment and no conclusion of a legal commitment based on a provisional commitment can be made with regard to the third party subject to a W5 warning.

Article 16

Consequence of a W1 warning

A W1 warning shall be registered for information purposes only and may entail no consequence other than reinforced monitoring measures.

Article 17

Consequences of a W2, W3b or W4 warning on contract or grant award procedures

1. Where a W2, W3b or W4 warning is registered at the time the AOD responsible or his staff consults the EWS in accordance with point (a) of Article 6(2), he shall inform, if the stage of the procedure so permits, the evaluation committee for the award of contract or grant concerned of the existence of such warning in so far as the existence of such warning constitutes a new element to be examined in connection with the selection criteria for that contract or grant. The AOD responsible shall take this information into account, in particular if the third party registered in the EWS were to head the list of the evaluation committee.

2. If the third party for which a W2, W3b or W4 warning has been registered heads the list of the evaluation committee, the AOD responsible, having due regard to the obligation to protect the Community's financial interests and image, the nature and seriousness of the justification for the warning, the amount and duration of the contract or grant and, where applicable, the urgency with which it has to be implemented, shall take one of the following decisions:

- (a) to award the contract or grant to the third party despite registration in the EWS, and ensure that reinforced monitoring measures are taken;
- (b) where the existence of such warning objectively calls into question the initial assessment of compliance with the selection and award criteria, to award the contract or grant to another tenderer or applicant on the basis of an assessment of compliance with the selection and award criteria differing from that of the evaluation committee and duly justify his decision;
- (c) to close the procedure without awarding any contract and duly justify this closure in the information given to the tenderer.

Where the AOD responsible decides to close the procedure in accordance with point (c), a restricted procedure with the time limits laid down for urgent cases pursuant to Article 142 of Regulation (EC, Euratom) No 2342/2002 may be used to award the contract through a new procedure.

Article 18

Consequences of a W2, W3b or W4 warning as regards existing contracts or grants

1. Where a W2, W3b or W4 warning has been registered for reasons related to the performance or award of an ongoing contract or grant or to the relevant award procedure, the AOD responsible may, after giving due consideration to the risks involved, to the nature of the warning and its justification, to the consequences which it is likely to have on the performance of the contract or grant, especially with regard to the amount, duration and, where applicable, the urgency of the latter, take one or more of the following actions:

- (a) to decide to let the contractor or beneficiary proceed with the performance of the contract or grant, under prescribed reinforced monitoring measures;
- (b) to suspend the time limit for payments in accordance with Article 106(4) of Regulation (EC, Euratom) No 2342/2002 for the purpose of further verification in order to ascertain, prior to any further payment, that the expenditure is eligible, and subsequently execute payments actually due;

(c) to suspend performance of the contract or grant in accordance with Articles 103 and 119 of the Financial Regulation;

(d) to terminate the contract or grant where it contains a provision to this effect.

2. Where a W2, W3b or W4 warning has not been registered for reasons related to the ongoing contract or grant or to the relevant award procedure, the AOD responsible may, depending on the type of warning and the consequences, which it is likely to have on the performance of the ongoing contract or grant, and after giving due consideration to the risks involved, including that of judicial litigation, take the following actions:

- (a) to apply one or more of the options referred to in paragraph 1(a) and (b);
- (b) to terminate the contract or grant if there is a provision that permits termination in the case of new elements, where those elements justify a real loss of trust on the part of the Commission and a threat to the Communities' reputation.

Article 19

Consequences of a W3a warning

1. Where a third party is subject to a W3a warning corresponding to a preventive attachment order, the accounting officer shall maintain the suspension of all payments pending a final judicial ruling on the principal creditor's claim, if the national law applicable so requires. Where the preventive attachment order is limited to a specific sum according to a judgment ('cantonnement'), the accounting officer shall suspend payments up to that amount.

2. Where a third party is subject to a W3a warning corresponding to an enforceable attachment order, the AOD responsible or his staff, in close cooperation with the accounting officer, shall execute the payment initially payable by the Commission or the executive agency to the party attached, for the benefit of the attaching party, up to the amount attached.

3. Paragraphs 2 and 3 apply unless enforcement of the attachment order is likely to disrupt the smooth operation of the Commission or executive agency. In this case, the accounting officer shall invoke Article 1 of the Protocol on Privileges and Immunities.

*Article 20***Consequences of a W4 warning**

1. Where a third party is subject to a W4 warning, the accounting officer shall systematically examine the possibility of offsetting Community entitlements with payment due to that third party in compliance with Article 73 of the Financial Regulation and Article 83 of Regulation (EC, Euratom) No 2342/2002.

2. The AOD responsible shall take this information into consideration before awarding any new contract or grant to the third party.

*Article 21***Consequences of a W5 warning as regards contracts and grant award procedures**

The AOD responsible shall exclude a third party subject to a W5 warning from participating in the contract or grant award procedure at the stage of the assessment of the exclusion criteria in accordance with Articles 93 and 114(3) of the Financial Regulation or with the applicable Council Regulation imposing CFSP-related financial restrictions.

*Article 22***Specific consequences of a W5 warning on existing contracts or grants**

1. Where a W5a warning has been registered for reasons that are likely to affect the implementation of contracts or grants already signed, the AOD responsible shall take the following action:

(a) where the terms of the contract or grant so permit, and where the reason for the W5 warning is related to the performance or award of an ongoing contract or grant:

(i) to suspend payments for the purpose of verification, execute payments actually due and recover any amounts unduly paid, if possible by offsetting with any payment due;

(ii) to terminate the contract or grant;

(b) in all other cases, to apply one of the options referred to in Article 18(1).

2. Save where otherwise provided in Council regulations implementing Common Positions adopted on the basis of

Article 15 of the Treaty on European Union, on which W5b warnings are based, the following rules shall apply:

(a) no funds may be made available, directly or indirectly to, or for the benefit of, a natural or legal person, group or entity listed in the relevant Council regulation;

(b) no economic resources may be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity listed in the relevant Council regulation.

*Article 23***Referral to the Commission**

In exceptional circumstances, including situations where the risk involved is of a reputational and political nature, and where Articles 15 to 22 do not provide an adequate solution, the AOD responsible shall refer the case to the Member of the Commission in charge of the policy area concerned, who may in turn refer the matter to the Commission.

The Secretariat General shall be kept informed of all relevant exchanges.

SECTION 4

TRANSITIONAL AND FINAL PROVISIONS*Article 24***Transitional provisions**

1. The service that requested registration of an EWS warning before the adoption of this Decision remains responsible for modification or removal of warnings registered at its request in accordance with this Decision.

2. For exclusions decided by an AOD responsible pursuant to points (b) and (e) of Article 93(1) of the Financial Regulation before 1 May 2007, the duration of the period exclusion shall take into account the duration of criminal records under national law. For such exclusions a maximum duration of four years from the date of notification of the judgment shall apply. If this maximum period has elapsed, the AOD responsible shall request removal of the warning.

*Article 25***Repeal of the Decision on the Early Warning System**

The Commission Decision C(2004)193/3⁽¹⁾ on the Early Warning System is hereby repealed with effect from 1 January 2009.

⁽¹⁾ Not published in the Official Journal.

Article 26

Application

This Decision shall apply from 1 January 2009.

Article 27

Publication

This Decision shall be published for information purposes in the *Official Journal of the European Union*.

It shall be annexed to the Internal Rules for the implementation of the general budget of the European Communities.

Done at Brussels, 16 December 2008.

For the Commission
Dalia GRYBAUSKAITĖ
Member of the Commission

ANNEX

Request by AOD of the Commission, executive agency, IAS, OLAF for data entry into the exclusion database/EWS, its modification or removal

NB : one request per warning

The request has to be sent in conformity with the procedure for classified information. It has to be sent in a single closed envelope.

- RESTREINT UE -

Place, date

..... D(...)

Note to the accounting officer ⁽¹⁾**Subject: Request for the registration/removal/modification of a warning in the exclusion database/EWS**

Requesting Directorate-General or executive agency:

Person authorised to request registration/removal/modification of a warning:

Name, first name:

Function:

I request

- registration of a warning
- removal of the warning ⁽²⁾ whose introduction was requested by note dated
- modification of the warning ⁽³⁾ (including renewal of an existing registration) whose introduction was requested by note dated

concerning the following entity:

Name (and, where the person is a natural person, given name) of the entity:

.....

Legal form (if legal entity):

.....

Name, given name of the person(s) with powers of representation over the legal entity:

.....

Address (if legal person, address of the headquarters): street/no./postcode/place/country

.....

Name, given name of the persons(s) with powers of representation, decision-making or control over the legal entity ⁽⁴⁾:

.....

Information related to the Legal Entities File (LEF):

- This entity already exists in the LEF under the following(s) key(s): 6
- The request for validation of this entity in the LEF has already been made. I attach the printed ABAC screen of the request made, which has the following key (normally starting with 'ABC'): A supporting document for the validation of the request is enclosed.
- The request concerns an entity which does not exist in the LEF and for which information was obtained from an implementing authority or body pursuant to Article 95(2) of the Financial Regulation (enclosed).

⁽¹⁾ 'Note for the file' for warnings introduced directly by the accounting officer.⁽²⁾ Do not fill in sections 1 to 4.⁽³⁾ Fill in all sections, not only the one concerned by the modification request.⁽⁴⁾ Fill in this section on a request distinct from that aimed at the legal person concerned (Decision, art. 5(5)), and only if the warning concerns a person with powers of representation, decision making or control over legal entities which are third parties, when those persons represent themselves a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities for the reasons listed under point (a) of Article 3(1) of the EWS Decision.

1) I request introduction of the following warning:

 W1

- W1a requested by OLAF
- W1b requested by OLAF or IAS
- W1c requested by AOD
- W1d requested by AOD

 W2

- W2a requested by OLAF or IAS
- W2b requested by AOD

Indicate reference to source of findings leading to warning request:

 W3

- W3a introduced directly by accounting officer
- W3b requested by OLAF or AOD

 W4 introduced directly by accounting officer W5 W5a – exclusion pursuant to Financial Regulation (FR)

- Article 93 (1) a FR (internal code: NW5a2a)
- Article 93 (1) b FR (internal code: NW5a2b)
- Article 93 (1) c FR (internal code: NW5a30)

Indicate reference to opinion of the LS and the CFS:

Indicate references to the contradictory procedure:

- Article 93 (1) d FR (internal code: NW5a2d)
- Article 93 (1) e FR (internal code: NW5a2e)

- Fraud
- Corruption
- Involvement in a criminal organisation
- Money laundering

Indicate the denomination of the court that rendered the judgment which has the force of *res judicata*:
.....

Indicate the date of the judgment which has the force of *res judicata*: DD/MM/YYYY: .../.../...

Indicate the duration of the period of exclusion from procurement procedures (where applicable):
Exclusion until DD/MM/YYYY: .../.../...

 Article 93 (1) f FR (= Article 96 (1) FR) (internal code: NW5a40)

Indicate reference and date of Commission decision: C(.....) of

 W5b – exclusion pursuant to Council Regulation No (indicate)

2) **Short description of the reasons for the warning request** ⁽¹⁾:

.....
.....

3) **Registration duration:**

- Registration until DD/MM/YYYY ⁽²⁾
- Registration unlimited in time or automatic removal of the registration pursuant to Regulation on the central exclusion database and Decision on the Early Warning System
- Provisional registration until DD/MM/YYYY (max. three months):

4) **Warning contact person** ⁽³⁾:

Name, first name:

Telephone number (including international dialling code):

Fax number (including international dialling code):

E-mail:

I certify that the information communicated was established and transmitted in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council concerning the protection of personal data.

[Signature of the person authorised to request introduction, removal or modification of the warning]

Copy: Mr/Mrs, EWS officer of the DG

⁽¹⁾ Where description cannot be given pursuant to confidentiality requirements, indicate: 'not disclosed'.
⁽²⁾ The duration of an exclusion pursuant to Article 93(1) points b, c, e, f of the Financial Regulation has to be decided by the Commission (College).
⁽³⁾ Person to be contacted for further details on the specific warning requested, who may be different from the EWS officer of the DG.