Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

22 April 2015 *

(Protection of the financial interests of the Union — Early warning system (EWS) enabling identification of the level of risk associated with contractors — OLAF enquiry into the performance of a public contract concerning an institutional modernisation project in Syria — Decisions to activate W1a and W1b warnings — Legal basis — Fundamental rights — Obligation to state reasons)

In Case T-320/09,

Planet AE Anonymi Etairia Parochis Simvouleftikon Ipiresion, established in Athens (Greece), represented by V. Christianos, lawyer,

applicant,

v

European Commission, represented by D. Triantafyllou and F. Dintilhac, acting as Agents,

defendant,

APPLICATION for annulment of the decisions of the European Anti-Fraud Office (OLAF) requesting the applicant's registration in the early warning system ('EWS'), by activation initially of a W1a warning and subsequently of a W1b warning,

THE GENERAL COURT (Eighth Chamber),

composed of M. Kancheva, acting as President, C. Wetter (Rapporteur) and E. Bieliūnas, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2014,

gives the following

Judgment

Background to the dispute

1 The applicant, Planet AE Anonymi Etairia Parochis Simvouleftikon Ipiresion, is a Greek company which provides advisory services in the field of the administration of companies. Since 2006, it has been engaged, in its capacity as a member of three consortiums, in three projects in Syria financed by

* Language of the case: Greek.

the European Commission. Since 16 October 2007, it has been the subject of an enquiry carried out by the European Anti-Fraud Office (OLAF) into suspected irregularities within the framework of these three projects.

2 Following a tendering procedure launched within the framework of the seventh Framework Programme for Research and Technological Development, the applicant was invited by the Commission, by a letter dated 18 April 2008, to enter into negotiations with the aim of determining the definitive terms of a contract for a grant regarding its proposal to assume the role of coordinator of a consortium concerning the project 'Advancing knowledge — intensive entrepreneurship and innovation for growth and social well-being in Europe'. The Commission's letter stated that any possible grant from the Community could not exceed an amount of EUR 3 300 000 and that negotiations had to be concluded before 30 June 2008.

3 The findings emerging in the enquiry mentioned in paragraph 1 above led OLAF to request the applicant's registration in the early warning system ('EWS') instituted by Commission Decision 2008/969/EC, Euratom of 16 December 2008 on the [EWS] for the use of authorising officers of the Commission and the executive agencies. On 26 February 2009, it requested the activation of a W1a warning and, on 19 May 2009, it requested the activation of a W1b warning. The registrations were made on 10 March and 25 May 2009 ('the contested measures').

4 On 27 February 2009, the Commission sent the applicant the negotiated contract for a grant ('the contract') so that the applicant and the other members of the consortium to which it belonged could sign it. On 11 March 2009, the applicant returned the signed contract to the Commission so that the latter, in turn, could sign it.

5 On 4 June 2009, the Commission informed the applicant by e-mail that the process of signing the contract had been suspended until a further condition had been satisfied, namely the opening by the applicant of a blocked bank account, through which the applicant would have access only to the part of the advance payment which it was due under the contract, whereas the rest of the advance payment would be transferred directly by the bank to the other members of the consortium. The e-mail stated that this new condition was required because of an unexpected event, namely the registration of the applicant in the EWS by the activation, first, of a W1a warning, and then of a W1b warning.

6 After the applicant had agreed with its bank that the bank undertook to transfer, following the receipt of the advance to be paid by the Commission, to each member of the consortium the amount which it was due, the Commission signed the contract on 3 July 2009.

Procedure and the forms of order sought by the parties

7 By application lodged at the Registry of the General Court on 14 August 2009 the applicant brought the present action.

8 By separate document, lodged at the Registry of the Court on 9 November 2009, the Commission raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the General Court.

9 By order of 13 April 2011 in *Planet* v *Commission* (T-320/09, ECR, EU:T:2011:172), the General Court (Sixth Chamber) dismissed the plea of inadmissibility.

10 By measure of organisation of the procedure of 19 April 2011, the Court requested the Commission to comment on the legal basis of its powers, in particular, to take the measures provided for in Decision 2008/969. The Commission did so within the prescribed time-limit. The applicant's observations were filed at the Registry of the General Court on 28 June 2011.

11 The defence was filed at the Registry of the Court on 27 May 2011.

12 By order of the President of the Sixth Chamber of the General Court of 12 July 2011, the proceedings in the present case, at the request of the Commission, were stayed pending a decision of the Court of Justice closing the appeal proceedings registered under reference C-314/11 P, brought by the Commission against the order in *Planet* v *Commission*, paragraph 9 above, (EU:T:2011:172).

13 By judgment of 19 December 2012 in *Commission* v *Planet* (C-314/11 P, ECR, EU:C:2012:823), the appeal brought against the order in *Planet* v *Commission*, point 9 above (EU:T:2011:172), was dismissed. Subsequently, the proceedings before the General Court recommenced.

14 On 19 February 2013, the Commission filed an application for a declaration that there is no need to adjudicate, since the competent services of the Commission, at the request of OLAF, had deleted the warnings concerning the applicant, so that the action had become devoid of purpose.

15 The reply was lodged at the Registry of the General Court on 20 February 2013.

16 By order of the General Court (Sixth Chamber) of 18 July 2013, the application for a declaration that there is no need to adjudicate was reserved for the final judgment.

17 By letter of 22 July 2013, the Commission waived its right to file a rejoinder and, in its place, sent the communication from one of its Members concerning certain provisional measures for application of the EWS. According to the Commission, that document deals with the measures provisionally adopted to comply with the judgment in *Commission* v *Planet*, paragraph 13 above (EU:C:2012:823), until Decision 2008/969 is 'definitively amended'.

18 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Eighth Chamber and the present case was therefore reallocated to that Chamber.

19 As the President of the Chamber was prevented from attending, the President of the General Court designated, in accordance with the order of precedence laid down in Article 6 of the Rules of Procedure, a first judge to replace the President of the Chamber and, pursuant to Article 32(3) of the Rules of Procedure, a second judge to complete the Chamber.

20 On 29 January 2014, the applicant requested the adoption of a measure of organisation of the procedure, under Article 64 of the Rules of Procedure, so that a time-limit could be fixed for the Commission to issue the new decision on the EWS for publication in the *Official Journal of the European Union*.

21 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure.

22 The applicant and the Commission presented oral argument and answered oral questions put by the Court at the hearing on 26 September 2014.

23 The applicant claims that the Court should:

— annul the contested measures;

— dismiss the application for an order that there is no need to adjudicate;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— declare that it is not necessary to rule on the action;

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

The application for a declaration that there is no need to adjudicate

25 The Commission alleges that, following the judgment of the Court of Justice in *Commission* v *Planet*, paragraph 13 above (EU:C:2012:823), its competent services, at the request of OLAF, deleted the warnings concerning the applicant. Taking account of the fact that the applicant is no longer subject to warnings to the users of the EWS and, accordingly, the contested warnings no longer exist, the Commission is of the opinion that the action has become devoid of purpose.

26 The applicant disputes that the action has become devoid of purpose. In that regard, firstly, it submits that the question of the legal basis of the Commission's power to adopt the measures provided for in Decision 2008/969 remains the objective of the dispute and a live question, since it was not settled in the judgment in *Commission* v *Planet*, paragraph 13 above (EU:C:2012:823). Secondly, the applicant claims that, although the Commission deleted the entry in the EWS (*ex nunc* deletion), the applicant still has an interest in the proceedings and in having an order made that, without any legal basis and, accordingly, the Commission having no power, the entry is void *ab initio* (*ex tunc*), namely from the date of the warnings. It cannot be excluded that the Commission may reverse its decision after the ruling that there is no need to adjudicate and reinstate the entry on the basis of the same grounds.

27 It must be borne in mind that the applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. That objective of the dispute must, like the interest in bringing proceedings, persist until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it. If the applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the General Court on the merits cannot bring him any benefit (see judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, ECR, EU:C:2007:322, paragraphs 42 and 43, and of 10 April 2013, *GRP Security* v *Court of Auditors*, T-87/11, EU:T:2013:161, paragraph 45).

28 It follows from the case-law of the Court of Justice that an applicant may retain an interest in seeking the annulment of an act of an institution of the European Union in order to prevent its alleged unlawfulness recurring in the future (see judgment in *Wunenburger* v *Commission*, paragraph 27 above, EU:C:2007:322, paragraph 50 and the case-law cited). Similarly, an applicant may retain an interest in seeking the annulment of an act which directly affects him in order to obtain a finding, by the EU judicature, that an unlawful act has been committed against him, so that such a finding can then be the basis for any action for damages aimed at properly restoring the damage caused by the contested act (see judgment in *GRP Security* v *Court of Auditors*, paragraph 27 above, EU:T:2013:161, paragraph 47 and the case-law cited).

29 In the light of that case-law, it is necessary to examine whether the applicant is likely actually to benefit from the proceedings before the General Court.

30 It is appropriate to note that the repeal of an act of an institution of the European Union does not amount to recognition of its illegality and takes effect *ex nunc*, by contrast with a judgment annulling an act, by virtue of which the act annulled is removed retroactively from the legal order of the European Union and deemed never to have existed (see, to that effect, judgment of 6 June 2013, *Ayadi* v *Commission*, C-183/12 P, EU:C:2013:369, paragraph 66). Thus, if the Commission lacks power or if the action must be upheld on other grounds, the entry of the applicant in the present case will be void *ab initio*.

31 In the present case, it is necessary to avoid acts adopted by the institutions whose temporal effects are limited and which will expire after an action for annulment has been brought but before the General Court is able to give the relevant judgment being excluded from review by the Court of Justice, since such a situation is incompatible with the spirit of Article 263 TFEU (judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, ECR, EU:T:2009:72, paragraphs 56 and 57).

32 In addition, although the entry of the applicant in the EWS was deleted (*ex nunc* deletion), it follows from the case-law above that there is an interest in the proceedings, in particular since the entry of the applicant was likely to harm its image, and only an annulment can provide a remedy and serve as the basis for any action for compensation. For those reasons, the application for a decision that there is no longer any need to adjudicate must be rejected.

The Commission's power to adopt the measures at issue

33 In support of the action, the applicant puts forward two pleas in law, the first alleging, in essence, infringement of essential procedural requirements of Decision 2008/969 and the second alleging infringement of basic principles and fundamental rights of EU law, in particular of the principle of sound administration, the right to be heard, the rights of the defence and the duty to state reasons.

34 In the order in *Planet* v *Commission*, paragraph 9 above (EU:T:2011:172), the General Court found that Decision 2008/969, on which the contested measures are based, makes no reference to primary or secondary law expressly conferring on the Commission the power to create, carry out and manage a database relating to legal or natural persons suspected of representing a risk to the financial interests of the European Union.

35 Furthermore, in accordance with settled case-law, lack of jurisdiction on the part of the institution which adopted the contested measure represents a ground for annulment as a matter of public policy, which should be raised by the EU Court of its own motion, whereas neither party has requested it to do so (see, to that effect, judgments of 17 December 1959 in *Société des fonderies de Pont-à-Mousson* v *High Authority*, 14/59, ECR, EU:C:1959:31, at p. 473; of 10 May 1960 in *Germany* v *High Authority*, 19/58, ECR, EU:C:1960:19, at p. 488; of 13 July 2000 in *Salzgitter* v *Commission*, C-210/98 P, ECR, EU:C:2000:397, paragraph 56). As regards whether the lack of power of the institutions which adopted the measure on the basis of which the contested measure was taken, it must be noted that although the EU Court is not obliged to raise that question of its own motion, it may be called upon to do so. That may be the case on the basis of the information in the file or if there is a manifest defect, in other words if the EU Court can easily detect it and identify it as such (see, to that effect, Opinion of Advocate General Mengozzi in *Common Market Fertilizers* v *Commission*, C-443/05 P, ECR, EU:C:2007:127, paragraph 104).

36 In the present case, having regard to the progress of the proceedings and the information in the file and in the light of the finding made in paragraph 40 of the order in *Planet* v *Commission*, paragraph 9 above, (EU:T:2011:172), the question of the legal basis of the Commission's power to adopt the measures provided for in Decision 2008/969 is a live question.

37 Accordingly, before examining the two pleas in law, it is appropriate to examine the Commission's power to adopt Decision 2008/969 and, in consequence, to take the contested measures.

38 On that subject, the Commission has submitted, relying on Article 27 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, as amended, (OJ 2002 L 248, p. 1; 'the Financial Regulation'), that that decision was adopted in the context of the principle of sound financial management and for the purposes thereof. In its view, the Commission, as sole and initial authorising institution, is to delegate, in accordance with Articles 51 and 59(2) of the Financial Regulation, powers with a view to the implementation of the budget by staff to whom it delegates or subdelegates in compliance with the conditions in its applicable internal rules. It also states that, as such, that decision is based on the primary prerogative which each institution and institutional body has autonomously to regulate the internal organisation of its services.

39 The applicant disputes the Commission's arguments. No power has been conferred on the Commission, whether by virtue of primary or secondary law, to create, carry out and manage a database relating to legal or natural persons on the sole ground that they were suspected of representing a risk to the financial interests of the European Union. The principle of sound financial management, referred to in Article 27 of the Financial Regulation, is an objective and cannot constitute the legal basis of the entries made in the EWS.

40 It is appropriate to note that the Commission's budgetary responsibility is based on Article 274 EC. Under that article, the Commission is to implement the EU budget, in accordance with the provisions of the regulations made pursuant to Article 279 EC, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management.

41 The Financial Regulation states the principles and basic rules governing the EU budget, in particular the principle of sound financial management. It also lays down the rules concerning the award of contracts, including the grounds for exclusion of a candidate or tenderer, and the creation of a central database containing the details of those persons.

42 Article 93(1) of the Financial Regulation refers, in particular, to the exclusion from participation in a procurement procedure if candidates or tenderers are bankrupt or being wound up, have been convicted of an offence concerning their professional conduct by a judgment which has the force of *res judicata* or concerning fraud or corruption or if they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes. Article 94 of that regulation refers to the exclusion of candidates or tenderers which are subject to a conflict of interest or are guilty of misrepresentation in the context of participation in the contract procedure and the grounds for exclusion referred to in Article 93(1) of the Financial Regulation. Article 96 of the Financial Regulation concerns the administrative or financial penalties which the awarding authority may impose on candidates or tenderers in the event of the misrepresentation referred to in Article 94 of that regulation and on contractors which have been declared to be in serious breach of contract for failure to comply with their contractual obligations under contracts financed by the budget.

43 Article 95(1) of the Financial Regulation reads as follows:

‘A central database shall be set up and operated by the Commission in compliance with Community rules on the protection of personal data. The database shall contain details of candidates and tenderers which are in one of the situations referred to in Articles 93, 94, 96(1)(b) and (2)(a). It shall be common to the institutions, executive agencies and the bodies referred to in Article 185.’

44 The central exclusion database referred to in Article 95 of the Financial Regulation was implemented by Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database (OJ 2008 L 344, p. 12). The database is to be administered by the Commission’s accounting officer or his subordinate staff (Article 4 of Regulation No 1302/2008). That regulation also lays down the entity, manner and conditions which authorise access to the content of the exclusion database (Article 5 of Regulation No 1302/2008).

45 In order to counter fraud and any other illegal activities affecting the financial interests of the European Union, on 16 December 2008 the Commission also adopted Decision 2008/969 on the EWS. That decision replaces Commission Decision C(2004) 193/3 on the EWS.

46 Under recital 4 in the preamble to Decision 2008/969, ‘[t]he purpose of the [EWS] is to ensure the circulation within the Commission and its executive agencies 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’.

47 In accordance with recitals 5 to 7 in the preamble to that decision, OLAF, which has access to the EWS in the pursuit of its tasks in the area of the conduct of investigations and the collection of information for the prevention of fraud, is responsible, together with the authorising officers responsible and the Internal Audit Service, for requesting the entry, modification or removal of EWS warnings, under the administration of the Commission’s accounting officer or his subordinate staff.

48 In that regard, the second subparagraph of Article 4(1) of Decision 2008/969 provides that ‘[t]he accounting officer [of the Commission or his subordinate staff] shall enter, modify or remove EWS warnings pursuant to requests by the authorising officer by delegation responsible, [by] OLAF and the Internal Audit Service’.

49 Under the first subparagraph of Article 5(1) of that decision, ‘[a]ll requests for registration of warnings, their modification or removal shall be addressed to the accounting officer’.

50 Under the third subparagraph of Article 6(2) of that decision, ‘[i]n the case of procurement or grant award procedures the authorising officer by delegation responsible or his staff shall verify whether there is a warning in the EWS at the latest before the award decision’.

51 It follows from Article 9 of Decision 2008/969 that the EWS relies on warnings allowing the identification of the level of risk associated with an entity according to categories ranging from W1, corresponding to the lowest level of risk, to W5, corresponding to the highest level of risk.

52 Articles 10 to 14 of Decision 2008/969 define the warnings. Thus, a W1a warning means that, at an early stage of OLAF’s investigations, there is sufficient reason to believe that findings of serious administrative errors or fraud are likely to be recorded in the EWS. Similarly, a W1b warning means that OLAF’s ongoing investigations and those of the IAS give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in the EWS. A W2 warning means that serious administrative errors or fraud have been found. A W3 warning means that the accounting officer has been notified of an attachment order in certain situations or that judicial proceedings for serious administrative errors or fraud have been commenced. A W4 warning means that recovery orders, exceeding a certain amount and on which payment is significantly overdue, have

been issued by the Commission. Finally, a W5 warning is issued in respect of persons in an exclusion situation, either because of an exclusion warning referred to in Article 10(1) to (3) of Regulation No 1302/2008 (a W5a warning), or because those persons are subject to financial restrictions related to the common foreign and security policy (CFSP) (a W5b warning) (Article 14(1) and (2) of Decision 2008/969).

53 Articles 10 to 14 of Decision 2008/969 also define the period during which a warning remains valid, which will vary according to the type of warning.

54 The consequences of entries in the EWS vary according to the level of the warnings. These effects, which appear in Articles 16 to 22 of Decision 2008/969, range from a W1 warning, which is for information purposes only and may entail no consequence other than reinforced monitoring measures, to a W5 warning, which entails exclusion from participation in a contract or grant award procedure, as regards contract or grant award procedures, or, for example, the suspension of payments, performance of the contract or a grant, as regards ongoing contracts or grants, and the direct or indirect blocking of funds and economic resources (in the context of the CFSP). The W2, W3b and W4 warnings may have the consequence, apart from the reinforcement of monitoring measures, that the authorising officer by delegation responsible may award the contract to another tenderer or close the procedure without awarding any contract. In the case of an ongoing contract, the authorising officer by delegation may suspend the time-limit for payments, suspend performance of the contract or terminate the contract or grant where it contains a provision to this effect.

55 Under Article 14(3) of Decision 2008/969, there is a duty to inform a third party concerned of an entry in the EWS and to give the third party the opportunity to express its views in writing. That duty is restricted to a W5a warning, thus to situations in which the authorising officer by delegation responsible envisages to exclude a third party in application of Article 93(1)(a) to (e) of the Financial Regulation.

56 Article 27 of Decision 2008/969 provides that that decision is published for information purposes in the *Official Journal of the European Union* and annexed to the Internal Rules for the implementation of the general budget of the European Union.

57 In the present case, it must first be borne in mind that, by virtue of Article 5 EC, in accordance with the principle of allocation of powers, each institution is to act within the limits of the powers conferred upon it by the Treaty. Respect for the principle of legal certainty requires that the binding nature of any act intended to have legal effects must be derived from a provision of EU law which must be expressly indicated therein as its legal basis (judgments of 16 June 1993, *France* v *Commission*, C-325/91, ECR, EU:C:1993:245, paragraph 26, and of 17 September 2007, *France* v *Commission*, T-240/04, ECR, EU:T:2007:290, paragraph 31).

58 It is clear that it does not follow either from the provisions of Article 274 EC or those of the Financial Regulation that the Commission has the express power to adopt a decision such as Decision 2008/969.

59 Article 274 EC does indeed provide that the Commission is to implement the budget, in accordance with the provisions of the regulations made pursuant to Article 279 EC. That article provides for recourse to the ordinary legislative procedure. However, the Financial Regulation, the legal basis of which is Article 279 EC, does not make reference to a system such as the EWS. That regulation solely provides, as has already been noted in paragraph 43 above, the institution of a central database relating to mandatory exclusions.

60 In that regard, it must be noted that EU law does not make it possible to conclude as to the existence of an implicit power. It is clear from the case-law that the existence of an implicit power, which constitutes a derogation from the principle of allocation of powers stated in the first paragraph of Article 5 EC, must be appraised strictly. It is only exceptionally that such implicit powers are

recognised by case-law and in order to be so recognised, they must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue (see judgment of 17 November 2009 in *MTZ Polyfilms* v *Council*, T-143/06, ECR, EU:T:2009:441, paragraph 47 and the case-law cited).

61 In the present case, it must be held that, notwithstanding the fact that a warning system may be a tool useful to the Commission's tasks as guardian and executive of the EU budget, the Commission has neither submitted nor shown that the EWS meets the condition referred to in the preceding paragraph to make it possible to conclude as to the existence of an implicit power.

62 The Commission has merely stated that it was a measure of internal organisation, a prerogative available to all EU institutions. It must be noted that, although the Commission is authorised to organise its internal functioning in order to ensure the greatest efficiency possible, in accordance with Articles 51 and 59(2) of the Financial Regulation as relied on by the Commission, the fact remains that its power of self-regulation are limited by the powers conferred on it.

63 Moreover, it must be observed in that regard that, in principle, internal measures have legal effects only within the internal sphere of the administration and do not create any right or obligation for the benefit of third parties (see judgment in *France* v *Commission*, paragraph 57 above, EU:T:2007:290, paragraph 43 and the case-law cited, and Opinion of Advocate General Tesauro in *France* v *Commission*, C-366/88, EU:C:1990:304, paragraph 22). In the present case, it is clear that Decision 2008/969 is intended to have external legal effects. The fact that the agents concerned must consult the EWS and draw certain consequences in the light of the entries therein and the publication of Decision 2008/969 in the *Official Journal of the European Union* are important indications in that regard.

64 In addition, while the EU legislature created a legal basis for the exclusion warnings, it did not consider it appropriate to do so for the other warnings set out in Decision 2008/969. Moreover, contrary to the W5 warnings which are based on objective and, to a certain extent, proven factors, the entry of W1a or W1b warnings is the consequence of an OLAF investigation despite the fact that findings of fraud or administrative errors have not yet been established. Finally, it cannot be denied that there may be binding consequences, as has been shown in the present case.

65 Furthermore, it cannot be accepted, without disregarded the fundamental rights, which include the presumption of innocence, the adage qui potest majus potest et minus.

66 The presumption of innocence enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (which corresponds to Article 6(2) and (3) of the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950), is intended to ensure that no-one is declared guilty, or treated as being guilty, of an offence before his guilt has been established by a court of law.

67 Unlike the exclusion warnings (see paragraphs 43 and 64 above), it cannot be disputed that the W1a and W1b warnings concern a situation where the investigations are still ongoing and thus in which no judge has yet established such guilt. Accordingly, if the Commission considers it necessary to take preventive measures at an early stage, it needs, all the more so for that reason, a legal basis permitting the creation of such a warning system and the taking of the relevant measures, a system which respects the rights of the defence, the principle of proportionality and the principle of legal certainty, the latter meaning that the rules of law must be clear and precise and predictable in their effect, in particular where they can have adverse consequences for individuals and undertakings.

68 Accordingly, it must be held that there is a legal basis for the exclusion warnings referred to in Articles 93, namely the W5a warning, and 94, namely the W5b warning, of the Financial Regulation, that legal basis being set out in Article 95 of the Financial Regulation. Similarly, it is possible to find a

legal basis for the W5b warning in a regulation or implementing measure adopted under the CFSP. However, it is not possible to refer to any legal basis for the W1a and W1b warnings, or for the other warnings, namely the W1c and W2 to W4 warnings and their consequences. Decision 2008/969 makes no reference to any provision of primary or secondary law expressly conferring on the Commission the power to create, implement and manage a database concerning the natural or legal persons suspected of constituting a risk to the financial interests of the European Union. The fact that Decision 2008/969 makes a general reference to the Financial Regulation, without, however, referring to a specific article, is not sufficient in that regard.

69 The fact that the Commission, by provisional measures, in order better to meet the requirements which follow from the fundamental rights, has adapted its practice until such time as Decision 2008/969 is formally 'amended' (see paragraph 17 above) so that it is possible henceforth for the entities which are subject to an application for a level W1 to W4 warning to express their point of view, that is to say, to submit their written observations prior to the entry of the warning does not alter the finding made in paragraph 68 above.

70 Thus, in the absence of any specific provision authorising the Commission to adopt such a decision, if the adoption of such a measure was necessary or useful, the Commission ought to have followed the procedure laid down in Article 279 EC, that is to say, submitting a proposal to the European Parliament and the Council of the European Union in order to create the necessary legal basis. Furthermore, at the hearing, the Commission stated that it had recently submitted a proposal to the EU legislature to amend the Financial Regulation in that respect.

71 Consequently, it must be held that, without a legal basis authorising the Commission to adopt Decision 2008/969, the contested measures, adopted on the basis of that decision, are accordingly also devoid of legal basis, so that they must be annulled.

The second plea in law

72 In any event, even if the Commission had the power to adopt Decision 2008/969, the General Court considers that the contested measures must be annulled on the basis of the second plea in law.

73 As part of this plea in law, the applicant alleges an infringement of fundamental rights, such as the principle of sound administration, the right to 'a prior hearing', the rights of the defence and the presumption of innocence. It also alleges an infringement of the duty to state reasons.

74 More particularly, the applicant criticises the absence of any opportunity of expressing its views on the contested measures which have binding effects, since the Commission failed validly to notify it within the relevant period, in breach of Article 8 of Decision 2008/969, which fails to have regard to the right to a prior hearing and the presumption of innocence.

75 The Commission disputes the alleged infringement of fundamental rights. In addition, it is of the opinion that the applicant was well aware of the reasons for its entry in the EWS and could deduce from all the facts and documents sent to it the reasons for its designation by the Commission as an entity requiring a certain circumspection.

76 It must be borne in mind, in that regard, that it follows from settled case-law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question (see judgments of 13 February 1979 in *Hoffmann-La Roche* v *Commission*, 85/76, ECR, EU:C:1979:36, paragraphs 9 and 11, and of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, ECR, EU:C:2009:598, paragraph 83 and the case-law cited).

77 It must also be recalled that, in accordance with a consistent body of case-law, the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act (see judgments of 2 October 2003 in *Corus UK* v *Commission*, C-199/99 P, ECR, EU:C:2003:531, paragraph 145; of 28 June 2005 in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraph 462; and of 29 September 2011 in *Elf Aquitaine* v *Commission*, C-521/09 P, ECR, EU:C:2011:620, paragraph 148).

78 The statement of reasons required by Article 253 TFEU must, however, be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63; *Elf Aquitaine* v *Commission*, paragraph 78 above, EU:C:2011:620, paragraph 150, and of 15 November 2012, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, C-539/10 P and C-550/10 P, ECR, EU:C:2012:711, paragraphs 139 and 140).

79 In the present case, it must be held that the contested acts were not notified to the applicant. Accordingly, the applicant did not have the opportunity of expressing its views in that regard and nor was it aware of the grounds justifying its entry in the EWS.

80 Indeed, Article 8(1) of Decision 2008/969 states that third parties, such as candidates, tenderers, contractors, suppliers, service providers and their respective subcontractors, are to be informed, in the calls for tender and calls for proposals and, in the absence of calls, before awarding contracts or grants, of the data concerning them that may be included in the EWS and, where third parties are legal entities, the persons who have powers of representation, decision-making or control within these entities are also to be informed. However, that communication from the authorising officer by delegation responsible that data may be entered in the EWS concerns only a possibility and does not constitute an obligation to inform the third party concerned when the entry in the EWS is actually made.

81 Article 8(2) of Decision 2008/969 provides that the service that requested the registration of an EWS warning is to be responsible for informing the natural or legal person concerned of the request for activation, updating and removal of any exclusion warning W5a directly concerning it and state the reasons thereof. That obligation to inform the person concerned is linked to a right for that person to express its views on the exclusion warning, which right follows from Article 14(3) of that decision.

82 It is appropriate to point out that Article 8(2) and Article 14(3) of Decision 2008/969 are the only provisions which provide for a right to be informed of an entry in the EWS. Such a right to be informed in advance and to express views is not provided for in respect of the other warnings.

83 Nevertheless, in accordance with the case-law referred to in paragraph 76 above, the rights of the defence must always be guaranteed, even in the absence of any specific rules concerning the proceedings in question. The same applies as regards the duty to state reasons.

84 In that regard, it must be noted that the fact that OLAF, by letter of 6 February 2009, informed the applicant of the investigations commenced and the reasons for their commencement is not sufficient alone and does not mean that the applicant should not have been informed of the contested acts in the context of the application of Decision 2008/969.

85 It is true that an investigation can, in accordance with Decision 2008/969, be the ground for a request by OLAF for a person to be entered in the EWS. It follows from Article 10 of that decision that OLAF is to request such 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 the EWS. In the present case, it is not in dispute that the applicant was informed only on 6 February 2009 of the fact that it was the subject of investigations and that, as part of those investigations, an on-site check was to be carried out between 22 and 26 February 2009. The Commission cannot therefore rely on that information alone given by OLAF to the applicant as part of those investigations and claim, in essence, that the applicant was able to 'deduce' from the facts and documents concerned the reasons for its being subject to monitoring measures. Furthermore, it is not apparent either from the file before the General Court that OLAF informed the applicant that those investigations could also result in a request for its registration in the EWS.

86 It must also be noted that the applicant was not informed either before or after its registration in the EWS. Although the objective pursued is to protect the EU budget by prudent measures, that in no way justifies that lack of communication. It is only incidentally, because the Commission suspended the contractual process and required an additional guarantee in respect of the 'Advancing knowledge — intensive entrepreneurship and innovation for growth and social well-being in Europe' project that the applicant discovered its registration in the EWS.

87 Even if the EWS was developed as an internal tool, the fact remains that an entry in the EWS has legal consequences for the registered person concerned, meaning that the rights of the defence, including the duty to state reasons, must be upheld.

88 Consequently, the plea in law alleging failure to state reasons and infringement of the rights of the defence must be accepted and the contested acts must also be annulled on that basis, without it being necessary to rule on the first plea in the action or on the request for a measure of organisation of the procedure referred to in paragraph 20 above.

Costs

89 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has been unsuccessful, it must be ordered to bear its own costs and also to pay those incurred by the applicant.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Annuls the decisions of the European Anti-Fraud Office (OLAF) requesting the registration of Planet AE Anonymi Etairia Parochis Simvouleftikon Ipiresion in the early warning system (EWS), and those of the European Commission concerning the activation of a W1a warning and a W1b warning concerning that undertaking;**

2. **Orders the Commission to pay the costs.**

Kancheva Wetter Bieliūnas

Delivered in open court in Luxembourg on 22 April 2015.

[Signatures]