Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database

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on the central exclusion database

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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)], and in particular Article 95 thereof,

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)], in particular to Article 98 thereof,

Whereas:

(1) The Commission, which is responsible for executing the general budget of the European Union and any other funds managed by the Communities, is under an obligation to set up and operate a central data base, in compliance with Community rules on the protection of personal data, with the objectives to make efficient the exclusion mechanism provided for in the Financial Regulation and to protect the financial interests of the Communities. The database should in particular cover the execution of all Community funds independently from the applicable management mode.

(2) The Financial Regulation places obligations on the institutions concerning the award of contracts and grants to third parties in the context of centralised management of Community funds. In particular, Articles 93 and 114(3) set out an obligation to exclude third parties from participation in procurement or grant award procedures where they are in one of the situations listed in Article 93(1). Articles 94 and 114(3) forbid the award of a contract or grant to third parties who, during a specific procurement or grant procedure, are in a situation of conflict of interest or misrepresentation in supplying the information required by the institution as a condition of participation in the procurement or award procedure. Articles 96 and 114(4) further establish the possibility for the contracting authority to impose administrative and financial penalties on third parties, in particular in the form of exclusion from the benefit of any Community fund for a period to be determined by the institution concerned pursuant to Article 133a of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[(3)].

Changes to legislation: *There are currently no known outstanding effects for the Commission Regulation (EC, Euratom) No 1302/2008. (See end of Document for details)*

(3) Articles 74 and 75 of Commission Regulation (EC, Euratom) No 2343/2002 of 23 December 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[(4)] requires these bodies to apply the abovementioned provisions.

(4) Article 50 of Commission Regulation (EC) No 1653/2004 of 21 September 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes[(5)] requires the executive agencies to apply the abovementioned provisions of the Financial Regulation for the implementation for their operating budget.

(5) Given that executive agencies have the status of authorising officers by delegation of the Commission for the implementation of operational appropriations for which they apply the Financial Regulation, they should have access to the exclusion database in the same manner as Commission services.

(6) The objectives and the purpose of the exclusion database should be defined in order to determine the use of the data.

(7) The European Anti-Fraud Office (OLAF) should have access to the exclusion database 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)[(6)] and Council Regulation (Euratom) No 1074/1999 of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)[(7)].

(8) The accounting officer of the Commission should ensure the administration of the exclusion database and have the right to modify data in the database. The relevant Commission service or the other institutions should be responsible for requesting the entry of exclusion warnings into the exclusion database.

(9) Rules for access to the exclusion database should differentiate between Commission services, executive agencies and all institutions and Community bodies using an accounting system provided by the Commission (hereinafter ABAC) which enables direct access to the warnings, on the one hand, and the other institutions, implementing authorities and bodies that do not have such access, on the other hand. Therefore these institutions should have access through designated contact points and implementing authorities or bodies should have access via liaison points.

(10) It should be possible to limit access to the exclusion database where implementing authorities or bodies manage funds with a very limited level of decentralisation, which renders access to the exclusion database inappropriate or where such access has to be denied for data protection reasons.

(11) In order to clearly define their responsibilities, the tasks of the contact points and liaison points should be determined.

(12) In order to reflect the fact that the database should be common to the institutions, the data flow should be channelled directly to the accounting officer of the Commission.

(13) In order to protect the financial interests of the Communities between an exclusion decided pursuant to Article 93(1) of the Financial Regulation for a specific procurement or grant procedure and the determination of the duration of the exclusion by the institution, the latter should be able to request provisional registration of an exclusion warning.

(14) In order to avoid outdated warnings, in particular those concerning entities which have been wound up, warnings indicating an exclusion pursuant to Article 93(1)(a) and (d) of the Financial Regulation should be automatically removed after five years.

(15) Given that exclusions pursuant to Article 94 of the Financial Regulation concern specific procurement or grant procedures and not – as under Article 93(1) – a general exclusion situation, the registration period should be limited and removed automatically.

(16) The procedure for requests based on information from implementing authorities or bodies, which applies to all management modes with the exception of centralised direct management, should be clearly spelled out.

(17) The share of responsibility of the implementing authorities or bodies as regards the data communicated, through the liaison point on one side and through the accounting officer on the other side, to the Commission service responsible, including rectification, updating or removal of the data should be clearly laid down.

(18) In order to provide for a clear set of rules in all cases where the implementing authority or body did not determine an exclusion duration pursuant to Article 133a(1) of the Implementing Rules, it should be stated that the decision on the exclusion duration should be prepared by the Commission service responsible and adopted by the Commission.

(19) The information flow between authorised users of the exclusion database should be detailed; contact warning persons for each warning should be determined, who shall provide information on the warning concerned to authorised users of the exclusion database.

(20) A specific provision should cover cases where proof provided by third parties is not consistent with data in the exclusion database, in order to ensure that data in the exclusion database are correct and up to date.

(21) In order to allow an exchange of best practices between institutions and to address issues related to the use of the exclusion database, a suitable framework should be defined.

(22) The processing of personal data inherent to the operation of the exclusion database shall be made in accordance with the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, applicable to Member States[8] and the 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[9], which are fully applicable.

(23) The present Regulation has been drafted taking due consideration of the opinion of the European Data Protection Supervisor. Furthermore, Regulation (EC) No 45/2001 stipulates that such processing is subject to prior checking by the European Data Protection Supervisor following notification by the Commission Data Protection Officer.

(24) For sake of clarity, data protection provisions should precise the rights of the persons whose data are or could be introduced into the exclusion database. Natural and legal persons should be informed of the introduction of data concerning them in the exclusion database.

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

1 This Regulation establishes a central database (hereinafter 'the exclusion database') as referred to in Article 95 of Regulation (EC, Euratom) No 1605/2002 (hereinafter 'the Financial Regulation').

2 Data contained in the exclusion database may be used only for the purposes of applying Articles 93 to 96 and 114 of the Financial Regulation and Articles 133 to 134b of Regulation (EC, Euratom) No 2342/2002 as well as Articles 96 to 99 and 110 of Regulation (EC) No 215/2008.

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

Article 2

Definitions

For the purpose of this Regulation, the following definitions shall apply:

1. 'institutions' mean European Parliament, Council, Commission, Court of Justice, Court of Auditors, European Economic and Social Committee, Committee of the Regions, Ombudsman, European Data-Protection Supervisor, executive agencies and bodies referred to in Article 185(1) of the Financial Regulation;

2. 'implementing authority or body' means authorities of the Member States and third countries, international organisations and other bodies participating in the implementation of the budget in accordance with Articles 53 and 54 of the Financial Regulation, with the exception of executive agencies and bodies referred to in Article 185(1) of that Regulation. Member States may assign tasks provided for in this Regulation to other national public authorities, which shall be assimilated to implementing authorities or bodies.

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

Article 3

Exclusion warning

Exclusion warnings shall contain the following data:

(a) information identifying third parties, which are in one of the situations referred to in Article 93(1), 94, 96(1)(b) and 96(2)(a) of the Financial Regulation;

(b) information concerning persons with powers of representation, decision-making or control over legal entities, when those persons have found themselves in one of the situations referred to in Article 93(1), 94, 96(1)(b) and 96(2)(a) of the Financial Regulation;

(c) the grounds for exclusion of third parties referred to in point (a) or persons referred to in point (b) and, where appropriate, the type of conviction and the duration of the period of exclusion.

Article 4

Administration of the exclusion database

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

The accounting officer of the Commission shall enter, modify or remove exclusion warnings pursuant to requests by the institutions.

2 The accounting officer of the Commission 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 and, where appropriate, the contact points of the other institutions designated in accordance with Article 6(1) or the liaison points designated in accordance with Article 7(2).

Article 5

Access to the exclusion database

1 Institutions, other than the Commission and executive agencies, shall have direct access to the data contained in the exclusion database via the accounting system provided by the Commission (ABAC) or through contact points.