

Statements / Restatements on EU information systems: alert mechanisms as a starting point

Presentation for the
EU Ombudsman / ReNEUAL conference

Towards an EU administrative procedure law ?

Brussels, March 15-16th 2012

Outline

- Introduction
 - EU Ombudsman's inquiry concerning the EWS (16.12.2011)
- Preliminary comparative analysis of (rapid) alert mechanisms:
 - system architectures
 - Outline of basic structures of EU alert mechanisms
 - notification types & requirements; Verification procedures & standards
- Preliminary evaluation of the legal infrastructure for EU alert systems:
 - EU Case law
 - Legal arrangements for (potentially) effective legal protection
- Next steps

Introduction I: EU Ombudsman's inquiry concerning the EWS (16.12.2011)

- Early Warning System (EWS) as an important tool of sound financial management of the EU budget
 - but need for enhanced credibility and legitimacy
- Legal basis: only partially explicit
- Clarity of definitions used in defining the different warnings?
- Protection of fundamental rights
 - starting point: all warnings adversely affect the persons concerned
 - improvements by EWS Decision 1302/2008
 - however, still
 - no right to be heard
 - no formal appeal procedure
- Accuracy of information on the EWS not guaranteed without
 - obligation to duly justify requests for an EWS warning
 - continual monitoring the underlying factual basis for EWS warning
 - obligation to deactivate warnings which are no longer accurate
 - adequate training of staff needed for the complex EWS

Introduction II

- Information Management as a key element of (composite) EU administrative procedures and of the ReNEUAL project (working group 4)
- Types or layers of EU information management arrangements:
 - (traditional) informational mutual assistance
 - on request; ad hoc; punctual
 - intensified structures of informational cooperation
 - qualified mechanisms for “constant” mutual assistance on request
 - duties to inform without prior request
 - information systems in a strict sense
 - centralized/decentralized systems of direct access to information originating from other authorities
- EU information management arrangements and data protection by design
 - The (reformed) EU data protection law as a framework for the ReNEUAL wg4 project
 - Concretisation of general data protection principles for EU information systems
- (rapid) alert mechanisms as a model for EU information management / systems?

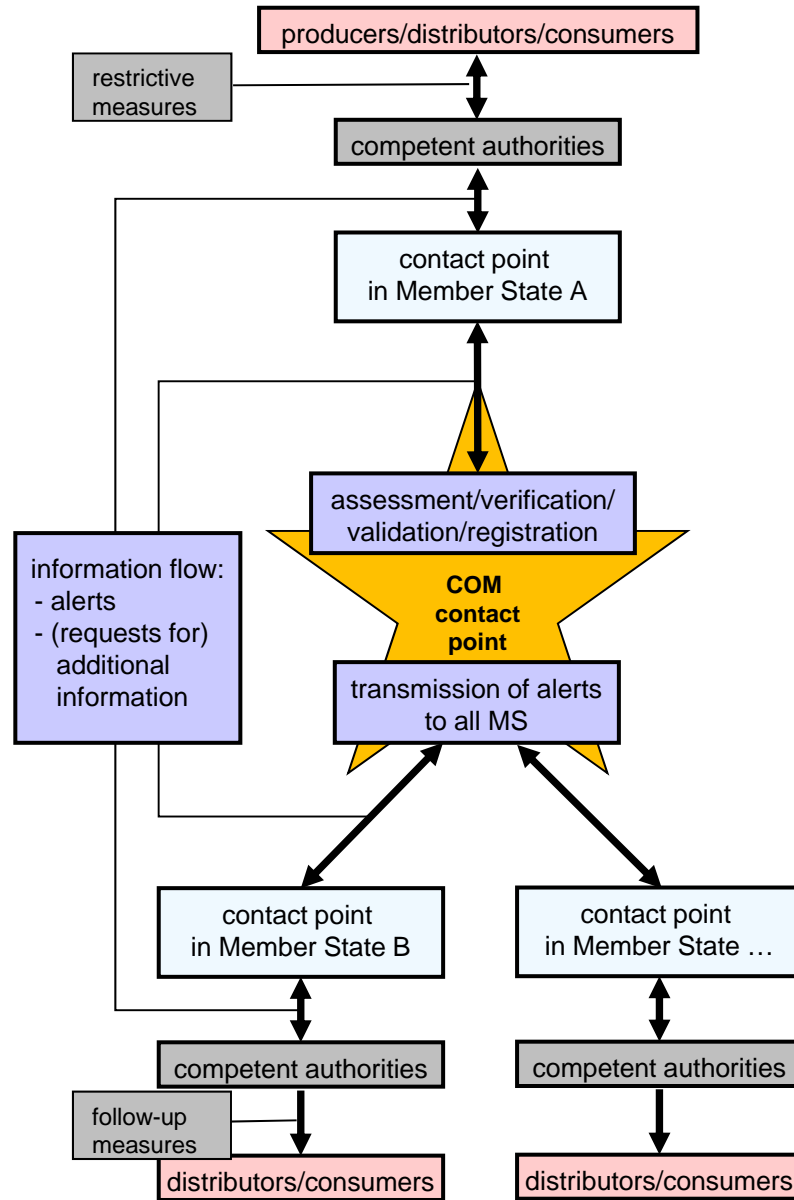
Preliminary comparative analysis of (rapid) alert mechanisms:

- Aim:
 - identification of topics with potentially generalizable rules
 - following steps: evaluation of existing rules in this field; restating/stating best practice rules
 - identification of topics more adequately regulated by sector-specific rules

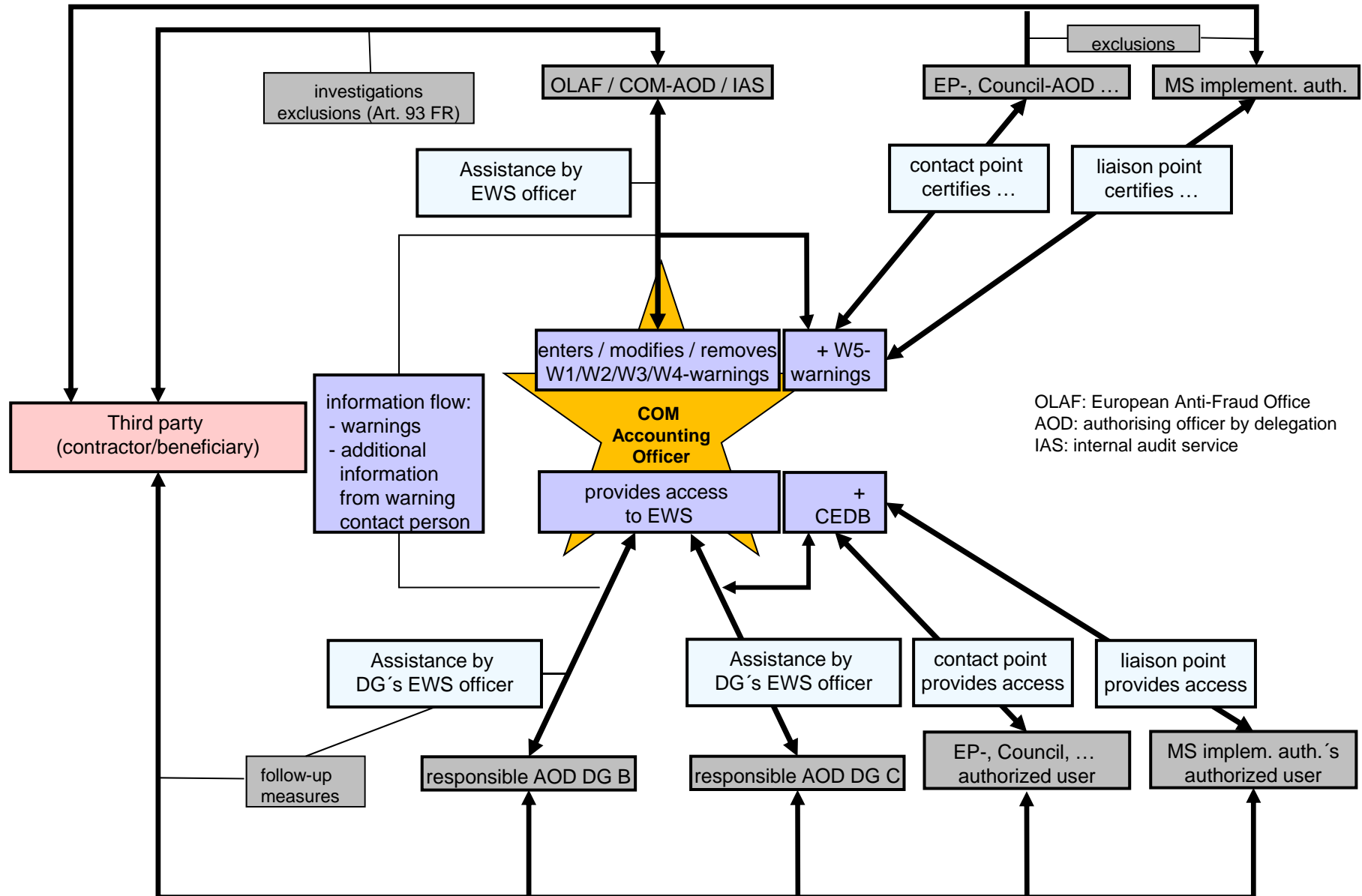
- Caveat: analysis is still at a very early stage and limited to certain alert mechanisms
 - EWS: Early Warning System concerning EU budget execution
 - CEDP: Central Exclusion data base concerning EU budget execution
 - RAPEX: Rapid Alert System for non-food consumer products
 - RASFF: Rapid Alert System for Food and Feed
 - IMI: Internal Market Information system alert mechanism
 - SIS II: Schengen Information System [*with help by Morgane Tidghi*]

- Starting point: **system architectures**

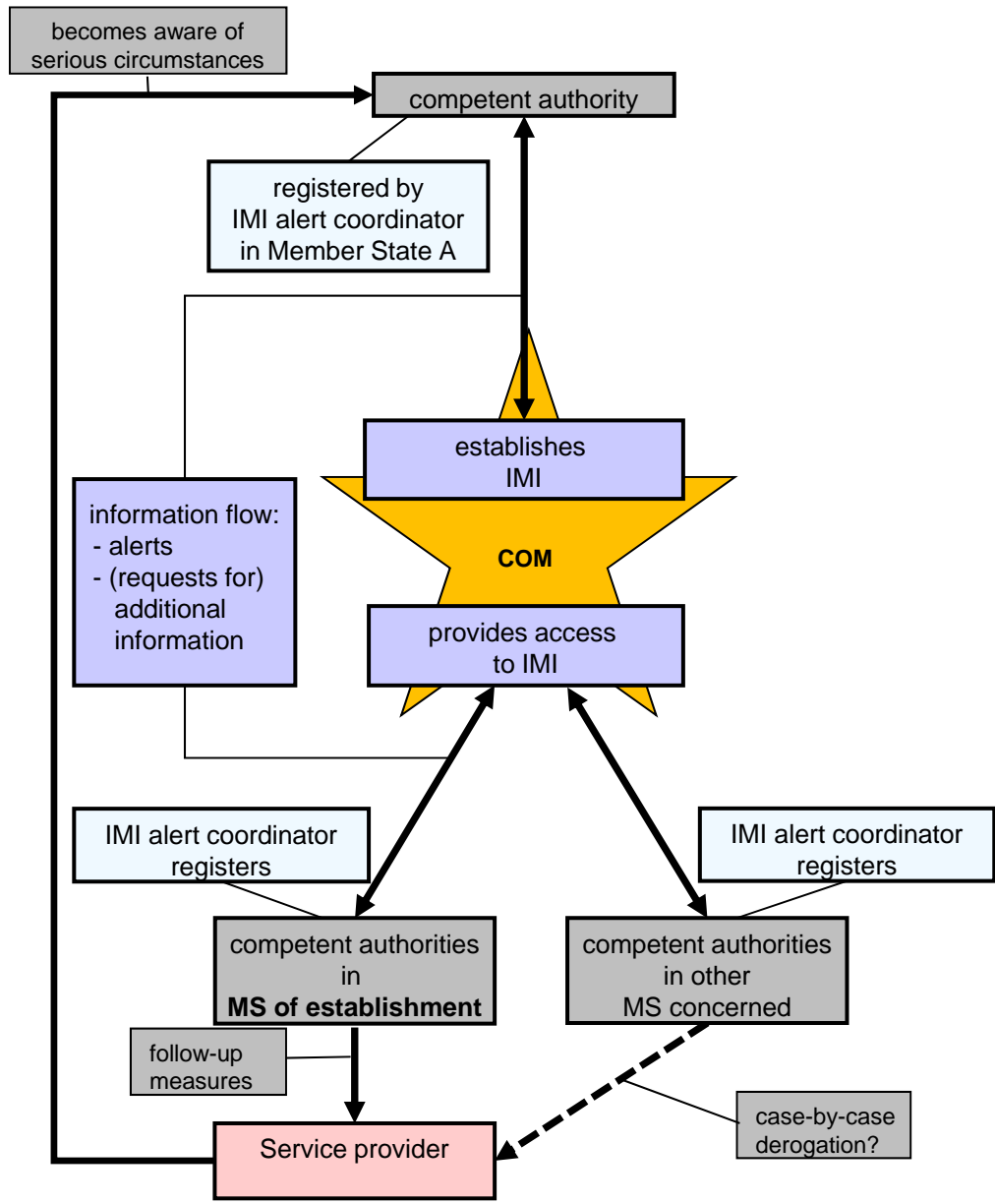
RASFF, RAPEX



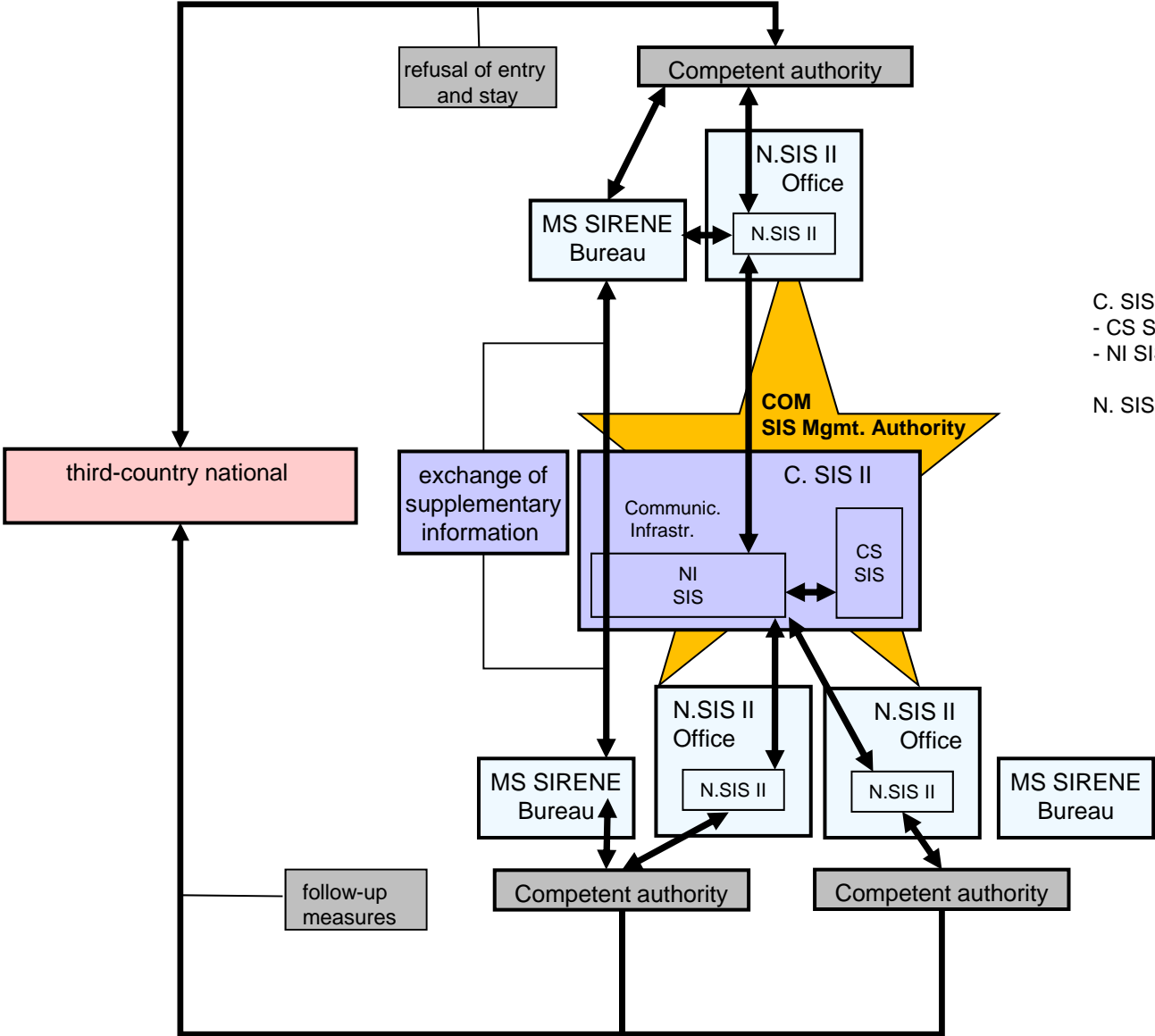
EWS/CEDB



IMI



SIS II



C. SIS II: Central SIS composed of
 - CS SIS: techn. support function = SIS II database
 - NI SIS: uniform national interface

N. SIS II: national copy of the SIS II database

Preliminary comparative analysis of (rapid) alert mechanisms: system architectures (conclusions I)

- architectures of EU alert mechanisms:
 - General observation: alert mechanisms as a mix of
 - formalized duties to inform without prior request (alerts, warnings, ...) and
 - trust building organisational arrangements for additional “informal” exchange of information
 - Specific features:
 - EWS/CEDB: mainly vertical network
 - complete integration of COM services, Executive Agencies
 - only partial integration of other EU institutions and Member States
 - RASFF/RAPEX: horizontal/vertical network
 - one to many communication & transparency for consumers
 - IMI: mainly horizontal network between MS concerned
 - rather limited role of COM
 - SIS II: mainly horizontal network
 - complex system of synchronized information systems
 - limited role of COM

Preliminary comparative analysis of (rapid) alert mechanisms: system architectures (conclusions II)

■ Relevance of normative contexts

- EWS/CEDB: direct implementation by the Commission with shared management through national implementing authorities
- RASFF/RAPEX: indirect/direct implementation
 - high relevance of the precautionary principle
- IMI: indirect implementation by member states
 - centralized competences of the MS of establishment
- SIS: indirect implementation by member states
 - decentralized competences/obligations of all MS concerned
 - only partially harmonized substantive (migration) law

Preliminary comparative analysis of (rapid) alert mechanisms: Outline of basic structures of EU alert mechanisms

- general architecture of EU alert mechanisms (information systems):
 - relevant actors and allocation of (decentralised ↔ centralised) competences
- **duties to inform through alert mechanisms (functionalities)**
- **standards for the collection and entry of data**
 - including verification processes
- competences and standards for alteration and actualisation of data
- data transfer (structure and standards)
- rules on data usage and data retention
- rights of data subjects
- data security
- oversight mechanisms and (coordinated) data protection supervision
- **legal protection and liability**

Preliminary comparative analysis of (rapid) alert mechanisms:

Info system	Notification types (functionalities)	Alert notification requirements	Verification unit/time-limit	Verification standards
EWS/CEDP (budget execution)	- W1-W4 warnings - W5-warnings	fraud or serious admin. errors; exclusions	- COM-AccO.? (- liaison point)	(D.P. Reg. 45/2001)
RASFF (food, feed)	- alert - border rejection - news - follow-up info - updating	(serious direct/indirect) risk that might require rapid action [unclear: compare Reg. 178/2002 ⇔ Reg. 16/2011]	- MS contact points? - COM contact point - within 24 h	completeness, legibility (use of COM data dictionaries, understandable language); correctness (legal basis, scope of RASFF; requirements of COM-Reg)
RAPEX (other products)	- alert/emergency (incl. restrictive action) - information (for follow-up/attention) - follow-up info. - updating	serious / life-threatening transnational risk + restrictive measure	- MS RAPEX contact point, - COM - shortest time possible: 5; 3; 10 days	conformity with RAPEX-rules; accurate data, (formal) correctness, completeness; degree of urgency
IMI (services)	- Alert - Urgent derogations - follow-up info - updating	serious damage to the health or safety of persons or to the environment	- MS alert coordinator? - not COM	??
SIS II (migration)	- refusal of entry and stay	- serious crim. offence - national migration law	- N.SIS II Office - SIRENE	- SIS II Regulation - quality of SIS data

Preliminary evaluation of the legal infrastructure for EU alert systems: EU Case law

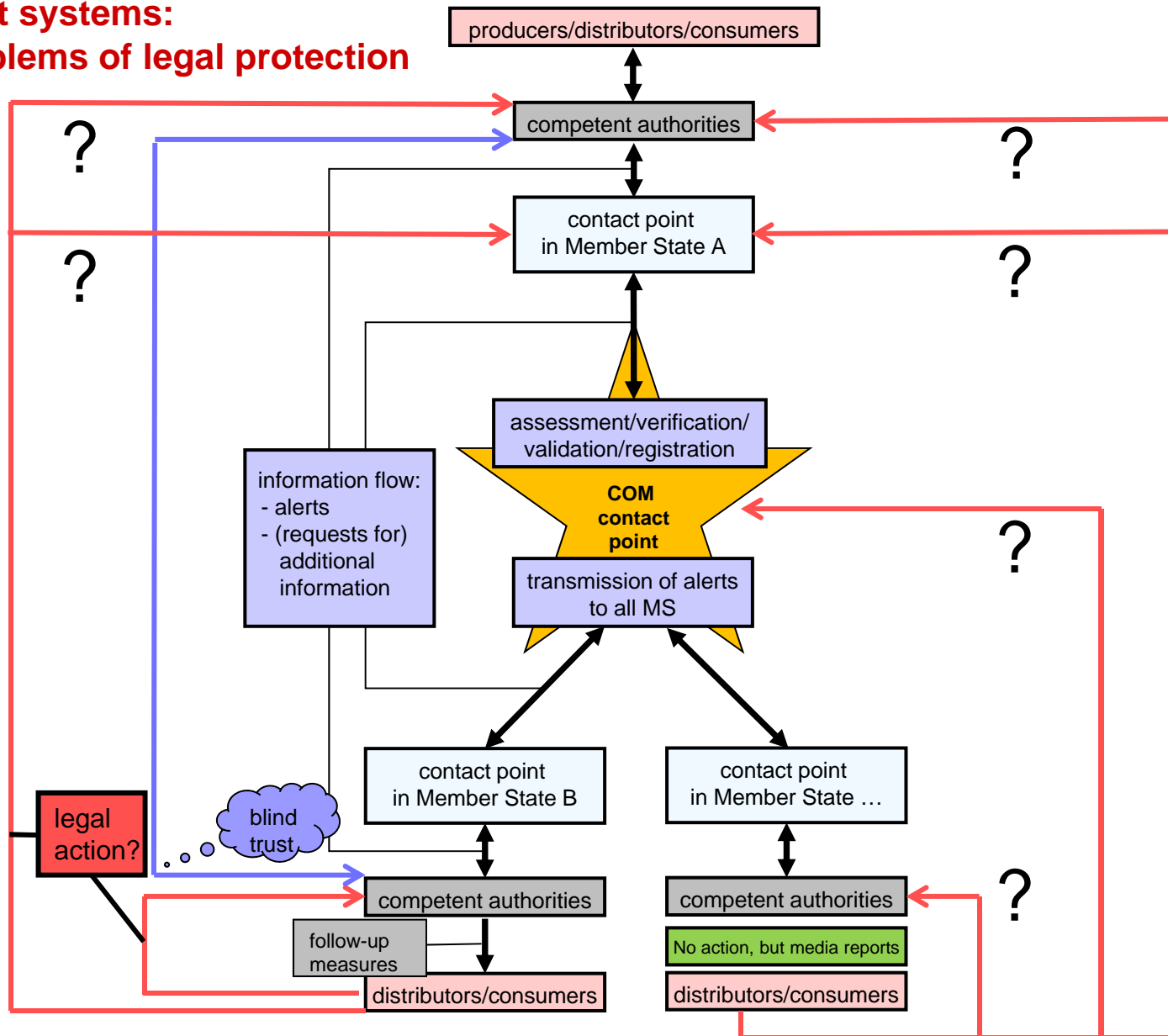
- OLAF's request for registration of an w1-warning in the EWS as an reviewable act under Art 263 TFEU
 - See EGC (2011) T-320/09 (Planet)
 - warning has adverse legal effects which must be reviewable under the rule of law
 - warning is the result of a discrete administrative procedure and not only a preparatory act

- No liability for Commission's distribution of MS-RASFF alerts
 - See CFI (2004) T-177/02 (Malagutti) concerning RASFF 1992
 - No COM liability for Island's restrictive measures
 - No COM liability for NL's (wrongful?) RASFF-information

- No COM liability for interadministrative statements concerning a MS RASFF notification, but ...
 - See CFI (2009) T-212/06 (Bowland Dairy) concerning RASFF 2002

- Legal protection on MS level against RASFF notifications?
 - German case law
 - no (successfull) action for annullment of notifications?
 - instead legal protection against publication of the allert / follow-up measures
 - (justifying) relevance of alerts in legal actions against follow-up measures?
 - eventual ACA-Europe cooperation project with ReNEUAL

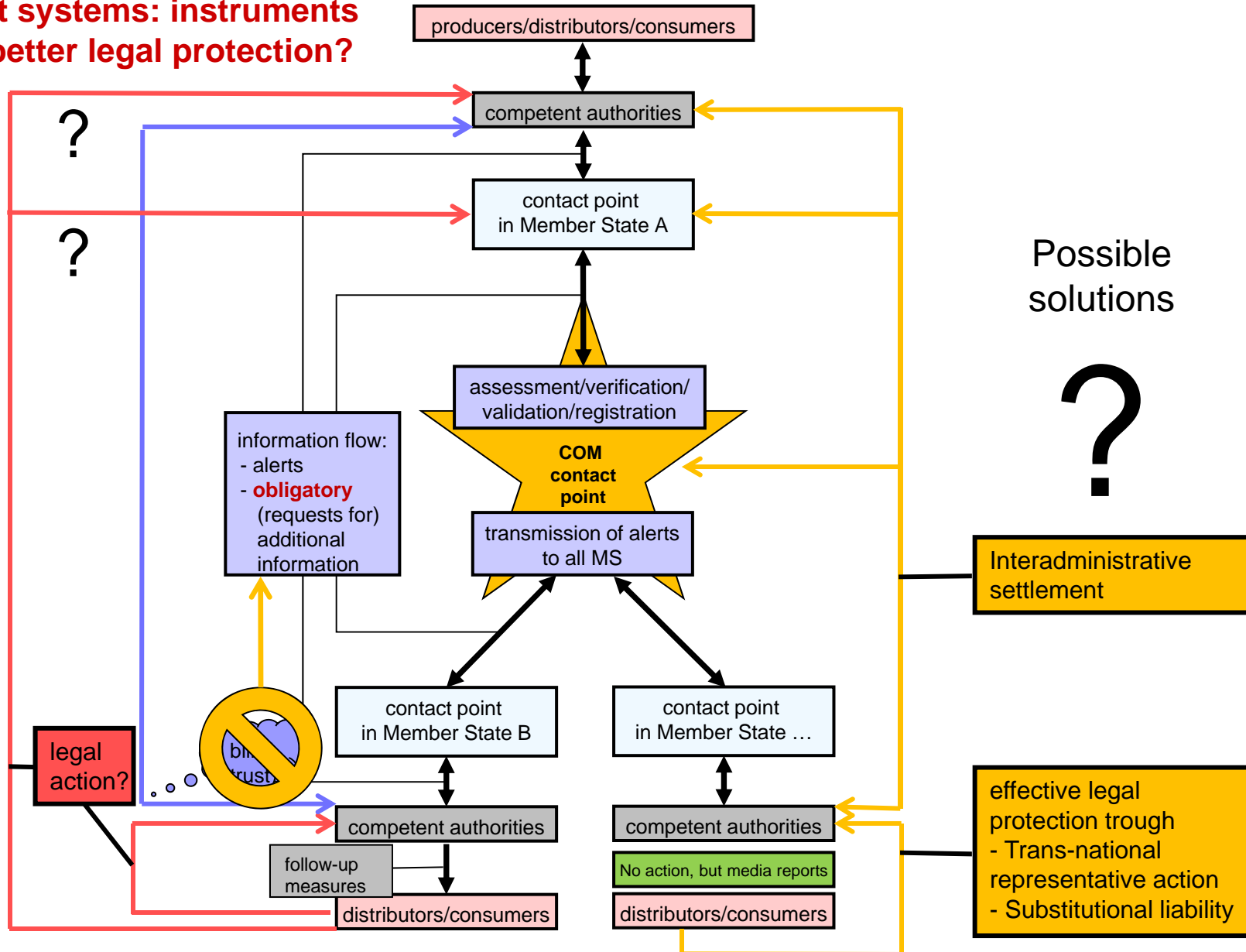
**Alert systems:
problems of legal protection**



Preliminary evaluation of the legal infrastructure for EU alert systems: Legal arrangements for (potentially) effective legal protection

- Administrative duties to control quality of data distributed through information systems
 - See ECJ, C-503/03, ECR 2006, I-1097 concerning the SIS I, arguing with
 - EU freedom of movement + defects in SIS I updating procedures + SIRENE offices as an organizational arrangement fostering interadministrative control duties
 - Now: Art. 25 SIS II Regulation 1987/2006
- Trans-national representative action
 - Art 111 Convention implementing the Schengen Agreement
 - See VG Wiesbaden (2010): adjusting national administrative procedural law to SIS network arrangements under Art. 106 II, 111 Convention ...
- Substitutional liability
 - Art 116 Convention implementing the Schengen Agreement

Alert systems: instruments for better legal protection?



Next steps

- Collecting further materials at EU level
 - Materials on new issues, esp. ongoing data protection reform
 - Internal guidelines etc. (institutions, bodies, DGs, agencies)

- Comprehensive evaluation of the status quo
 - Summary of issues/principles and rules (*'bottom up'*)
 - See above: Outline of basic structures of EU info systems
 - Checking with relevant EU law principles (*'top down'*)
 - Broadening the scope by analyzing additional info systems
 - Comparative analysis (selection of legal systems)

- Enhanced involvement of practitioners

- Drafting statements, if any
 - On scope of general principles for information management
 - Principles and rules specific to alert mechanisms, ...?