

## **Draft recommendation of the European Ombudsman in his own-initiative inquiry into case OI/3/2008/FOR against the European Commission**

Recommendation

**Case** OI/3/2008/FOR - **Opened on** 29/10/2008 - **Recommendation on** 18/07/2012 -

**Decision on** 06/07/2012

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

### **The background to the own-initiative inquiry**

1. The European Commission's Early Warning System ('EWS') is a computerised information system operated by the European Commission which seeks to identify " *threats* " to the EU's financial interests and reputation [2] . For example, the EWS allows Commission staff involved in tender procedures to check whether any tenderers are suspected of fraud. The original rules on the EWS [3] were repealed immediately after the commencement of the present inquiry by the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies [4] . The present inquiry thus takes into account the modifications included in the Commission Decision of 16 December 2008.
2. The EWS has five main categories of warning, from W1 to W5. It contains the name of the physical or legal person subject to a warning (in this draft recommendation, the Ombudsman will refer only to " *persons* ", except where it is necessary to distinguish between physical and legal persons), the type of warning and the reasons why the warning was put in place. If appropriate, the duration of the warning is included. Finally, the name of a " *contact person* " for that warning within the institutions is included. The Commission's accounting officer and his/her staff administer the EWS, that is, they add and remove data from the EWS on request.
3. A W1 warning is made where there are " *sufficient reasons* " to believe that " *findings* " of fraud, serious administrative errors or other irregularities will be recorded in the future in relation to a person. There are various sub-categories of a W1 warning. A W1a warning is made by OLAF at an early stage of an OLAF investigation, where there are " *sufficient reasons* " to believe that " *findings* " of fraud, serious administrative errors or other irregularities will be recorded in the future in relation to a person. A W1b warning is made by OLAF, or by an internal auditor, during an investigation where there are " *sufficient reasons* " to believe that " *final*



*findings* " of fraud, serious administrative errors or other irregularities will be recorded in the future in relation to a person. A W1c warning applies where investigations of the Court of Auditors, or any other audit or investigation made under its responsibility or brought to its attention give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in relation to a person. A W1d warning applies where a candidate, tenderer or an applicant has been excluded from the award of a contract or grant in a given procedure in accordance with points (a) or (b) of Article 94 [5] of the Financial Regulation [6] .

4. A W1 warning remains active for a maximum of six months, after which it is deactivated automatically. If it is adjudged that an alert in the EWS needs to be maintained after this six-month period, and the W1 warning will not be replaced with another type of EWS warning within the initial six-month period, then a new request for a W1 warning shall be made.

5. A W2 warning is made in relation to a person where "*findings* " of serious administrative errors or fraud are made by OLAF, by an Internal Audit Service, or by the European Court of Auditors in relation to that person. A W2 warning shall remain active for a maximum of six months, after which it will be deactivated automatically. If the warning in the EWS needs to be maintained and will not be replaced with another type of warning within this period, a new request for a W2 shall be made.

6. There are two sub-categories of W3 warning: W3a warnings and W3b warnings. A W3a warning is made when an EU institution receives a notification of an attachment order [7] relating to a person. A W3b warning is made when an EU institution receives information that the person is subject to "*judicial proceedings* " for serious administrative errors or fraud. A W3a warning remains active until the attachment order is lifted. A W3b warning remains active until a judgment having the force of *res judicata* is rendered, or until the case has been otherwise settled.

7. A W4 warning is made in relation to a person that is subject to a recovery order issued by an EU institution or body provided the recovery order exceeds a certain amount and provided the payment is "*significantly overdue* " [8] .

8. There are two sub-categories of W5 warning: W5a warnings and W5b warnings.

9. A W5a warning is made in relation to a person where that person is in one of the situations listed under Article 93 of the Financial Regulation, or where the said person was excluded from contracts or grants financed by the EU's budget, in accordance with Articles 96 and 114(3) of the Financial Regulation.

10. Article 93 of the Financial Regulation reads as follows:

" 1. *Candidates or tenderers shall be excluded from participation in a procurement procedure if:*

(a) *they are bankrupt or being wound up, are having their affairs administered by the courts,*



*have entered into an arrangement with creditors, have suspended business activities, are the subject of proceedings concerning those matters, or are in any analogous situation arising from a similar procedure provided for in national legislation or regulations;*

*(b) they have been convicted of an offence concerning their professional conduct by a judgment which has the force of res judicata;*

*(c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify;*

*(d) they have not fulfilled obligations relating to the payment of social security contributions or the payment of taxes in accordance with the legal provisions of the country in which they are established or with those of the country of the contracting authority or those of the country where the contract is to be performed;*

*(e) they have been the subject of a judgment which has the force of res judicata for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests;*

*(f) following another procurement procedure or grant award procedure financed by the Community budget, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations.*

*2. Candidates or tenderers must certify that they are not in one of the situations listed in paragraph 1. "*

**11.** Whenever it is envisaged to make a W5a warning under points (a), (b), (c), (d) and (e) of Article 93(1) of the Financial Regulation, the person concerned is given the opportunity to express his/her/its views in writing. The EWS Decision states that, in order to protect the Union's financial interests, a provisional registration of an exclusion warning under W5a may, however, be made before having given the person concerned the opportunity to express his/her/its views (alternatively, a W2 warning may be made). If, at any stage, there is an intention to launch the procedure pursuant to Article 96 of the Financial Regulation [9] , the person concerned must always be given the opportunity to express his/her/its views in writing.

**12.** 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.

**13.** A W5b warning is entered in the EWS where a person has been listed in accordance with a Council Regulation imposing financial restrictions relating to the Common Foreign and Security Policy (CFSP). An EU institution is therefore prohibited from making funds and economic resources available to that person. Any person listed in accordance with a Council Regulation imposing CFSP-related financial restrictions shall be registered under W5b as long as the designation of this person remains valid.



**14.** As regards the effects of EWS warnings, the EWS Decision states that a W1 warning is "*for information purposes only*" and "*may entail no consequence other than reinforced monitoring measures*" [10] .

**15.** Where a W2, W3b (judicial proceedings) or W4 (recovery orders) warning is registered, the evaluation committee for the award of the contract or grant concerned is informed of the existence of such a warning in so far as the existence of such a warning constitutes a new element to be examined in connection with the selection criteria for that contract or grant. This information must be taken into account, in particular if the person registered in the EWS were to head the list drawn up by the evaluation committee. If the person for which a W2, W3b or W4 warning has been registered heads the list drawn up by the evaluation committee, one of the following decisions must be taken:

(a) the contract or grant may be awarded to the person despite registration in the EWS. Reinforced monitoring measures must then be taken;

(b) where the existence of such a warning objectively calls into question the initial assessment of compliance with the selection and award criteria, the contract or grant will be awarded to another tenderer or applicant on the basis of an assessment of compliance with the selection and award criteria. The decision must be duly justified;

(c) the procedure is closed without awarding any contract. The decision must be duly justified.

When choosing which of the above decisions to take, the evaluation committee must take account of the obligation to protect the Union'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 the contract or grant has to be implemented.

**16.** 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, one or more of the following actions may be taken 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:

(a) proceed with the execution of the contract or grant, under prescribed reinforced monitoring measures;

(b) suspend the time limit for payments 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) suspend performance of the contract or grant;



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

**17.** Where a person is subject to a W3a warning (corresponding to a preventive attachment order), all payments are suspended pending a final judicial ruling on the creditor's claim. Where the preventive attachment order is limited to a specific sum according to a judgment ("*cantonnement*"), the Commission's accounting officer shall suspend payments up to that amount. Where a person is subject to a W3a warning corresponding to an enforceable attachment order, the payment initially payable by the Commission or the executive agency shall be executed for the benefit of the attaching party, up to the amount attached.

**18.** A person subject to a W5 warning must be excluded 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.

**19.** Where a W5a warning affects contracts or grants which have already been signed, the following action shall be taken 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) suspend payments for the purpose of verification, then execute payments actually due or recover any amounts unduly paid (if possible, by offsetting with any payment due);

(ii) terminate the contract or grant.

**20.** For W5b warnings (relating to CFSP-related financial restrictions), the following rules apply:

(i) 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;

(ii) 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.

**21.** Access to EWS is restricted to authorised users only. The information contained in the system may not normally be disclosed to third parties.

**22.** Article 8 of the EWS Decision was introduced in order to ensure the respect of data protection rules. It states that in calls for tender, calls for proposals, or before awarding contracts or grants, physical persons must be informed that the data concerning them may be included on the EWS. They must also be informed of the persons to whom the data may be communicated. Physical persons must be informed of the request for activation, updating and removal of any exclusion warning (W5a warning) directly concerning him/her and state the reasons thereof. The Commission will respond to requests from physical persons to rectify inaccurate or incomplete personal data and to any other requests or questions from those subjects. In addition to these reporting requirements, any physical person may request



information on whether he/she is registered in the EWS. Subject to a decision on whether restrictions laid down in Article 20(1) of Regulation 45/2001 apply, the Commission shall inform the person whether he/she is registered in the EWS and attach the data stored in the EWS concerning that person.

**23.** Removed warnings shall be accessible for audit and investigation purposes only and shall not be visible to the users of the EWS. Personal data contained in warnings referring to physical persons shall remain accessible for such purposes only for five years after the removal of the warning.

**24.** Legal persons, such as companies, NGOs, and universities, may be informed about W5a warnings concerning them provided they make an official written request. Legal persons are not informed about other warnings.

## **The subject matter of the inquiry**

**25.** In his letter opening his own-initiative inquiry, the Ombudsman asked the Commission to provide answers to the following:

1. What does the Commission consider to be the legal basis for the issuance of W1 to W4 warnings? Please justify the answer.
2. Please provide information as to the number of persons that were present on the EWS under each of the various levels of EWS warnings for each of the following calendar years: 2004, 2005, 2006 and 2007. Please indicate how many of these persons spontaneously contacted the Commission to request that it confirm whether they were actually on the EWS.
3. The Ombudsman understands that full access to the EWS is limited to a defined category of authorised users of the EWS. Despite this restricted access, does the Commission consider that it is possible for the reputation of the persons included on the EWS to be negatively affected within the Commission, and within the other institutions and bodies, as a result of being placed on the EWS? When answering this question, can the Commission bear in mind that evaluation committees may also be informed that an entity is on the EWS.
4. Can the Commission explain how it would deal with an appeal from a person challenging its inclusion on the EWS? Can the Commission explain how its proposed means of dealing with such a challenge would comply with principles of independence and fairness? Can the Commission explain how its present system complies with Article 16 of the European Code of Good Administrative Behaviour (Right to be heard and to make statements) and Article 133 bis (1) and 134 bis (3) of Implementing Rules to the Financial Regulation. Please provide an answer as regards W5 warnings and W1 to W4 warnings.
5. When an entity is subject to a warning under W2-W5, the accounting officer must preventively suspend any payment to that entity. Can the Commission confirm whether there are instances



when this procedure results in delays in making payments which exceed the limits set out in Article 106 of Commission Regulation 2342/2002? Can the Commission confirm whether the person in question would be informed that the delay has resulted from the fact that its name appears on the EWS under a W2-W5 warning.

6. The original EWS Decision stated that, where a W2, W3b or W4 warning is in effect at the time the authorising officer consults the EWS prior to making an individual budgetary commitment in the framework of a tender procedure, he shall bring that information to the attention of the evaluation committee in so far as that information constitutes, in connection with the selection criteria, a new element to be examined with regard to the tenderer/applicant's economic, financial, technical and professional capacity. It also states that, in any event, the authorising officer must take this information into account, if the person entered in the EWS were to head the list drawn up by the evaluation committee. Can the Commission confirm that the tenderer/applicant is informed when such information is brought to the attention of an evaluation committee or taken into account by the authorising officer? Is the fact that this information was brought to its attention mentioned in the report of the evaluation committee?

7. In the event that a person for which a W2, W3b or W4 warning has been entered heads the list drawn up by the evaluation committee, the authorising officer takes a "*duly substantiated*" decision to award the contract/grant to another tenderer/applicant or to close the procedure without awarding any contract. Can the Commission confirm whether tenderers/applicants are informed of the precise reasons why they were not awarded the tender/grant (or why the procedure was closed), including the fact that they were on the EWS? Can the Commission explain how, in its view, its policy complies with Articles 100 and 101 of the Financial Regulation and Article 149 of the Implementing Rules to the Financial Regulation?

8. A W5 warning blocks all budgetary commitments to the person concerned so long as this warning remains active. Please justify how a person concerned can effectively exercise its legitimate rights of defence, by, for example, providing evidence that he/she/it is not in fact bankrupt. What, precisely, are the mechanisms for appealing a W5 warning?

9. The Ombudsman understands that a recent Draft Regulation of the Commission, which will deal with W5 warnings, will allow interested persons to make requests to rectify inaccurate or incomplete personal data. Can the Commission confirm that other inaccuracies or omissions in relation to W5 warnings, such as errors or omissions in relation to whether a person is bankrupt, which might be identified by an interested party in relation to a W5 warning, but which do not concern personal data, will also be rectified once the Commission has been informed of such errors or omissions?

10. The Ombudsman understands that the Commission has introduced a modification to the 2007 version of the EWS Decision. Article 15a now states that "[w] *here 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. Where the preventive attachment order is limited to a specific sum, the accounting officer shall suspend payments up to that amount*". The underlined text appears to be new compared





to previous versions of the EWS Decision. Thus, it appears that, contrary to certain statements made in Case 2468/2004/OV, the Commission now explicitly agrees that payments which exceed the amount set out in a " *contained* " attachment order can be made. However, the 2007 version does not state that W3a warnings will be discontinued once the specific sum set out in the contained attachment order has been blocked by the Commission. Can the Commission provide a justification, in terms of protecting the financial interests of the Union, as regards the necessity of maintaining the W3a warning once an attachment order has been contained and the specific sum set out in the contained attachment order has been blocked? Does the Commission agree there may be situations where the entity in question does not represent a threat to the Union's financial interests and reputation despite the fact that an attachment order is issued in relation thereto by a national court?

## The inquiry

**26.** The Ombudsman opened his inquiry on 29 October 2008. On 27 February 2009, the Ombudsman received the opinion of the Commission. This opinion was then made public on the website of the European Ombudsman with a request for the public to provide comments. The Ombudsman received a number of submissions from the public until September 2009.

## The Ombudsman's analysis and conclusions

### Arguments presented to the Ombudsman

**27.** In its opinion to the Ombudsman the Commission first declared that the EWS is an internal tool of the Commission which is necessary for the protection of the financial interests of the Union. It then set out to answer the ten questions posed by the Ombudsman in his inquiry.

**28.** As regards the legal basis for W1 to W4 warnings, the Commission considers that the legal basis is Article 317 of the Treaty on the Functioning of the European Union (TFEU) and Article 27 of the Financial Regulation, which require the Commission to respect the principle of sound financial management when implementing the general budget of the European Union. It went on to state that the purpose of the EWS warnings is to inform the various services of the Commission and the executive agencies that a person with whom the Commission has or is likely to have financial relations, is affected by a warning. It referred to persons that:

- are suspected of having committed fraud or serious administrative errors (W1, W2 and W3b warnings);
- are subject to an attachment order [11] (W3a warnings);
- are subject to significant recovery orders [12] issued by the Commission on which payment is significantly overdue [13] (W4 warnings);





**29.** As regards the number of persons registered in the EWS from 2004 to 2007, the Commission provided information concerning 2005 to 2008, as included in the following table [14] .

**Situation as of 31-12-2005**

**Situation as of 31-12-2006**

**Situation as of 31-12-2007**

**Situation as of 31-12-2008**

**W1**

2

9

19

32

**W2**

7

29

37

43

**W3**

31 (W3a: 12 + W3b: 19)

44 (W3a: 11 + W3(b): 33)

95 (W3a: 18 + W3b: 77)

133 (W3a: 18 + W3b: 115)

**W4**

9



548

565

659

719

**W5**

65 W5a

88 W5a

100 W5a

130 W5a (+5798 W5b)

**Total**

653

735

910

1057 (+5798 W5b)

Apart from 2008, when there were a large number of W5b warnings, more than two thirds of the warnings were W4 warnings. As regards the number of registered companies that spontaneously contacted the Commission requesting confirmation as to whether they were registered in the EWS, the Commission noted that the EWS is an internal tool. Thus, registrations in the EWS are not publicised. In addition, confirmation of a registration was possible (and in any event not mandatory) for W5a warnings only, which correspond to exclusion situations preventing the Commission from awarding a procurement contract or a grant to the person subject to a warning. Finally, the Commission did not establish a register of such formal requests which, in any event, were scarce from 2004 to 2008 (no more than three demands). It went on to say that if such confirmation requests were to increase, such a register could be established. As from 2009, the transparency of the EWS and of the registered warnings was increased. In particular, in addition to the publication in the Official Journal of the new EWS Decision, third parties are now systematically informed in the calls for tender and in the calls for proposals that data concerning them may be included in the EWS; third parties subject to W5a warnings are systematically informed of any activation, updating and removal of the exclusion warnings, and of the reasons for the warnings; a natural person may request information from the Commission's accounting officer on whether he/she is subject to W1 to W4



warnings.

**30.** As regards the issue of whether inclusion on the EWS may negatively affect the reputation of a person, the Commission argued that the purpose or effect of the EWS is not to have negative effects, within the Commission and executive agencies (and within the other institutions and bodies as regards W5a warnings), on the reputation of the persons subject to a warning. The EWS aims to share information about objective situations concerning persons with whom the Commission and executive agencies (and the other institutions and bodies as regards W5a warnings) have or are likely to have financial relations; to indicate appropriate precautionary measures to be taken by the Commission's services and executive agencies (and the other institutions and bodies as regards W5a warnings) in accordance with sound financial management and the specific provisions of relevant community legislation, in particular the Financial Regulation.

**31.** In addition, access to the EWS is restricted to a defined category of authorised users, who have to keep the information confidential. Among these authorised users are the evaluation committees, which obtain information on W2, W3b and W4 warnings only. These evaluation committees are "authorised users" only in so far as the warning constitutes a new element to be examined with regard to the tenderer or applicant's economic, financial, technical and professional capacity. Informing the evaluation committees in such cases is of particular relevance, since these committees are specifically entrusted with assessing the economic, financial, technical and professional capacity of tenderers or applicants. The economic, financial, technical and professional capacity of a tenderer or applicant can be altered if the tenderer or applicant is a very bad debtor (W4 warnings) or is suspected of fraud or serious administrative errors (W2 and W3b warnings).

**32.** As regards rights of appeal and defence, the Commission stated that no formal " *appeal* " from a person challenging its inclusion in the EWS has been referred to up to the end of 2008. In case of such a challenge, the Commission stated that it would consider the arguments put forward by the person with the greatest care, and in full independence and fairness. In particular, the Commission shall consider any proven modification of the objective situation of the person, such as the fact that the person is no longer suspected of fraud or serious administrative errors (W1, W2 and W3b warnings); or that the person is no longer subject to an attachment order preventing it/he/she from being paid directly (W3a warnings); or that the person finally paid its/his/her debt towards the Commission (W4 warnings); or that the person is no longer in an exclusion situation (W5a warnings) because, for instance, the person has paid its social security contributions and taxes; or that the person is no longer listed on a Council Regulation imposing financial restrictions (W5b warnings) related to Common Foreign Security Policy.. In light of the results thereof, the Commission asserted that it would proceed to make the necessary adjustments in the EWS. It stated that provisions to this effect had recently been introduced in the rules governing the EWS. The Commission then referred to Article 8 of the Commission Decision of 16 December 2008 on the EWS, and in particular to Article 8(2) thereof, which states that "[t] he 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 ". It went on to state that its services " 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".*

**33.** As regards rights of appeal and defence, the Commission stressed that, in its view, warnings W1 to W4 do not as such adversely affect the rights or interests of the persons subject to a warning. Only W5a warnings, which correspond to exclusion situations, require that procurement contracts or grants must not be granted during the period of exclusion of the persons subject to a warning. However, this requirement results more from the decision of exclusion itself than from the warning. In these cases of exclusion, not only is the person concerned informed of the decision to exclude him/her, but, furthermore, a proper contradictory procedure is carried out as provided in Article 133a(l) of the Implementing Rules of the Financial Regulation. Therefore, a person will never be excluded from a procurement contract or a grant without first being offered the possibility to answer to the Commission's written and detailed arguments.

**34.** In the Commission's view, the above system complies with Article 16 of the European Code of Good Administrative Behaviour [15] and with the principle of the right of defence. In any event, apart from complaining to the Ombudsman in case of maladministration, the person may submit the Commission's exclusion decision to judicial review.

**35.** As regards delays in payment, the Commission could not totally exclude that, in very few instances, the procedure of preventive suspension of any payment to a person flagged under W2-W5 warnings could result in delays in making payments which exceed the time-limits set out in Article 106 of the Implementing Rules of the Financial Regulation. However, the services of the Commission Accounting Officer closely monitor the procedure of preventive suspension of payment, reminding the Commission's authorising officers concerned that they have to check and rapidly confirm whether the suspended payment has to be made or not. In more than 95% of the cases, suspension of payment has not led to late payment. Should a payment be late, interest above a threshold of EUR 200 will be automatically paid. Should a delay in payment occur because of his/her preventive suspension, the person concerned must be informed of the time-limit for the suspension of the payment, in accordance with Article 106(4) of the Implementing Rules of the Financial Regulation. The person will not be informed in principle that he/she is registered in the EWS. The Commission justified this by stating that such information is, in principle, purely internal (except for W5a warnings as of 2009).

**36.** As to whether a tenderer/applicant is informed when W2, W3b or W4 warnings are brought to the attention of an evaluation committee or taken into account by the authorising officer, the Commission stated that the tenderer or candidate is not informed when a W2, W3b or W4 warning is brought to the attention of an evaluation committee or taken into account by the authorising officer, if the third party entered in the EWS were to head the list drawn up by the evaluation committee. The information contained in the warning has to be mentioned in the report of the evaluation committee in so far as this information impacts the assessment of the economic, financial, technical and professional capacity of the tenderer or candidate made by the evaluation committee.



**37.** As regards whether tenderers/applicants are informed of the precise reasons why they were not awarded the tender/grant (or why the procedure was closed), including the fact that they were on the EWS, the Commission stated that, according to Article 14(2) of the EWS Decision, in the event that the person for which a W2, W3b or W4 warning has been entered heads the list drawn up by the evaluation committee, the authorising officer shall decide either to award the contract/grant to the flagged person, or, where that new information objectively calls into question the initial assessment of compliance with the selection and award criteria, take a duly substantiated decision to award the contract/grant to another tenderer/applicant on the basis of an assessment of compliance with the selection and award criteria differing from that of the selection committee, or else to close the procedure without awarding any contract and justify this closure in the information given to the tenderer. The Commission argued that this is in line with Articles 100 and 101 of the Financial Regulation and Article 149 of its Implementing Rules, which, in case of procurement, make the authorising officer responsible for deciding to whom the contract is to be awarded, in compliance with the selection and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules and oblige him to deviate from the evaluation committee's conclusions when the committee did not take relevant information into account. It also requires the Commission to inform tenderers or candidates whose applications or tenders have been rejected of the grounds upon which the decision was taken. In addition, it requires the Commission to inform the tenderers or candidates of the grounds for any decision not to award a contract. These grounds will include the possible impact of information contained in the W2, W3b or W4 warnings, but not the warning itself.

**38.** As regards rights of appeal and defence in case of a W5a warning, the Commission noted that the Ombudsman asks the Commission to justify how a person can effectively exercise its legitimate rights of defence (by, for example, providing evidence that it is not in fact bankrupt), as a W5 warning blocks all budgetary commitments to the person concerned. The Commission noted that the Ombudsman also asks the Commission what precisely are the mechanisms for appealing a W5 warning. The Commission limited itself to stating that it has already answered these questions when answering the more general question of how inclusion in the EWS can be challenged.

**39.** As regards the right of rectification in relation to W5a warnings, the Commission stated that inaccuracies or omissions in relation to W5a warnings, such as errors or omissions as to whether a person is bankrupt, which might be identified by an interested party in relation to a W5a warning, will also be rectified, once the Commission has been informed of such errors or omissions. In particular, the EWS Decision provides that, where certifications and evidence obtained by a Commission service on the occasion of an award procedure are not consistent with an activated W5a warning, the service concerned shall immediately inform the service responsible for the warning, so that deactivation may be effected.

**40.** As regards attachment orders, the Commission clarified the rules in Article 19(1) of the new Commission Decision on the EWS of 16 December 2008. It stated that, where a person 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 (known as a "*cantonnement*"), the accounting officer shall suspend payments up to that amount. The Commission went on to state that the rule is that a W3a warning entails the suspension of all payments to the person who is the subject of the preventive attachment order, until a final judgment has been delivered by the competent court on the principal creditor's claim, only if the national law applicable requires such total suspension. However, where the preventive attachment order is limited to a specific sum according to a "*cantonnement*" procedure organised in strict accordance with the national law applicable, only that amount shall be suspended. If the national law applicable is not strictly complied with, the Commission stated that it may be required to pay the third party's creditor a second time, which would certainly be contrary to sound financial management.

**41.** The Commission also provided a brief explanation of Belgian rules governing attachment orders (known as "*saisies-arrêts*" in French). Under Belgian law, such "*saisies-arrêts conservatoires*" imply, when they are communicated to the Commission as a debtor of a third party, that the Commission cannot pay the third party and must keep the necessary sums in its possession. Put otherwise, it must not pay its debt as long as a final judgment does not indicate to the Commission to whom the payment must be made (either to the third party or to a creditor of the third party). If the Commission were to pay the third party in spite of the attachment order, the Commission could be obliged to pay a second time in favour of the third party's creditor. The suspension of payment must cover the Commission's whole debt towards the third party, even if the third party's debt towards its creditor is inferior. The only method of avoiding such total suspension of payment is for the third party to proceed by virtue of a special procedure called "*cantonnement*", which limits the amounts that are subject to "*saisies-arrêts*". This "*cantonnement*" must be organised in accordance with specific rules.

**42.** The Commission noted that French law provides for a "*saisie-arrêt exécutoire*" (an "*enforceable attachment order*"). This attachment order implies that, when the Commission has a debt towards a third party, the Commission cannot pay the third party directly. Rather, it has to pay the third party's creditor, unless the Protocol on Privileges and Immunities can be invoked.

## **Comments from third parties following the public consultation**

**43.** A number of interested parties submitted comments to the Ombudsman in relation to his own-initiative inquiry. The comments can be summarised as follows.

**44.** In its capacity as an independent office conducting administrative investigations, the European Anti-Fraud Office (OLAF) provided its contribution to the public consultation on the Commission's Early Warning System.

**45.** It stated that fraud, corruption and other illegal activities affecting the European Union's financial interests exploit weaknesses in or circumvent the processes in place for managing and controlling EU funds. In order to safeguard the interests of the taxpayers, it is of the utmost



importance to prevent fraud and corruption in all sectors of the EU budget.

**46.** OLAF readily supports the right of individuals and organisations to be treated fairly, with due respect for the principle of the presumption of innocence. OLAF respects and attributes the utmost importance to the interests and rights of individuals and companies while pursuing its mandate, which is the protection of the financial interests of the Communities.

**47.** Since the entry into force of the revised EWS decision, all persons that have dealings with the Commission are informed in advance that the information they supply might be used for the Early Warning System if the circumstances justify the inclusion of such information. Furthermore, the EWS decision is published in the Official Journal.

**48.** In conformity with its mission, OLAF is convinced that the EWS constitutes an important financial management tool for preventing fraud and irregularities. It is very important that OLAF can, at an early stage of its investigations, use the EWS to share certain operational findings, with the authorising officers of the Commission. It stated that, once public money is disbursed, it is often difficult or even impossible to recover funds should irregularities or fraud occur (for example, because the entity responsible for the irregularities or fraud was dissolved or went bankrupt). It is therefore essential to inform that the Commission services responsible for disbursements so that they can verify the correctness of payments before the payments are made.

**49.** OLAF stressed that the EWS is the only tool available to circulate information on persons that represent a risk for the financial interests of the EU. For the Commission departments and the executive agencies, it constitutes an important risk management instrument.

**50.** It stated that a case investigated by OLAF may concern only a single contract with a specific Directorate-General, whereas the same contractor may have other contracts with another Directorate-General. Experience shows that certain fraudsters operate according to fraud patterns ("*modi operandi*").

**51.** As regards the importance of category W1a and W1b warnings, OLAF stated that, in the investigative stage of a case, it requests this warning if there is enough reason to believe that serious irregularities or fraud might have taken place. The OLAF warning is based on objective elements of suspicion. The warning recommends that the services responsible for disbursements should practise reinforced monitoring to ensure that the money is spent in accordance with what it is intended for.

**52.** Such warnings, and in particular warnings of level W1a, are usually requested before the persons concerned have heard or have even become aware of the ongoing OLAF investigation. It stated that out of OLAF's 261 cases in active investigation in the sectors concerned (in particular, external aid and direct expenditure) by the EWS on 1 June 2009, 18 persons were flagged in this category. It is clear from this statistic that OLAF does not light-heartedly request warnings for persons in this situation but does so only where it identifies serious indications of fraud or irregularities which might have repercussions beyond the facts investigated. In such





cases, the persons concerned constitute a risk for other Commission departments. Given that these warnings have to be renewed every six months, OLAF regularly checks whether the warning is still justified. As regards the importance of a warning in category W1a, OLAF's investigation practice respects the principle of proportionality and takes into account, whenever possible, the right to be heard.

**53.** When the investigation has been closed and OLAF has recorded findings of serious irregularities and/or fraud, it requests a warning in category W2. OLAF's 321 cases in follow-up in the sectors concerned by the EWS have again led to a limited number of warnings in category W2, namely, 33 (as of 1 June 2009).

**54.** In external investigations, which are relevant in this context, OLAF investigators enable the persons concerned to express their views, unless there are reasons to defer this hearing. Such reasons can arise when there is a need to maintain absolute secrecy for the purpose of safeguarding the investigation or when a judicial authority so requests. OLAF then establishes a final case report and draws its conclusions. In the rare cases where a decision to defer informing the person concerned is adopted, the protection of the financial interests of the EU requires that an EWS warning be made. Given that these warnings have to be renewed every six months, OLAF again regularly checks whether the warning is still justified.

**55.** As regards the importance of W3b warnings, OLAF stated that only persons that are involved in judicial proceedings can be flagged in category W3b. Out of all 582 of OLAF's cases, 98 persons had been flagged in this category by 1 June 2009. In such cases, the seriousness of the alleged wrongdoings is confirmed by a decision of the national judicial authorities to launch a criminal investigation or to indict a person on the basis of national criminal law. According to OLAF, this strongly justifies exercising additional prudence at the award and disbursement stage. OLAF closely monitors the developments with the competent national judicial authorities in the framework of its judicial follow-up and requests a deactivation of the warning once a judgment becomes final ( *res judicata* ).

**56.** OLAF stated that persons under judicial investigation are not necessarily informed thereof by the competent national authorities, given that this might conflict with the principle of judicial secrecy and be prejudicial to the conduct of the inquiry, particularly as concerns the search for evidence. Information on ongoing judicial investigations from national judicial authorities, with which OLAF has developed valuable contacts, has necessarily to be provided by these national authorities at the point in time when the prosecutor or the examining magistrate (the " *juge d'instruction* " in French) considers appropriate. It is important, OLAF stated, that the Commission departments/executive agencies be aware of the fact that national judicial authorities consider it necessary to open a judicial investigation.

**57.** As regards the importance of warning in category W5a, OLAF does not itself request warnings in this category, but considers the warnings in this category particularly important for the prevention of fraud. It provides the Commission departments with a tool that empowers them to implement the exclusions provided for in the Financial Regulation. This is particularly important as regards the exclusion of persons subject to a final judgment for fraud. Category



W5a comprises persons which are to be excluded from further award procedures, not because they are signalled in the EWS but because they are known to be subject to an exclusion situation defined in Article 93(1) of the Financial Regulation.

**58.** By way of conclusions, OLAF stated that the W1-W3 warnings do not produce any binding legal effect on the authorising officers, but allow the Commission's finance departments and the executive agencies to exercise caution before entering into contractual relations with third parties and before money leaves their bank accounts. Payments due will always be made to the persons concerned, but the extra verification operation safeguards the financial interest of the EU and consequently of the taxpayer. OLAF considers that the EWS constitutes a vital tool enabling the Commission departments to prevent fraud and to apply the principle of sound financial management. Applied in a correct manner by the Commission departments, it constitutes a well-balanced mechanism to protect the financial interests of the EU, while fully taking into account the interests of the persons concerned.

**59.** FEACO (the Fédération européenne des consultants en organisation) stated that the EWS has serious flaws and inconsistencies that require specific attention and corrections, as it may have serious implications for legal persons working for the European Institutions. FEACO concerns are related to:

(i) transparency of criteria to be listed. The reading of Article 9.1 of Decision 2008/969/EC in itself paves the way for arbitrary decisions and different interpretations;

(ii) uncertain procedures. Articles 4 and 5 of Decision 2008/969/EC are telling, since they provide no details as to the procedure and the necessary steps for the registration in the EWS. Article 4 mentions that the accounting officer " *shall adopt implementing measures* ". Article 5 provides that only the authorising officer by delegation, the Director-General or a Director may submit requests. However, the definition of an authorising officer by delegation is such that a large number of persons can be invested with this authority.

(iii) uncertain information channels and possibility of appeal. Article 8 of Decision 2008/969/EC does not specify any objection or appeal mechanism for legal persons. It notes that, although the Commission shall respond to allegations made to it, there is no external body to assess the accuracy of the allegations. There is no time-limit for the Commission's reply and, while the EWS registration can remain valid for six months (which is too long), the registration can be reintroduced.

**60.** FEOCO stated that it is necessary to have increased access to information. Legal persons should be informed before they are listed, should have access to their records by a simple registered request and should be allowed to defend themselves within a reasonable timeframe. After a thorough investigation, during which the legal persons accused of wrongdoing have been afforded the benefits of due process, the findings could be then appear on the EWS.

**61.** FEOCO also stated that it is necessary to have a right of appeal. There appears to be no appeal mechanism for levels W1, W2 or W3, and there is no arbitration mechanism. In



particular, for level W1 and W2, legal persons appear to be subject to the decision of an unspecified civil servant. There is an urgent need further to strengthen the mechanism within the Commission to ensure a fair and transparent appeal assessment.

**62.** FEOCO stated that it is necessary to remove or amend W1, W2 and W3 warnings. It stated that it is unclear how these levels are assigned, and by whom, within the Commission. Besides, the system does appear to be quite vague and thus subject to (diverse) interpretations, which should not be the case.

**63.** Specifically, as regards W1 warnings, it is unclear who decides to list companies on level W1 and what procedure has been followed to investigate/ascertain administrative errors or fraud. The system appears to be open to interpretation. FEOCO stated that it may be intended that W1 warnings do not entail any consequences other than reinforced monitoring measures. However, these reinforced monitoring measures are not defined and entail serious consequences of a financial and administrative nature.

**64.** As regards W2 warnings, it is unclear what a "*finding*" is and who decides what a "*finding*" is. It is clear that if a finding results from an OLAF or a Court of Auditors inquiry, legal grounds should exist to establish it. Otherwise, FEOCO does not note any other mechanism that protects the presumption of innocence.

**65.** As regards W3 warnings, FEOCO states that the presumption of innocence is an essential foundation of the European judicial system. It can be understood, it stated, that persons subject to judicial proceedings are listed, but the presumption of innocence calls for non-disclosure of their names until the case is closed. In addition, it states that the manner in which a W3 warning is removed is unclear.

**66.** FEACO also believes that access to the EWS is not sufficiently restricted (although the Commission suggests that a category of authorised users has been defined). FEACO calls for further restrictions on who (within the Commission) can have access to the EWS requests. Moreover, all requests for access must be documented and the use of the system should be monitored and audited regularly.

**67.** FEACO also believes that a certification mechanism should be introduced. It states that legal persons are sometimes required to form European-wide consortia to reply to tenders launched by the European Institutions. For transparency and accountability reasons, it is essential that parties to a consortium inform each other of their respective legal situation vis-à-vis the EWS. In this context, it is essential that the Commission provide a person with a EWS certification stating that the person does not fall under the only established and indisputable levels of the EWS, that is W4 and W5 warnings. Certificates should be produced by the Commission on request within 90 days from the date of the request.

**68.** Transparency International, an NGO, also submitted comments. It noted, as a general point, that public contracting is an area prone to corruption. Despite the existence of laws and regulations forbidding corruption in public contracting and other public fund-related activities,



corruption still occurs on a broad scale. Corruption frequently results in inferior quality goods and services and unnecessary purchases by public bodies. Transparency International stated that, if corruption in public contracting is not contained, it will grow.

**69.** Transparency International went on to state that due process must guide the entry and exit procedures for persons that might be on the EWS. This implies the need to establish and follow due process procedures guaranteeing that the entry into the EWS will not infringe individuals' rights.

**70.** Transparency International stated that consultation and consideration of the information contained in the EWS must be a mandatory requirement for all EU officials responsible for expenditure when managing their projects. If the EWS were expanded to EU Member States in the area of "*shared-management*", this obligation should also apply to their staff. Furthermore, both EU and Member State officials should report on the use they have made of the EWS.

**71.** Transparency International stated that the grounds and criteria for listing persons in the EWS should be clear. Implementation guidelines should be established that set criteria to assess the situations giving rise for inclusion in the EWS. In particular, these guidelines would determine the criteria by which the EU institutions can justify entries at the level of W1 to W4 warnings on the grounds of "*sufficient reasons to believe that findings of serious administrative errors and fraud are likely*". These could include, for example, a confession by someone involved in corrupt activities, reliable information by third parties and circumstantial evidence.

**72.** As a result of the aforementioned transparency principle, the provision of clear and timely information to the persons concerned regarding their inclusion on the EWS should be a "*must*".

**73.** With regard to both mandatory and discretionary exclusion from EU contracts, Transparency International stated that exclusion should extend to parent or subsidiary companies when their participation or governance structure implies their involvement and responsibility. However, exclusion should be lifted for companies and individuals who have effectively corrected the structures and behaviour that led to their being sanctioned, repaired the damage caused, have given assurances of correct behaviour for the future and have not been involved in similar cases before.

**74.** Transparency International stated that while the European Commission's Central Exclusion Database is a tool that is accessible to all operators implementing the EU's budget to check whether a person is excluded from EU funding, the EWS functions as an internal information tool of the European Commission, and only applies within the framework of funds under the direct management of the Commission. The main objective of the EWS is to assist Commission staff in identifying persons representing potential risks to the EU's financial interests. It noted that being listed in the EWS does not - except in W5 cases - lead to exclusion. Thus, warnings in the EWS that come under categories W1 to W4 constitute only pre-stages of potential future exclusion. These pre-stages are nonetheless important as they enable the Commission's services to take the necessary precautionary measures, alerting Commission's operational and financial managers so that they can pay particular attention and apply reinforced monitoring to



grant and tender procedures that involve operators that are listed in the EWS due to, for example, suspected corruption.

**75.** In Transparency International's view, the EWS offers a timely remedy that can contain damage to, and protect the integrity of, EU funds by warning Commission officials that there are existing doubts about the integrity of applicants for EU funding. This allows Commission staff to operate carefully when dealing with persons for whom judicial proceedings are pending or for whom fraud or corruption is suspected. The principle of transparency with regard to the listed persons is also to be applied in the EWS. This should happen via the notification to the persons that they have been included in the EWS. This notification should clearly state the reasons for that inclusion as well as the requirements that they should fulfil to be taken off the list.

**76.** Transparency International stated that it is, however, not sufficient for the current EWS to be only applicable to persons that benefit from funds under centralised management. Since around 80% of the EU funds - particularly agricultural and regional funds - are spent via national authorities at Member State level (shared-management), research should be carried out as regards ways of making the EWS a tool that applies to all modes under which EU funds are disbursed. Otherwise, the usefulness of the EWS remains limited.

**77.** Transparency International stated that due process must govern entry and exit procedures. Persons concerned must be given the opportunity to deny, correct or clarify the facts that underlie the accusations against them. They must also be given the right of access to an independent review mechanism.

**78.** Regarding how transparency is to be implemented, Transparency International stated that there should be a mechanism whereby the information in the EWS, including the name and address of the debarred person, the ground for sanctioning and the date and period of debarment, can be monitored, and officials can be held accountable by providing public access to the list.

**79.** Transparency International stated that discretionary exclusion should be possible when certain criteria are met. It noted that the Financial Regulation contemplates two types of exclusion: mandatory exclusion in cases where there is a final criminal conviction ( *res judicata* ) as a result of illegal behaviour; and discretionary exclusion in cases of " *grave professional misconduct* ". While both mechanisms are necessary, they vary in their degree of effectiveness. Waiting for a final criminal judgment ( *res judicata* ) would make exclusion ineffective, as court cases are rare and decisions often come only years after the criminal act. Instead, the discretionary exclusion of persons, when based on " *sufficient evidence* ", allows a much more timely and effective intervention.

**80.** With regard to discretionary exclusion, the grounds and criteria for debarment should be clear, and established and published in advance, by drawing-up implementation guidelines that set criteria to assess the situations identified as causes for exclusion. In particular, these guidelines should determine the criteria by which the contracting authority can justify the exclusion on the grounds of " *grave professional misconduct* ". These grounds could include a



confession by someone involved in corruption, reliable information by third parties, circumstantial evidence, as well as evidence and convictions emerging in a court of law of a member and/or non-member country.

**81.** As regards exclusion as an effective tool to curb corruption, Transparency International states that the exclusion of corrupt persons, as one of several possible tools for preventive action, has become an important tool in containing corruption on its supply side. Although it is a form of administrative and not of criminal sanction, it has an important preventive effect. It is often more effective than other approaches. There are various reasons to explain its impact. Exclusion creates a proportionate deterrent effect that successfully dissuades potential wrongdoers. While it is difficult to measure exactly how many cases have been prevented so far, Transparency International states that business people have confirmed its effectiveness. The power of its dissuasive effect is derived from its direct influence on the economic incentives relating to corrupt activities and from the certainty of its application. Since it imposes sanctions where their impact is greatest, that is in the market, it raises the stakes for those doing business in ways that are not consistent with the law and public trust.

**82.** Transparency International stated that corruption thrives in obscurity and spreads when there is impunity. Unfortunately, as Transparency International stated, investigations of corruption cases (as is true for many other crimes) take too long. Exclusion can and should be structured as a timely remedy that can contain damage to, and protect the integrity of, public funds, by keeping corrupt operators away from public contracts.

**83.** According to Transparency International, exclusion alone will not create clean markets but it is a highly effective complement to other preventive and repressive actions.

**84.** Comments were received from various law firms. CMS De Backer stated the following:

- It argued that the decision to place a person on the EWS could be arbitrary. The requests of the services of the Commission to place a person on the EWS are not subject to any form of prior or *ex-post* control.
- W1, W2 and W3 warnings refer to "*serious administrative errors*". However, the concept of a "*serious administrative error*" is not defined in the EWS Decision.
- Persons are not informed before EWS warnings are made against them, even though such warnings may adversely affect them.
- As regards the Commission's view that there has been an improvement of transparency since the adoption of the new EWS Decision, CMS DeBacker argued that this improvement was marginal. A registration on the EWS does not give rise to any positive obligation on the part of the Commission to inform the person, irrespective of the type of warning concerned (given that the right to be informed of a registration only applies as regards physical persons and does not apply as regards legal persons).
- Even though the purpose of the EWS is not to affect negatively the reputation of persons placed on the EWS, this is not what happens in practice. CMS DeBacker argued that users of the EWS do not, in practise, protect the confidentiality of the information on the EWS. CMS DeBacker insisted that information in relation to who is on the EWS does indeed circulate beyond authorised persons. This is disastrous for the persons who are the subject of the EWS





warning. It added that competitors of companies that are known to be on the EWS take advantage of this situation, for example, by informing national authorities or other companies who might wish to form a consortium with the company on the EWS.

- As regards the right to appeal, CMS DeBacker noted the Commission's statement that no "*formal appeal*" had been made until the end of 2008 against a decision placing a person on the EWS. It noted that the Commission did not state to whom an administrative appeal should be addressed. If such an appeal were to be addressed to the service that places the EWS warning, questions would arise as regards the objectivity of the appeal process. If such an appeal were to be addressed to the accounting officer of the Commission, it should be noted that the accounting officer has no formal authority of control over the services that place EWS warnings.

- CMS DeBacker noted that if, as the Commission argues, a decision to include a person on the EWS is not an "*act adversely affecting that person*", serious problems would arise as regards the right to appeal. In sum, if it were the case that a decision to place a person on the EWS is not an act adversely affecting that person, the Commission could argue before a competent court that the case was inadmissible, since it is only possible for persons to bring actions for annulment if they show that the act adversely affects them. If it were the case that a decision to place a person on the EWS is not an act adversely affecting that person, this would also mean that there would be no need to hear the person before the decision is taken.

- CMS DeBacker noted that the Commission's position was that the decision taken "*as a result*" of a placement on the EWS (such as the decision not to award a contract to a person) would be a decision open to appeal. However, if this is the case, it would place the person concerned in a difficult position. It would mean that the number of actions for annulment it would have to take would be multiple, even though the real issue the person concerned would wish to contest would be its inclusion on the EWS.

- As regards delays in payments, CMS DeBacker doubted that an EWS warning gave rise to very few delays in payments. It provided examples of delays.

- CMS DeBacker drew particular attention to the failure to provide information to tenderers as regards their inclusion on the EWS. No information is given to such persons. However, it argued, placing a person on the EWS does affect the person's rights. A person on a W2, W3 and W4 warning may find that it is not awarded a contract, even though it heads the list established by an evaluation committee (and may never know that it was because of the EWS warning).

- CMS DeBacker argued that even if a person on the EWS were awarded a contract, this would not mean that it would suffer no negative consequences as a result of its inclusion on the EWS. "*Reinforced vigilance*" measures would still be taken against that person. CMS DeBacker also noted that there is no indication as to what these measures might be. Such measures were noted in Annex 7 of the previous EWS Decision, which was not a public document, but are not included in the new EWS Decision, which is a public document. The "*reinforced vigilance*" measures have thus not been the subject of any official publication.

- CMS DeBacker argued that if a call for expression of interest is cancelled due to the fact that the winning tenderer is on the EWS, there will also be negative effects for the person concerned as a result of the EWS warning.

- CMS DeBacker noted that the level of knowledge and training of staff charged with placing persons on the EWS is not known. It noted that there did not appear to be training programmes for staff charged with operating the EWS. This could lead to poor decisions by staff operating





the EWS.

- Finally, it concluded by stating that, while the need to protect the financial interests of the Union is understandable, this need should not lead to the non-respect of fundamental rights. The EWS system should be efficient without being disproportionate. If this is not the case, the EWS will not strike a correct balance between two legitimate interests: the interest of ensuring good financial management on the one hand, and the right to be informed, the right to confidentiality and the rights of defence on the other hand.

**85.** Lallemand & Legros law firm stated that it is also necessary to take into account how EWS warnings are understood by Commission staff. Even though it is only W5 warnings that are supposed to impact on the rights of persons concerned, Commission staff consider all other warnings as a " *negative mark* " against the persons concerned. Commission staff are then induced not to take positive decisions in favour of such persons. Rather, they prefer to eliminate them from tender procedures by one means or another. In sum, a warning on the EWS constitutes a presumption of guilt. An example was given of an evaluation committee revising its initial positive assessment of a company on the basis of an EWS warning.

## The Ombudsman's assessment leading to a Draft Recommendation

**86.** Among the questions he put to the Commission, the Ombudsman first asked the Commission what it considered to be the legal basis for the issuance of W1 to W4 warnings. This is an important question, given that the lack of competence of the institution which has adopted a contested measure constitutes a ground for annulment of that measure for reasons of public policy. The issue of the legal basis for the issuance of EWS warnings is also an important question in so far as it impacts on the interpretation of the correct scope of EWS warnings.

**87.** It is solely for the Union courts to rule upon any eventual lack of competence regarding the creation and operation of the EWS. The Ombudsman notes, however, that it is good administration for the Commission to ensure that, in relation to any measures it takes, it can give a reasonable and coherent explanation to the Ombudsman with regard to its competence to take such measures.

**88.** Article 95 of the Financial Regulation foresees the operation of a CED (Central Exclusion Database [16] ) common to all the EU institutions and executive agencies for persons falling within the scope of Articles 93 and 94 of the Financial Regulation. As such, there is an explicit legal basis for a CED covering W5a and W1d warnings. It is reasonable to consider that this legal basis also covers the corresponding EWS warnings of the Commission.

**89.** However, as noted in the Order of the General Court in Case T-320/09 [17] , there is no rule of primary or secondary law which would explicitly give the Commission competence to create and operate an EWS covering any other warnings (that is W1a, b and c, W2, W3, W4 and W5b warnings). The Ombudsman is of the view that, if a legal basis for such warnings is to



be found, it can only derive, **as an implicit power**, from the general obligation to ensure sound financial management in Article 317 TFEU [18], from the general obligation to counter fraud and any other illegal activities in Article 325 TFEU [19] and from the general obligation to ensure the sound financial management of EU funds set out in Article 27 of the Financial Regulation.

90. The Union Courts have stated that it is only exceptionally that implicit powers can be recognised to exist. 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 [20].

91. However, if it is to be accepted that there is a legal basis for the creation and operation of an EWS covering all warnings, including W1a, b and c, W2, W3, W4 and W5b warnings, it follows that all the specific rules within an EWS **must be shown to be necessary to attain the objective of sound financial management and combating fraud**. In sum, when interpreting the scope of each specific warning, it must be ensured that the scope **goes no further than is necessary to attain the objective of sound financial management and combating fraud**. In the Ombudsman view, the requirement that an implicit power be interpreted strictly can only be adhered to if: (1) the scope of the warning is clearly defined; and (2) the clearly defined rule is demonstrated to be necessary to ensure the practical effect of sound financial management and combating fraud, does not go beyond what is necessary to achieve that purpose [21] (the proportionality test) and fully respects fundamental rights.

## Concerning the clarity of the definitions used in defining the different warnings

92. A W1 warning is made in the case of a person where there are "*sufficient reasons*" to believe that findings of "*fraud*" or "*serious administrative errors or other irregularities*" will be recorded in the future in relation to him/her.

93. In the Ombudsman's view, the term "*fraud*" can be clearly defined ("*fraud*" is referred to in Article 93.1(f) of the Financial Regulation). It is also reasonable to consider that, where there are "*sufficient reasons*" to believe that a person has already committed "*fraud*", it would constitute sound financial management to inform relevant staff within the institution of these concerns. However, the terms "*serious administrative error and other irregularities*" are not defined in any EU legislation or in the case-law. Furthermore, the EWS decision itself does not define this term. The Ombudsman thus notes, with concern, that the terms "*serious administrative errors or other irregularities*" are unclear and potentially very broad in scope, and thus potentially imply that the W1 warnings exceed the implicit competence of the EU [22]. In the Ombudsman's view, the use of these terms should be reviewed by the Commission. If the Commission wishes to continue to use them, it should define their scope precisely [23].

94. The Ombudsman also notes that the same terms "*serious administrative errors or other irregularities*" are also used in relation to W2 warnings, which are warnings made in relation to a person where findings of "*serious administrative errors, irregularities*" or "*fraud*" are made by



OLAF, by an Internal Audit Service, or by the European Court of Auditors in relation to that physical or legal person. The same conclusion as regards W1 warnings can thus also be made as regards W2 warnings. The use of these same terms also potentially implies that the W2 warnings exceed the implicit competence of the EU and should be reviewed by the Commission with a view to clarifying its scope.

**95.** The Ombudsman also notes with concern the reference to "*findings*" and "*final findings*" in relation to W1 warnings, and "*findings*" in relation to W2 warnings. The term "*findings*" is not defined in the EWS Decision. As regards W1 warnings, it could be understood, at first sight, that the intention of the Commission is that the term "*findings*" and "*final findings*" concerning this warning relates to the belief that "decisions" within the meaning of Article 93 and Article 94 of the Financial Regulation regarding the person concerned will be made at some point in the future. Put otherwise, a W1 warning is applicable when there are "*sufficient reasons*" to believe that a decision under Article 93 or Article 94 of the Financial Regulation will be made in the future in relation to a physical or legal person). Such an interpretation of the term "*findings*" is, however, undermined by the use of the same term "*findings*" in relation to W2 warnings. As regards W2 warnings, it would not be possible to consider that the term "*findings*" relates to "*decisions*" within the meaning of Article 93 and 94 of the Financial Regulation because, if a decision has already been adopted by applying Article 93 or 94 of the Financial Regulation to a physical or legal person, a W5a warning would apply rather than a W2 warning. As such, there is clearly a lack of clarity as regards the meaning and scope of the term "*findings*" in relation to both W1 and W2 warnings.

**96.** It may be the case that the Commission's intention as regards W2 warnings is that a W2 warning will apply when OLAF makes a "*finding*" within the meaning of Article 9 and Article 12 of Regulation 1073/1999 concerning investigations it conducts. Article 9 of Regulation 1073/1999 states that, on completion of an investigation, OLAF shall draw up a report, under the authority of its Director, specifying the facts established, the financial loss, if any, and the "*findings*" of the investigation, including the recommendations of the Director on the action that should be taken. However, if this is the case, an appropriate reference to these specific articles of Regulation 1073/1999 should be included in the EWS Decision, in order to ensure that the scope of the term "*finding*" in the EWS Decision is sufficiently defined.

**97.** The EWS Decision also refers to "*findings*" by the Court of Auditors (in relation to W1 and W2 warnings). The Ombudsman has been unable to identify a specific legal meaning for the term "*findings*" in relation to the work of the Court of Auditors. On the basis of the audits it carries out, the Court of Auditors issues "*reports*" and "*opinions*" which may contain "*recommendations*" [24]. While the term "*finding*" has no defined legal meaning as regards the work of the Court of Auditors, the said Court, however, regularly uses the term "*findings*" in its "*reports*" and "*opinions*" to refer, generally, to facts that the Court of Auditors has determined to exist [25]. In the Ombudsman's view, it is necessary for the EWS Decision to define more precisely the meaning of the term "*findings*" in relation to the work of the Court of Auditors. Such a more precise definition could, for example, state that the term findings concerns findings of fact by the Court of Auditors set out in an opinion or report of the Court of Auditors.



**98.** The EWS Decision also refers to "*findings*" by the "*Internal Audit Service*". The Ombudsman has been unable to identify a specific legal meaning for the term "*findings*" in relation to the work of the Commission's "*Internal Audit Service*". Article 85 of the Financial Regulation states that the internal auditor shall advise his/her institution on how to deal with risks, by issuing independent "*opinions*" on the quality of management and control systems and by issuing "*recommendations*" for improving the conditions for implementing operations and promoting sound financial management. It goes on to state that the internal auditor shall ensure that action is taken on recommendations resulting from audits. Article 110 of the Implementing rules of the Financial Regulation indicates that the institution shall provide the internal auditor with a mission charter detailing his tasks, duties and obligations [26]. The Mission Charter of the Internal Audit Service of the Commission [27] refers, generally, to "*findings*" [28] within the "*recommendations*" of the Internal Audit Service. In the Ombudsman's view, it is necessary for the EWS Decision to define more precisely what is meant by the term "*findings*" in relation to the work of the Internal Audit Service (such as stating that the term "*findings*" concerns "*findings*" of fact by the Internal Audit Service set out in an opinion or recommendation of the Internal Audit Service).

**99.** The Ombudsman recalls that the purpose of such clarifications is to ensure that the scope of W1 and W2 warnings is clearly defined and thus that it can be demonstrated that the warnings are indeed necessary to ensure the practical effect of sound financial management. Such definitions are also important as regards ensuring the effectiveness of the rights of defence (see below).

**100.** A W3a warning is made when an EU institution receives a notification of an "attachment order" relating to a person. An "*attachment order*" is a clearly defined concept; it is an order from a court which requires the debtors of an identified person to retain a certain amount from the amount owed to that identified person for the purposes of paying a particular creditor of that identified person. However, it should be ensured, when issuing a warning under W3a, that the warning is limited to the amount referred to in the attachment order. If a W3a warning does not indicate the amount to be retained, there exists a risk that the effect of the warning would exceed what is necessary to ensure the practical effect of sound financial management [29]. Whereas the previous EWS Decision did not require that the W3a warning set out the quantitative limits of an attachment order, the present EWS Decision states that, if the preventive attachment order is limited to a specific sum as a result of a judgment ("*cantonnement*"), payments can be suspended only up to that amount. In the Ombudsman's view, in principle this ensures that the W3a warning goes no further than is necessary to guarantee the practical effect of sound financial management. However, it is important, when using the EWS, that the warning is constantly updated to ensure that users of the EWS are informed of any payments that have already been blocked in application of the attachment order (and not only the total amount to be blocked), so as to ensure that the warning does not, in practice, produce excessive results. The Commission should also ensure that a W3a warning is deleted immediately once an attachment order is lifted.

**101.** A W3b warning is made when an EU institution receives information that the person is subject to "*judicial proceedings*" for serious administrative errors or fraud. A W3b warning



remains active until a judgment having the force of *res judicata* is rendered, or until the case has been otherwise settled.

**102.** The EWS Decision does not define the expression "*judicial proceedings*" other than to say that such proceedings must concern serious administrative errors or fraud. It might thus be understood that W3b warnings cover administrative court and criminal court proceedings. The Ombudsman notes that judicial systems differ significantly from one Member State to another and that, therefore, there is no single interpretation of the term "*judicial proceeding*". For example, in certain jurisdictions, where an inquisitorial system applies, "*judicial proceedings*" could be used to refer to the investigation by an instructing magistrate. Other jurisdictions do not have such "*judicial investigations*" but, rather, rely solely on law enforcement agencies and public prosecutors to carry out investigations.

**103.** The Ombudsman notes that, according to the case-law of the EU courts, "*the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community and that interpretation must take into account the context of the provision and the purpose of the relevant regulations.*" [30] Thus, the definition of "*judicial proceedings*", as used in the EWS Decision, should not be based on the law of a single Member State.

**104.** With a view to identifying what the correct interpretation of the term "*judicial proceedings*" should be, the Ombudsman first notes that the interpretation of the term "*judicial proceedings*" should be based on the purpose and context of the EWS and, specifically, the purpose and context of the W3b warning within the EWS Decision.

**105.** The Ombudsman underlines that the purpose of the EWS is to inform the Commission's services when there are at least "*sufficient reasons*" to believe that a relevant "*finding*", for example, of fraud, will be made against a physical or legal person. As such, the Ombudsman notes that there must at least be a certain factual basis for placing a person on the EWS, even at the lowest intensity of a W1 warning. The Ombudsman notes that "*judicial proceedings*" that are still in the instruction phase do not necessarily imply that any facts at all have been established relating to a person. Indeed, an instruction phase may be opened merely on the basis of an accusation by a third party. It would thus not appear logical *automatically* to place a person on the EWS because he/she is subject to the instruction phase of "*judicial proceedings*" [31]. It would appear necessary for the relevant Commission services to carry out a specific analysis of judicial proceedings, at least in those judicial proceedings which are still in an instruction phase, in order to clarify their nature and factual basis.

**106.** As regards the importance of W3b warnings, OLAF stated that only persons undergoing judicial proceedings can be flagged in category W3b. Out of all 582 OLAF's cases, 98 persons had been flagged in this category by 1 June 2009. In such cases the seriousness of the alleged wrongdoings is confirmed by the decision of the national judicial authorities to launch a criminal investigation or to indict a legal person based upon national criminal law. According to OLAF, this strongly justifies extra prudence at the award and disbursement stage. OLAF closely



monitors the developments with the competent national judicial authorities in the framework of its judicial follow-up and requests a deactivation of the warning of the persons concerned once a judgment becomes final ( *res judicata* ).

**107.** The Ombudsman also notes that, in contrast to W1 and W2 warnings, which expire automatically after six months (after which they must be expressly renewed or changed to another warning), a W3b warning remains valid until a judgment having the force of *res judicata* is rendered, or until the case has been " *otherwise settled* ". It certainly is logical for such a rule to exist if the interpretation of the term " *judicial proceedings* " were limited to those " *judicial proceedings* " that can be ended by a judgment having the force of *res judicata* , or can be otherwise " *settled* ". However, it would not be logical for such a rule to exist if the term " *judicial proceedings* " were interpreted broadly to cover also the instruction phase of judicial proceedings within an inquisitorial judicial system. An instruction phase within an inquisitorial judicial system cannot be ended by a judgment having the force of *res judicata* , and cannot be otherwise " *settled* ". It can only be ended by a finding that there are no grounds to proceed (a finding of " *non lieu* " in French) or if the case is bound over for trial.

**108.** In light of the above, it would be necessary to define more clearly the term " *judicial proceedings* " in the EWS decision. The Commission should give consideration, in any revised definition of the term " *judicial proceedings* " in relation to W3b warnings, to limiting the term " *judicial proceedings* " to cases where the national judicial authorities bring a case to trial, that is, in cases where the instruction phase has ended. Such W3b warnings should be lifted when that trial has ended with a ruling having the force of *res judicata* , or where the trial has otherwise been settled.

**109.** The above does not imply that no EWS warning can be made in relation to a person that is subject to a judicial investigation. Clearly, a W1 [32] or W2 [33] warning could be made in relation to such a person. In the event that a national judicial authority has commenced an instruction phase on the basis of information received from OLAF, it would be, for example, appropriate for the Commission to issue a W2 warning based on OLAF's " *finding* " which led OLAF to contact the national judicial authorities. Alternatively, depending on the specific facts of the case, a W1 warning could be issued. It is important to note that W1 and W2 warnings, unlike a W3b warning, expire automatically every six months, thus requiring the Commission official responsible for the warning to check if the warning remains justified before requesting its renewal. This alternative classification also has important implications for the right to be heard (see paragraphs 112 to 143 below). While such a limitation of the scope of W3b warnings has important procedural implications, it does not imply that the capacity of the Commission to protect the financial interests of the Union is in any way diminished, given that the consequences of a W2 warning (in terms of the preventive measures that can be taken in relation to the person subject to the warning) are identical to the consequences of a W3b warning (see paragraphs 120 below).

**110.** The Ombudsman considers that the scope of W4 [34] and W5 warnings are sufficiently clear.





**111.** The Ombudsman considers that the Commission's failure properly to define the scope of W1, W2 and W3b warnings constitutes an instance of maladministration, in relation to which he will make a draft recommendation below.

## **The protection of the Fundamental Rights of persons included on the EWS**

**112.** The Ombudsman notes that, in addition to ensuring that the EWS does not exceed the competence of the EU to act, the rights of persons included on the EWS, especially the fundamental rights of such persons as set out in the Charter of Fundamental Rights, must be protected. While certain legal rights, including fundamental rights, apply to physical persons only, (for example the right to the protection of personal data), other rights apply to both physical and legal persons. These fundamental rights, which all physical and legal persons have, include the right to good administration laid down in Article 41 of the European Charter of Fundamental Rights. This right implies that every person has the right to have his/her/its affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right includes at least the right of every person to be heard, before any individual measure which would adversely affect him or her is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy (these rights form part of the general fundamental rights of defence); and the obligation of the administration to give reasons for its decisions.

**113.** Article 52 of the European Charter of Fundamental Rights states that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. It adds that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

**114.** Thus, when the administration applies the legal requirement to ensure sound financial management, it is necessary for it to show that any restrictions on the fundamental rights of persons go no further than is necessary to achieve the administration's legitimate needs and that these restrictions are strictly proportionate to the need to achieve those legitimate needs.

**115.** In addition to fundamental rights, the Ombudsman also notes that the Code of Good Administrative Behaviour includes: (1) the obligation to act proportionately, impartially, fairly and reasonably (Article 6); (2) the obligation to ensure, at every stage of the decision-making procedure, that the rights of defence are respected, including the right to submit comments before a decision affecting rights or interests is taken (Article 16); (3) the obligation to state the grounds of decisions which may adversely affect the rights or interests of a person, encompassing the obligation to indicate clearly the relevant facts and the legal basis of the decision (Article 18); (4) the obligation to indicate the possibilities of appeal of any decision which may adversely affect the rights or interests of a person, including the possibility of judicial proceedings and complaints to the Ombudsman (Article 19).





**116.** In particular, Article 16 of the European Code of Good Administrative Behaviour (right to be heard and to make statements) provides that:

*" 1. In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision making procedure, the rights of defence are respected.*

*2. Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken. "*

**117.** The Union Courts have also stated, as regards the right to judicial review, that it must be possible to review the grounds of a decision placing a person on a list when the decision to put the person on the list leads to the imposition of a restrictive measure on that person [35] . This means that the Union authority taking the decision to place a person on a list is required to communicate the grounds for that decision to the person concerned, either when that decision is taken, or, at the very least, as swiftly as possible after that decision is taken, in order to enable them to exercise their right to bring an action to annul such a decision.

**118.** Observance of the obligation to communicate the grounds for inclusion on the EWS is necessary both to enable the persons to whom restrictive measures are applied to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, how best to defend their interests [36] .

**119.** The Commission has argued, in its opinion to the Ombudsman, that the EWS is a purely internal tool and that W1 to W4 warnings do not, as such, adversely affect the rights or interests of the persons concerned. If it were true that the EWS could not adversely affect the rights or interests of the persons concerned, the Ombudsman notes that there would be no issue of a possible infringement of the right to be heard.

**120.** However, the Ombudsman first notes that Article 15 of the EWS Decision states that the accounting officer " *shall suspend any payment to a beneficiary for whom a W2, W3, W4 or W5 warning has been registered* ". While such a suspension can be eventually lifted, it is clear that the placing of a person on a W2 to W5 warning does not only have effects internally. Second, the Ombudsman also notes that where a W2, W3b or W4 warning relates to a tenderer/applicant, the warning shall be brought to the attention of the relevant evaluation committee (Article 17 of the EWS Decision), in so far as it constitutes, in connection with the selection criteria, a " *new element* " to be examined with regard to the tenderer/applicant's economic, financial, technical and professional capacity. The relevant evaluation committee must take this information into account, in particular if the tenderer/applicant were to head the list drawn up by the evaluation committee. The Ombudsman notes that the Commission has stated (see paragraph 31 above) that informing the evaluation committees in such a case is of particular relevance, since these committees are precisely entrusted with assessing the capacity of tenderers, which can be altered if the tenderer or applicant is a very bad debtor (W4 warnings) or is suspected of fraud or serious administrative errors (W2 and W3b warnings). If an



evaluation committee's view on a tenderer is altered as a result of an EWS warning, it is thus abundantly clear that the placing of a person on a W2 to W4 warning does not only have effects internally. The Ombudsman thus concludes that the Commission is not correct when it argues that W2 to W4 warnings do not produce any effects in relation to the legal situation of the persons concerned.

**121.** As regards W1 warnings, the EWS Decision states that a W1 warning shall be registered "*for information purposes only*" and may entail no consequence other than "*reinforced monitoring measures*". The Ombudsman notes, however, that the General Court has stated, in relation to the EWS [37], that the fact that an administration processes data for purely internal purposes, notably by collecting, managing and using them, does not exclude that such operations may undermine the interests of citizens. The existence of such a breach depends, in effect, on several factors, notably the nature of the data processed, the specific purpose of the processing, the particular consequences of this processing, as well as the conformity between, on the one hand, the purpose and the consequences of the processing and, on the other hand, the applicable provisions establishing the competence of the administration. It added that it should be checked whether the warning in the EWS in relation to the person concerned (in the case at hand it was a W1 warning) is an operation which solely concerns a superior and his/her subordinates and whether its effects are limited to the internal sphere of the institutions, bodies, offices and agencies of the Union. The General Court added that it follows from Article 6 of Decision 2008/969 that, in the framework of budgetary commitments, as well as and procurement and grant award procedures, the responsible Commission authorising officers must verify whether there is a warning in the EWS concerning candidates to these procedures. If such is the case, Articles 15 to 17 and 19 to 22 of the EWS authorise and oblige the accounting officer or the responsible authorising officers to take specific measures against the persons or the project concerned. Hence, the General Court noted, given that the inherent purpose of the EWS Decision is to protect the financial interests of the Union in the framework of the execution of budgetary measures, the effect of placing an EWS warning in relation to a person, even a W1 warning, is not confined to the institutions, bodies, offices and agencies of the Union. In sum, the effects are not merely "internal". Such a warning also necessarily affects the relationships between the authorising officers and the persons concerned. In sum, the effect of placing an EWS warning in relation to a person also has external effects.

**122.** The General Court added that, although Article 16 of the EWS Decision states that "[a] W1 warning shall be registered for information purposes only and may entail no consequence other than reinforced monitoring measures", and is thus less restrictive than Articles 15, 17 and 19 to 22 of the EWS decision (which refer to W 2 to W5 warnings), it results from Article 16 of the decision that a W1 warning leads in reality to an obligation for the authorising officer concerned to take reinforced monitoring measures. In effect, a W1 warning would be useless if the authorising officer concerned, who is aware of suspicions of fraud or serious administrative errors, is not obliged to ensure that monitoring measures are reinforced. Thus, the Court concluded, in the case before it, that as from the registration of the applicant on the EWS under a W1 warning, the Commission was obliged to take reinforced monitoring measures towards it [38]. The applicant was thus in a less favourable situation compared to the situation it was in before the adoption of the W1 warning.



**123.** It follows from the above, the General Court added, that denying the applicant the right to a judicial review as to the existence of facts at the centre of the contested acts is not in conformity with the rule of law in the Union.

**124.** The General Court stated that the above is all the more true if one takes into account the fact that the EWS Decision does not provide for a right of natural and legal persons to be informed, or even heard, before the registration of W1, W2, W3, W4 and W5b warnings in the EWS. Of course, a person who, for one reason or another, is informed of his/her registration in the said system can, in accordance with Article 8(2)(b) of the said Decision, request that the data concerning him/her be rectified. However, the decision to rectify the data is entirely at the discretion of the service that requested the registration of the warning of that person in the system.

**125.** Finally, the General Court underlined that the contested acts should not be considered as intermediary or preparatory acts which cannot be challenged. In effect, they present the legal features of acts against which an action can be brought and they also constitute the final stage of a special procedure, that is, the registration of a person on a warning list without providing that person with an opportunity to comment on the reasons for the registration. This procedure differs also from the decisions whereby the various specific requirements provided for by Decision 2008/969 are implemented.

**126.** As such, the Ombudsman concludes that the inclusion of a person on any level of the EWS adversely affects the legal situation of the person concerned.

**127.** The Ombudsman recalls that Article 41 of the European Charter of Fundamental Rights [39] states that every person has the right to be heard before any individual measure which would affect him or her adversely is taken. Moreover, it must be remembered that observance of the rights of the defence, and more specifically the right of persons to make known their views on any matters which might be relied on to their detriment as the basis of a decision adversely affecting them, is an essential procedural requirement [40] .

**128.** The Ombudsman notes that the very existence of the EWS, and its basic rules, was not always public information. The EWS decision was, initially, not published in the Official Journal. The new EWS decision has now been published in the Official Journal. The Ombudsman commends the Commission for taking this step, which enables third parties to, at least, become aware of the EWS and of the basic rules concerning this system.

**129.** The Ombudsmen also notes that third parties are now informed, in calls for tenders and in the calls for proposals, that data concerning them may be included in the EWS. The Ombudsman also commends the Commission for taking this step.

**130.** Furthermore, according to the Commission, third parties subject to W5a warnings are now systematically informed of any activation, updating and removal of the exclusion warnings, and of the reasons for these warnings [41] . The Ombudsman also commends the Commission for



taking this step.

**131.** In addition, the Ombudsmen notes that a physical person may now request the Commission's accounting officer to provide him or her with information as to whether he or she is subject to any EWS warning. This rule was introduced in order to ensure that the EWS complies with the data protection rules. The Commission has informed the Ombudsman that it can now provide such information on request.

**132.** The Ombudsman underlines, however, that these improvements, while welcome, do not address the issue of the right to be heard. In order for the right to be heard to be respected, persons concerned must be given the opportunity to comment on the evidence to be used in the decision adversely affecting them before that decision is taken. This right can only be limited in exceptional circumstances [42] .

**133.** In order for the right to be heard to be made effective, clear mechanisms must be established, whereby persons can challenge their proposed and intended inclusion on the EWS.

**134.** As a first step in such clear mechanisms, a rule should be established that the person concerned should be informed *ex officio* of his/her/its proposed inclusion in the EWS. The Ombudsman notes that the right to be heard is rendered illusory if the persons included on the EWS can only obtain information about their inclusion in the EWS upon request [43] . It is necessary, in that context, to inform the persons concerned of the purpose of the EWS, of the meaning of the warning that applies to them, of the facts which gave rise to the proposal to include them on the EWS [44] , and their rights in relation to the rectification of any errors relating to the warning that applies to them. Such mechanisms should include the designation of a separate service within the Commission to review any administrative challenge to a proposed EWS warning. Put otherwise, the person/services responsible for proposing an EWS warning [45] should not carry out this review [46] . The procedures for making a request for review should be made public (in a reviewed EWS Decision). Persons should also be specifically informed that they have the right to challenge the position taken by the review body before the EU courts or the Ombudsman.

**135.** As regards the substantive issues to be dealt with in the context of a person's right to be heard, it should be noted that, when the Commission informs a person of its intention to issue an EWS warning concerning him/her (with a view to respecting that person's right to be heard), it does not always need to put forward definitive proof that the person concerned has committed fraud or other serious irregularities. Of course, if the proposed warning is a W5a warning, it would be sufficient to provide a copy of the Article 93 decision relating to that person. However, if the proposed warning is a W1 warning, the Commission need only put forward the reasons which it considers are " *sufficient* " to believe that findings of fraud or " *serious administrative errors or other irregularities* " will be recorded in the future in relation to that person. If the proposed warning is a W2 warning, the Commission should put forward the " *findings* " that have been arrived at concerning that person.

**136.** In relation to W3a warnings, the evidence of the attachment order should be



communicated to the person concerned. In relation to W3b warnings, the evidence of the commencement of judicial proceeding should be communicated to the person concerned. In short, the person should be informed that the judicial authorities have decided to bring the person to trial for fraud or other serious administrative irregularities. In relation to W4 warnings, the evidence of the recovery order should be communicated to the person concerned. In relation to W5b warnings, the evidence of the listing in a Council Regulation imposing CFSP-related financial restrictions should be communicated to the person concerned.

## **Possible limitations on the right to be heard**

**137.** As noted above, Article 52 of the European Charter of Fundamental Rights states that any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and must respect the essence of those rights and freedoms. It adds that, subject to the principle of proportionality, limitations may be made only if they are necessary and if they genuinely meet objectives of a general interest recognised by the Union or the need to protect the rights and freedoms of others. The Ombudsman agrees that this necessity test may indeed be met where a refusal of information is clearly shown to be necessary in order to protect the effectiveness of ongoing investigative measures concerning that person, or concerning other persons subject to the investigative measures. It is, in sum, arguable that the existence of an ongoing investigation should not be communicated to a person **if** such communication would be likely to jeopardise the effectiveness of the investigation. For example, it may be justified not to inform a person of a fraud investigation against it if that information would allow that person to undermine that investigation by eliminating important evidence or when the gathering of such evidence requires a surprise effect.

**138.** Whether or not informing a person under investigation would impair the investigation will depend on the precise nature of the case and the facts under investigation. It will often be the case, in certain investigations, that the person under investigation will already be aware of the investigation, perhaps because the investigating body has already contacted the person concerned about the alleged serious administrative errors or other irregularities. In such circumstances, guaranteeing the right to be heard before a decision to issue a W1 or W2 warning is taken would clearly not undermine the investigation.

**139.** It may also be the case that an investigation is of a nature where, or at a stage that, it cannot be negatively affected by actions of the person under investigation, even if that person is made aware of the existence of the investigation.

**140.** The necessary procedural guarantees could be provided by requiring that the service which proposes the EWS warning expressly justify why it is necessary not to inform the person concerned of the existence of the warning. These justifications should be submitted to a very senior official [47] who should, before the EWS warning is placed, take a reasoned decision setting out whether exceptional circumstances actually exist which would justify not informing the person concerned in advance of the EWS warning concerning that person. If the service proposing the W1 or W2 warning wishes to renew that warning after six months, it should again



justify why it still considers it necessary not to inform the person concerned of the warning [48] .

**141.** As regards W3b warnings, as already noted above (see paragraph 109), the Ombudsman has taken the view that W3b warnings should only apply to cases where the judicial authorities have decided to bring the case to trial. W3b warnings should not apply to cases which are merely subject to a judicial investigation (however, W1 or W2 warnings could be made in relation to such cases). If the Commission wishes to issue a W1 or W2 warning in relation to a case where a judicial investigation is underway, the judicial authorities concerned should be consulted, with a view to ascertaining if the release of the information in relation to the existence of the W1 or W2 warning would undermine the "*judicial proceedings*". The fact that a decision not to inform the person concerned is made subject to a control by the judicial authorities offers, in itself, an important procedural guarantee.

**142.** If W3b warnings only applied in circumstances where the judicial authorities have brought a case to trial, it would not be problematic to inform a person concerned of a W3b warning. In sum, informing the person concerned of the W3b warning would clearly not undermine judicial proceedings given that the person concerned would always already be aware of the decision to bring the case to trial.

**143.** In conclusion, with respect to paragraphs 112 to 142 above, the failure to ensure that the right to be heard is respected as regards persons to be included in the EWS constitutes an instance of maladministration, in relation to which the Ombudsman will make a draft recommendation below.

## **Accuracy of information on the EWS**

**144.** Aside from the fact that an EWS warning has negative effects on a person included in the system, the accuracy of data on the EWS is vital for effective financial management by the Commission. If the EWS does not contain all relevant and accurate data on all persons who pose a risk to the financial interests of the EU, or if it contains data in relation to persons who do not pose a risk, or no longer pose a risk, to the financial interests of the EU, the EWS will not be effective. Every reasonable step must thus be taken to ensure that inaccurate or incomplete data are erased or rectified in good time.

**145.** It is thus in the interests of the Commission itself that the necessary steps be taken to deactivate warnings without delay once the warnings are no longer accurate. Warnings should be deactivated not only when a fixed period has elapsed, but as soon as there ceases to be a need for the warning.

**146.** Staff who request a warning or a renewal of a warning should duly justify the request for such action(s), with reference to specific verified facts. Likewise, if the underlying facts change to an extent which would justify a modification of the warning, the modification should be made as soon as the underlying facts change.





**147.** The Ombudsman notes that W1 and W2 warnings remain active for a maximum of six months. After this period, the warning is automatically deactivated. Such warnings can, however, be renewed for a further period of up to six months. The automatic deactivation of W1 and W2 warnings after six months is an important procedural guarantee to ensure that W1 and W2 warnings will not remain active indefinitely, and without due consideration being given to their continued justification. However, the person responsible for requesting the warning should monitor closely and continuously the underlying factual situation which gave rise to the warning, with a view to ensuring that any modification in that factual situation is taken account of immediately. The warning should not only be automatically deactivated when six months have elapsed; it should be removed as soon as the underlying reason for the warning no longer applies.

**148.** W3, W4 and W5 warnings are applied in relation to specific factual situations: (i) where an attachment order exists; (ii) in case of ongoing judicial proceedings; (iii) where a recovery order has been issued; (iv) in the context of a decision finding that a person is in one of the situations listed under Article 93 or Article 94 of the Financial Regulation; or (v) when a person is listed in accordance with a Council Regulation imposing CFSP-related financial restrictions. The person responsible for requesting such a warning should also continuously monitor the underlying factual situation, with a view to ensuring that any modification in that factual situation is taken account of immediately.

**149.** To be sure, the person responsible for requesting an EWS warning should continuously monitor the underlying factual situation with a view to ensuring that any modification in that factual situation is taken account of immediately. Put otherwise, in sum, the person should ensure that the deletion or modification of a warning is not unduly delayed. This having been said, it is also the case that it is not sufficient to rely solely on the diligence of the members of staff charged with such surveillance. It is obvious that this monitoring by the responsible person within the Commission would be greatly facilitated if the persons included on the EWS were informed of the warning and could thus supply the responsible person within the Commission with relevant updated information. In short, the right to be heard is not only of benefit to the person concerned; it is also of benefit to the Commission since it ensures that the EWS will be a more accurate operational tool. A person that is subject to an EWS warning is well-positioned to provide updated information to the institutions relating to possible modifications of an underlying factual situation. This is particularly the case in relation to W3 warnings, that is, in relation to the existence of an attachment order and the existence of ongoing judicial proceedings. Indeed, it will normally be the case that the person concerned will know of the lifting of an attachment order as soon as it is lifted, whereas it is not certain that the official charged with managing the W3a warning will be immediately aware of the lifting of the attachment order. Likewise, it will normally be the case that the person concerned will know of the termination of judicial proceedings immediately, whereas it is not certain that the official charged with managing the W3b warning will be immediately aware thereof.

**150.** The EWS is a complex system. Staff charged with operating the EWS should be provided with specific training as regards its proper use. This training should include information as regards the protection of the rights of the persons included on the EWS.





**151.** Prior to making his draft recommendation, the Ombudsman wishes to underline the importance of the EWS. It is certainly a necessary tool; in the absence of the EWS, it would be difficult for the Commission to ensure sound financial management [49] . However, the credibility and legitimacy of the EWS, and thus its long-term effectiveness, is dependent on ensuring that it respects the rights, especially their fundamental rights, of the persons included on the system. It cannot now be disputed, in light of the Order of the General Court in case T-320/09 *Planet v Commission* of 13 April 2011 (see paragraph 121 to 125 above), that the decision to include a person on the EWS adversely affects the legal situation of that person. It automatically follows from that finding that the person concerned has a right to be heard before the decision is taken and has a right to challenge that decision. These rights are fundamental rights. It is very much in the interests of the Commission to take the opportunity afforded by the present Draft Recommendation to correct the deficiencies in the EWS with a view to ensuring that the EWS respects fundamental rights.

## C. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

**The Commission should review its EWS decision to make certain that its scope goes no further than is necessary to ensure the practical effect of sound financial management. The Commission should also ensure that it does not breach the fundamental rights of persons included on the EWS, in particular the right to be heard before an EWS warning is issued. In order to do this the Commission could:**

- 1. Clearly define the scope of the EWS Decision in accordance with the guidance set out in paragraphs 92 to 111 of the present draft recommendation;**
- 2. Guarantee, in accordance with the following requirements, the right to be heard before decisions to include persons on the EWS are taken:**
  - a. The right to be heard can only be limited in very exceptional cases. These very exceptional cases must be duly reasoned and subject to strict procedural guarantees;**
  - b. The right to be heard requires the creation of an internal review mechanism which is separate from the services requesting an EWS warning;**
  - c. The right of access to the file is necessary to make the right to be heard effective;**
  - d. The internal review mechanism should, if it confirms a proposal to place an EWS warning, inform the persons subjected to the EWS warning that they have the right to complain to the European Ombudsman or to seek judicial review through the EU courts;**



**e. The internal review procedures, and the right to complain to the Ombudsman or to seek judicial review, should be set out explicitly in a revised EWS Decision;**

**3. The Commission should take all necessary measures to ensure that data included on the EWS is accurate and up-to-date. It should acknowledge that the collaboration and information of the persons concerned is essential in order to guarantee the accuracy and timeliness of the information contained in the EWS.**

**4. The Commission should ensure that staff responsible for operating the EWS receive specific training on how to use the EWS properly, including how to protect the rights of persons included on the EWS.**

The Commission will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 31 March 2012. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 16 December 2011

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.

[2] See also the new Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the Central Exclusion Database (CED), which contains the relevant details of third parties that are in a situation of exclusion as regards grants and procurement procedures (see OJ L 344, 20.12.2008, p. 12). Unlike the EWS, which is only accessible to the EU institutions and executive agencies, the CED is accessible to the executive agencies, EU bodies, as well as the authorities of Member States and international organisations participating in the implementation of EU funds. The present inquiry only concerns the EWS.

[3] Decision EWS C(2004) 193/3, as last amended by the 2007 internal rules (this decision was not published in the Official Journal).

[4] See OJ L 344, 20 December 2008, p. 125.

[5] Article 94 of the Financial Regulation reads as follows:

*" Contracts may not be awarded to candidates or tenderers who, during the procurement procedure:*



*(a) are subject to a conflict of interest;*

*(b) are guilty of misrepresentation in supplying the information required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information. "*

[6] The previous EWS Decision placed persons excluded from the award of a contract or grant in a given procedure in accordance with Article 94 of the Financial Regulation under a W5a warning " *for information* " but without " *activation* " of the warning.

[7] An attachment order (" *saisie-arrêt* " in French) is an order made by a court which requires the debtors of an identified person to retain a certain amount from the amount owed to that identified person for the purposes of paying a particular creditor of that identified person.

[8] Internal guidelines are established as to the thresholds determining the relevant amounts and the relevant overdue period for registration under W4 warnings.

[9] Article 96 of the Financial Regulation refers to the right to impose administrative (exclusion from EU contracts and tenders for up to 10 years) or financial penalties on candidates or tenderers in the cases referred to in point (b) of Article 94. Article 96 also provides for the right to impose administrative or financial penalties on contractors who have been declared to be in serious breach of their obligations under contracts covered by the budget. In all cases, however, the contracting authority must first give the person concerned an opportunity to submit observations.

[10] See Article 16 of the EWS Decision.

[11] " *Saisie-arrêt* " in French.

[12] That is to say, greater than EUR 30 000.

[13] A payment is considered to be " *significantly overdue* " when the debt remains unpaid more than one month after a formal demand has been sent.

[14] The Commission did not provide information for 2004.

[15] Article 16 of the European Code of Good Administrative Behaviour provides as follows:

*" 1. In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision making procedure, the rights of defence are respected.*

*2. Every member of the public shall have the right, in cases where a decision affecting his rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken. "*



[16] See footnote 1 above.

[17] See the Order of the General Court in Case T-320/09, *Planet v Commission* of 13 April 2011 (not yet reported and only available in French) at paragraphs 40 and 41.

[18] Article 317 TFEU states that:

*" The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management. (...). "*

[19] Article 325 TFEU states that:

*" 1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.*

*(...). "*

[20] 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, 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, to that effect, Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and Others v Commission* [1987] ECR 3203, paragraph 28; Case T-240/04 *France v Commission* [2007] ECR II-4035, paragraph 37 and Case T-143/06, *MTZ Polyfilms Ltd. v Council* [2009] ECR II-4133 paragraph 47).

[21] It is also necessary to note that, when exercising rights of defence (see below), persons included on the EWS must be empowered to present justifications as to why their inclusion on the EWS does not serve the purpose of ensuring sound financial management and combating fraud.

[22] The previous version of the EWS Decision referred to "*other irregularities*" in relation to W1 warnings. The use of this term was even more unclear.

[23] One possible means of clarifying the scope of W1 warnings would be to make a cross reference to Article 93 and 94 of the Financial Regulation so that "*serious administrative irregularities*" for which there are "*sufficient reasons*" to believe a person has committed such irregularities cannot be broader than the scope of the administrative irregularities referred to in Article 93 and Article 94 of the Financial Regulation.



[24] Article 287(4) TFEU refers to "*annual reports*", "*special reports*" or "*opinions*". The Rules of Procedure of the Court of Auditors of the European Union (OJ L 103/1 of 23 April 2010) also make references to "*decisions*", "*observations*" and "*statements of assurance*".

[25] For a recent example, see Special Report no 10/2011, at paragraphs 30, 44, 50, 73 and 86.

[26] In this context, the European Commission established an "*internal audit service*" through a Commission Decision of 11 April 2000 (see SEC(2000) 560). The Commission internal audit service also audits the EU agencies. Other EU institutions have their own internal auditor.

[27] Available at [http://ec.europa.eu/dgs/internal\\_audit/docs/ias\\_charter\\_en.pdf](http://ec.europa.eu/dgs/internal_audit/docs/ias_charter_en.pdf) [Link]

[28] See section 4 thereof.

[29] Indeed, the Ombudsman notes, the Commission itself has stated in relation to attachment orders (see Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts {SEC(2006) 1341} COM/2006/0618 final) that limiting the attachment to a specific amount, rather than allowing the blocking of the entire balance standing to the credit of the debtor in the account(s) seized, would discourage abuse and be proportionate. (See also, by analogy, Articles 26-28 of the Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to Facilitate Cross-Border Debt Recovery in Civil and Commercial Matters {SEC(2011) 937}{SEC(2011) 938} COM(2011) 445).

[30] Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd. v Commission* [2005] ECR II-4065, paragraph 100.

[31] It might be appropriate, depending on the facts of the particular case, to issue a W1 warning if the instruction phase of the judicial proceeding has already determined *certain facts* in relation to the person concerned which gave "*sufficient reasons*" to believe that a finding of fraud, for example, would be made against the physical or legal person concerned. Of course, as is the case with all W1 warnings, such a W1 warning would expire after six months unless renewed.

[32] W1 warnings are made where there are "*sufficient reasons*" to believe that findings of fraud or serious administrative errors or other irregularities will be recorded in the future in relation to a person.

[33] W2 warnings are made where "*findings*" of fraud or serious administrative errors or other irregularities are recorded in relation to a person.

[34] As noted in footnote 8, "internal guidelines" are established as to the thresholds determining the relevant amounts and the relevant overdue period for registration under W4



warnings. The Ombudsman is of the view that these guidelines should be made public. The Ombudsman also notes, however, that in the present inquiry the Commission has indicated that the relevant amount is EUR 30 000 and that a payment is considered to be " *significantly overdue* " when the debt remains unpaid more than one month after a formal demand has been sent (see footnotes 12 and 13 above). In the Ombudsman's view, in the interests of transparency, these details should be included in the EWS Decision itself.

[35] See, inter alia, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraphs 462 and 463.

[36] See, to that effect, *Heylens and Others* (cited above), paragraph 15.

[37] See Order of the General Court in case T-320/09 *Planet v Commission* of 13 April 2011 (not yet reported and only available in French on the Court's website).

[38] The General Court noted that the contested acts affected the applicant's margin of negotiation, the organisation within its consortium and, hence, its possibility effectively to sign up to a project.

[39] See also Case 81/72 *Commission v Council* [1973] ECR. 587, paragraph 594 et seq, and the abundant subsequent case law.

[40] See, for example, Case T-48/05 *Franchet and Byk v Commission* [2008] ECR II-1585 at paragraphs 126-156. See also Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 478- 487.

See also Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others v Commission* [2001] ECR II1337, paragraph 134.

[41] The Ombudsman notes with concern that this right is not absolute. The EWS Decision states that, in order to protect the Union's financial interests, a provisional registration of an exclusion warning under W5a may be made before having given the person concerned the opportunity to express his/her views (alternatively, a W2 warning may be made).

[42] See Case T-48/05 *Franchet and Byk v Commission* [2008] ECR II-1585 at paragraph 146, where the court referred to an exception in cases necessitating the maintenance of absolute secrecy for the purposes of the investigation. In such cases, the obligation to invite the person concerned to give his views subject to strict procedural guarantees (in that case, the deferment of the right to be heard required the agreement of the most senior Commission official, that is, the Secretary-General of the Commission).



[43] A person will only request information about possible inclusion on the EWS if he/she/it has reason to suspect that they are on the EWS. It is reasonable to assume that not all persons included on the EWS will actually suspect that they have been included. This would be especially true of those persons who consider their inclusion on the EWS not to be justified. However, the Ombudsman takes good note of the suggestion made by FEOCA (paragraph 67 above) that persons should also have a right to request specific confirmation from the Commission that they are not included on the EWS. The Ombudsman sees no reason why the Commission could not agree to such requests.

[44] This would include a right of access to the file (subject to the protection of information legitimately classified as confidential).

[45] Authorising officers, OLAF and the Internal Audit Service are responsible for initiating EWS warnings.

[46] In principle, this could be the Commission's accounting officer, who is responsible for entering, modifying or removing EWS warnings, pursuant to requests made by the authorising officers, OLAF and the Internal Audit Service.

[47] This senior official could be the Director-General of DG Budget or the Commission's accounting officer (who is the Deputy Director-General of DG Budget).

[48] It must be underlined that no such concerns could ever arise as regards W3a warnings, W4 warnings and W5 warnings. Such warnings are not connected to any ongoing investigation of the person concerned. Thus, the fact that the person concerned is made aware of the warning, through being granted the right to be heard, does not in any way undermine any investigation of the person concerned.

[49] It should also be borne in mind that without an official EWS, there might be a risk that an informal system of 'black-listing' could emerge. Such an eventuality would be unwelcome.