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P. NIKIFOROS DIAMANDOUROS

Mr José Manuel Barroso  
President of the European Commission  
B - 1049 Brussels  
BELGIQUE

Strasbourg, 29 -10- 2008

**OI/3/2008/FOR**

Mr President,

According to Article 195 of the Treaty establishing the European Community, the European Ombudsman is empowered to conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of Community institutions and bodies. By virtue of this provision, I hereby open an inquiry into a possible case of maladministration by the Commission. The reasons for the inquiry are as follows.

The European Commission's Early Warning System ("EWS") is a computerised information system containing details of third parties who are deemed to represent a threat to the Communities' financial interests and reputation. The applicable rules on the EWS are contained in Commission Decision on the Early Warning System (EWS C(2004) 193/3, as last amended by the 2007 internal rules).

On 6 December 2006 the European Data Protection Supervisor issued an Opinion on a notification for Prior Checking on the Early Warning System (Case 2005-120) received from the Commission's Data Protection Officer.

The Ombudsman has had the opportunity to deal with two cases in which internal warnings relating to the standing of third parties played a role.

*Case 278/2003/JMA*

Case 278/2003/JMA involved a Spanish environmental organisation which had requested financial assistance under a Community action programme for the promotion of non-governmental environmental organisations. The request was rejected by the Commission due to a legal action against the organisation being pursued at the time before the Spanish courts. As a result of his inquiry, the Ombudsman found that the Commission had been unable to show that it had struck a fair balance between the

need to pursue the sound financial management of its grants, and the complainant's right to be treated both fairly and with due respect for the presumption of innocence.

*Case 2468/2004/OV*

Case 2468/2004/OV concerned a complainant who was involved in a number of projects financed by the Commission. In the framework of a commercial dispute, one of the complainant's subcontractors obtained from a national court in Luxembourg an attachment order against it. When the Commission was informed of this order, it blocked all payments to the complainant and listed it in the EWS. Once informed that the attachment order was limited to EUR 50 000, the Commission decided to retain this sum from the amounts due to the complainant. However, the complainant remained on the EWS until the attachment order was lifted nearly one year later. The Ombudsman considered that the complainant's continued listing in the EWS was unfair and constituted an instance of maladministration. He therefore closed the case with a critical remark.

Subsequent to the above outlined cases, the Ombudsman has carried out a careful analysis of the EWS decision. The questions which arise in this own-initiative inquiry are the following:

**A. General questions:**

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 the number of entities 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 companies *spontaneously* contacted the Commission to request that it confirm whether their names were actually on the EWS.
3. The Ombudsman understands that full access to the EWS is allowed to a defined category of authorised users of the EWS. Despite this restricted access, does the Commission consider that there 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 an entity 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 both W5 warnings and W1 to W4 warnings.

5. When an entity is flagged 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 beneficiary in question would be informed that the delay has resulted from the fact that its name appears on the EWS under a W2-W5 flag.

#### **B. Specific questions in relation with the different levels of warning**

6. The EWS Decision states 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 insofar 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 third party entered in the EWS were to head the list of 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 a third party for which an W2, W3b or W4 warning has been entered heads the list of the evaluation committee, the authorising officer takes a "duly substantiated" decision to award the contract/grant to another tenderer/applicant or 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 entity concerned so long as this warning remains active. Please justify how a person or company concerned can effectively exercise its legitimate rights of defence (by, for example, providing evidence that 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 parties 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

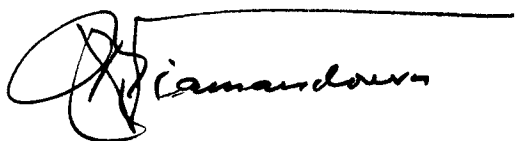
omissions in relation to whether a company or person is bankrupt, which might be identified by an interested party in relation to a W5 warning, but which no do not concern personal data, will also be rectified once the Commission has been informed of such errors or omissions?

10. The Ombudsman understands that the Commission has introduced a modification to the 2007 version of the EWS Decision. Article 15a now states that "*Where a third party is subject to a W3a warning corresponding to a preventive attachment order, the Accounting Officer shall maintain the suspension of all payments pending a final judicial ruling on the principal creditor's claim. Where the preventive attachment order is limited to a specific sum, the accounting officer shall suspend payments up to that amount.*" (emphasis added) 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 beyond the amount set out in "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 Community, 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 Communities' financial interests and reputation despite the fact that an attachment order is issued in relation thereto by a national court?

I kindly request the Commission to provide me with an opinion in relation to the above questions. A reply by 28 February 2009 would be greatly appreciated.

Please note that the European Data Protection Supervisor has requested the European Ombudsman to inform him of any Own Initiative Inquiry the Ombudsman may wish to carry out in relation to the EWS. Therefore, a copy of this letter will be forwarded to the European Data Protection Supervisor.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Diamandouros', with a long horizontal line extending to the right.

P. Nikiforos DIAMANDOUROS

Cc: Mr Peter Hustinx, European Data Protection Supervisor