

Brussels, **27 FEB. 2009**
D-(03). 1271

Dear Mr Diamandouros,

Subject: Own Initiative Inquiry, ref. OI/3/2008/FOR

I refer to your letter of 29 October 2008 to President BARROSO about this inquiry.

Please find attached the opinion of the Commission.

The Commission remains at your disposal for any further information you may require.

Yours sincerely,



Dalia Grybauskaitė

Enclosure

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Comments of the Commission on the European Ombudsman's Own Initiative Inquiry – ref.: OI/3/2008/FOR

A. Background

On 29 October 2008, the Ombudsman launched an own-initiative inquiry as regards the European Commission's **Early Warning System (EWS)**. The Ombudsman has indicated that he dealt with two cases in which 'internal warnings relating to the standing of third parties played a role' (Cases 278/2003/JMA and 2468/2004/OV). Subsequent to these cases, the Ombudsman analysed the applicable rules to the EWS, set out in the "EWS" Decision adopted by the Commission in 2004¹, and asks ten questions.

B. Reply from the Commission

The EWS is an internal Commission tool which is necessary for the protection of the financial interest of the Union.

1. Legal basis for W1 to W4 warnings - The Commission considers that the legal basis for issuing W1 to W4 warnings is Articles 274 of the EC Treaty and 27 of the Financial Regulation², which require the Commission to respect the principle of **sound financial management** when implementing the general budget of the European Communities.

The purpose of these warnings is to **inform** the various services of the Commission and the executive agencies that the third parties concerned by those warnings and with whom the Commission has or is likely to have financial relations:

- are suspected of having committed **fraud or serious administrative errors** (W1, W2 and W3b warnings);
- are subject to an **attachment order** ("saisie-arrêt" in French) which prevents the Commission to pay the third parties (W3a warnings);
- are subject to significant³ recovery orders issued by the Commission on which payment is significantly overdue⁴, i.e. are "**very bad debtors**" (W4 warnings);

¹ Commission Decision (2004) 193/3 on the Early Warning System (EWS), as last amended by the 2007 Commission Internal rules. This Decision has recently been repealed with effect from 1.1.2009 by the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies (OJ L 344, 20.12.2008, p. 125). See also the new Commission Regulation (EC, Euratom) No 1302/2008 of 17 December 2008 on the central exclusion database (OJ L 344, 20.12.2008, p. 12). Unless otherwise specified, the Commission will nevertheless refer only to the Commission Decision (2004) 193/3 as last amended by the 2007 Internal Rules when answering to the questions.

² Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1), as last amended by Council Regulation (EC) No 1525/2007 of 17.12.2007 (OJ L 343, 27.12.2007, p. 9).

³ That is to say superior to eur 30,000 in principle.

⁴ That is to say that the debt is still unpaid more than one month after a formal demand has been sent.

and to incite them to **take the appropriate measures** provided in the Community legislation to protect the financial interest of the Communities.

It responds to the **European Parliament's wish**, expressed in 1997, that the Commission did so⁵.

2. Number of registrations and of confirmation requests - As regards the number of entities registered in the EWS from 2004 to 2007, the Commission can provide full information as regards 2005 to 2008 included, in the following table, but not for the year 2004. More than two thirds of the warnings are W4 warnings (except if W5b warnings are taken into account, as it is the case from 2008).

	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 Serious administrative errors/fraud suspected	2	9	19	32
W2 Findings of serious administrative errors/fraud	7	29	37	43
W3 (a) Attachment orders + (b) Judicial proceedings pending for serious administrative errors/fraud	31 (W3a: 12 + W3b: 19)	44 (W3a: 11 + W3b: 33)	95 (W3a: 18 + W3b: 77)	133 (W3a: 18 + W3b: 115)
W4 Significant recovery orders unpaid	548	565	659	719
W5 (a) Exclusion cases + (b) CFSP related financial restrictions	65 W5a	88 W5a	100 W5a	130W5a (+5798 W5b)
Total	653	735	910	1057 (+5798W5b ⁶)

⁵ In 1997, the Commission proposed to introduce "un système efficace d'alerte précoce pour les directions générales lorsque de graves erreurs administratives (ou des fraudes) sont détectées chez des organisations ou des entreprises bénéficiant de fonds communautaires" (Commission document SEC(97) 1562/2 of 30.07.1997). "Ce point particulier découle de la surprise que des parlementaires ont exprimée en apprenant que certaines directions générales ont continué à passer des contrats avec des entreprises qui avaient déjà fait l'objet de critiques de la part de la Cour des comptes depuis la fin de 1995" (ibidem).

As regards the number of registered companies which spontaneously contacted the Commission requesting confirmation whether they were registered in the EWS, it has first to be noted that the EWS being an internal tool, registrations in the EWS are **not publicized**. In addition, confirmation of a registration was possible (and in any event not mandatory) **only for W5a warnings**⁷, which correspond to exclusion situations preventing the Commission to award a procurement contract or a grant to the person flagged. Finally, the Commission has not established a register of such formal requests which, in any event, have been scarce from 2004 to 2008 (**no more than three demands**). If such confirmation requests increase, such register could be established.

As from **2009**, the **transparency of the EWS and of the registered warnings is increased**⁸. In particular, in addition to the publication in the Official Journal of the EWS Decision⁹:

- third parties are 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 of the warnings;
- a natural person may request from the Commission Accounting Officer information on whether he is subject to W1 to W4 warnings.

3. Affecting negatively the reputation - The purpose or effect of the EWS is not to affect negatively within the Commission and executive agencies (and within the other institutions and bodies as regards W5a warnings), the reputation of the flagged persons. It aims:

- to **share information about objective situations**, listed in Annex 1, concerning third parties 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 precautionary appropriate measures** to be taken by the Commission services and executive agencies (and the other institutions and bodies as regards W5a warnings) in accordance with the sound financial management and the specific provisions of relevant community legislation, in particular the Financial Regulation.

⁶ The 5798 figure does not mean that 5798 **different** entities are registered under level W5b warning (Common Foreign Security Policy related financial restrictions) as some entities are registered under different names (X alias Y alias Z).

⁷ See Article 8(3) of the EWS Decision, as amended by the 2006 Commission Internal Rules: *'Following an official written request from the duly identified legal entity concerned or a third party which has duly proved its power to represent the legal entity concerned, the Commission's accounting officer may inform that third party whether or not the legal entity concerned is registered in the central database set up for exclusions cases in accordance with Article 95 FR (cases corresponding to W5a warnings) and give the name of the author of the alert to be contacted for further information'*.

⁸ See Article 8 of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies.

⁹ Under the previous regime, and from 2006, the EWS Decision was posted on the Europa website.

In addition, as the Ombudsman notes, 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 **as regards only W2, W3b and W4 warnings and only in so far as the warning constitutes 'a new element to be examined with regard to the tenderer/applicant's economic, financial, technical and professional capacity'**¹⁰. Informing the evaluation committees in such case is of particular relevance as these committees are precisely entrusted with assessing this capacity, 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).

4. Rights of appeal and defence - Up to the end of 2008, no formal 'appeal' from an entity challenging its inclusion in the EWS has been referred to the Commission.

In case of such challenge, the Commission would consider the arguments put forward by the entity with the greatest care, in full independence and fairness. In particular, **the Commission shall consider any proven modification of the objective situation of the entity**, such as the fact that:

- it is no longer suspected of fraud or serious administrative errors (W1, W2 and W3b warnings),
- or that it is no longer subject to an attachment order preventing him to be paid directly (W3a warnings),
- or that it finally paid its debt towards the Commission (W4 warnings),
- or that it is no longer in an exclusion situation (W5a warnings) because, for instance, it has paid its social security contributions and taxes,
- or that it is no longer listed on a Council Regulation imposing Common Foreign Security Policy related financial restrictions (W5b warnings);

and proceed to the necessary adjustments in the EWS.

Provisions to this effect have recently been introduced in the rules governing the EWS¹¹.

The Commission would like to stress that warnings W1 to W4 do not as such adversely affect the rights or interests of the third parties flagged. Only W5a warnings, which correspond to exclusion situations, require not to award procurement contracts or grants during the period of exclusion to the third parties flagged. 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, but furthermore a proper

¹⁰ Article 14(1), point a, of the EWS Decision – Article 17(1) of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies provides similarly that the evaluation committee for the award of contract or grant concerned shall be informed of the existence of the warning *'in so far as the existence of such warning constitutes a new element to be examined in connection with the selection criteria for that contract or grant'*.

¹¹ See Article 8 of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies and in particular Article 8(2): *'The 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 (hereinafter 'the data subject concerned'): (a) (...) (b) it 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'.*

contradictory procedure is carried out as provided in Article 133a(1) of the Implementing Rules of the Financial Regulation^{12 13}.

Therefore, a third party 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.

In the Commission's view, this system complies with Article 16 of the European Code of Good Administrative Behaviour¹⁴ and the principle of the 'rights of defence'. In any event, apart from complaining to the Ombudsman in case of maladministration, the entity may submit the Commission's exclusion decision to a judicial review in accordance with Article 230 of the EC Treaty.

5. Delays in payment - The Commission cannot totally exclude that, **in very few instances**, the procedure of preventive suspension of any payment to an entity flagged under W2-W5 warnings¹⁵ 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 authorising officers concerned that they have to check and confirm rapidly 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 200 euros threshold will be automatically paid¹⁶.

Should a delay occur in the payment due to its preventive suspension, the third party must be informed of the suspension of the payment time-limit, in accordance with Article 106(4) of the Implementing Rules of the Financial Regulation, but will **not** be informed in principle that he is registered in the EWS, as such information is purely internal in principle (except for W5a warnings as from 2009 – see supra, 2).

6. Information in case of W2, W3b or W4/selection stage - The tenderer or candidate is **not** informed when a W2, W3b or W4 warning is brought to the attention of an evaluation

¹² Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as last amended by Commission Regulation (EC, Euratom) No 478/2007 of 23.04.2007 (OJ L 111, 28.04.2007, p. 13).

¹³ See also Article 96 of the Financial regulation and Article 14(3) of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies, which sets out the principle that whenever the Commission envisages to exclude a third party, it shall give the third party concerned the opportunity to express its views in writing. The third party shall be given at least 14 calendar days to do so.

¹⁴ Article 16 of the European Code of Good Administrative Behaviour: '*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.*

¹⁵ Article 12 of the EWS Decision – Article 15 of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies.

¹⁶ Article 106(5) of the Implementing Rules of the Financial Regulation.

committee (see supra, 3) or taken into account by the authorising officer, if the third party entered in the EWS were to head the list of 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 committee¹⁷.

7. Information in case of W2, W3b or W4/award stage - According to Article 14(2) of the EWS Decision, *'in the event that the third party for which a W2, W3b or W4 warning has been entered heads the list of the evaluation committee'*, the authorising officer shall decide **either to award** the contract/grant to the third party flagged, **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 motivate this closure in the information given to the tenderer'*¹⁸.

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 into account a relevant information;
- oblige the Commission to inform the tenderers or candidates whose applications or tenders have been rejected *'of the grounds on which the decision was taken'*;
- oblige 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**.

8. Rights of appeal and defence in case of W5a - The Ombudsman asks the Commission to justify *'how a person or company 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 entity concerned'*. He also asks *'what precisely are the mechanisms for appealing a W5 warning'*.

The Commission has already answered these questions when answering to the more general question of how the inclusion in the EWS can be challenged (supra, 4).

¹⁷ Article 147(2), point b), of the Implementing Rules of the Financial Regulation provides that the written record to be established by the evaluation committee must contain *'the names of the candidates or tenderers rejected and the reasons for their rejection'*.

¹⁸ See also Article 17(2) of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies.

9. Right of rectification as regards W5a warnings - The Commission **can confirm** that 'inaccuracies or omissions in relation to W5a 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 W5a warning will also be rectified once the Commission has been informed of such errors or omissions' (see supra, 4 and especially footnote 11).

In particular, Article 7(2), point b), of 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.

10. Preventive attachment orders and "cantonnement" – Concerning the last question relating to the W3a warnings for preventive attachment orders ("saisies-arrêts conservatoires" in French) and the impact of the "cantonnement" procedure, the Commission has clarified the rules in Article 19(1) of the Commission Decision of 16 December 2008 on the EWS for the use of authorising officers of the Commission and the executive agencies:

'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, if the national law applicable so requires. Where the preventive attachment order is limited to a specific sum according to a judgement ("cantonnement"), the accounting officer shall suspend payments up to that amount'.

The Commission has the following comments:

- 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 judgement 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 would be exposed to pay a second time to the third party's creditor, which would certainly be contrary to the sound financial management.

According to Article 12(3) of the Commission Decision of 16 December 2008, the W3a warning will only be deactivated when a judgment having the force of *res judicata* is rendered or the case has been otherwise settled¹⁹.

Annex 2 further develops the notions of preventive attachment orders and "cantonnement" in Belgian law, as it is the national law most frequently applied to the preventive attachment orders notified to the Commission.

Copy: Mr Peter Hustinx, European Data Protection Supervisor

¹⁹ In Belgian law, a "mainlevée de la saisie" will be considered as a settlement of the case.

Annex 1: chart summarising the various types of warnings and their consequences on the management of funds

Type of warning	Consequences on the management of funds
W1 (serious administrative errors/fraud suspected)	Reinforced monitoring of procurement contracts/grants only.
W2 (<u>Findings</u> of serious administrative errors/fraud) + W3b (<u>Judicial proceedings pending</u> for serious administrative errors/fraud) + W4 (significant recovery orders unpaid)	<p>* The Accounting Officer preventively suspends the payments and requests a formal confirmation from the competent authorising officer that the payment must be made</p> <p>* <u>For contracts/grants already signed</u>: competent authorising officer to decide case by case between: a) proceeding with the contract/grant with only reinforced monitoring, b) suspension of payment time-limits for further verification, c) suspension of the contract/grant or d) termination of the contract/grant (if it contains a provision to this effect)</p> <p>* <u>For new award procedures</u>: also depending on each case : competent authorising officer to decide between award with reinforced monitoring, or not awarding to the flagged entity after reassessing the selection criteria, or else motivated closure of the procedure</p> <p>* For W4 warnings: offsetting if possible.</p>
W3a (attachment orders – "saisies-arrêts")	<p>* <u>Preventive attachment orders ("saisies-arrêts conservatoires")</u>: payments suspended pending a final court ruling if the national law applicable so requires (except if a "cantonnement" is organised in accordance with the national law applicable)</p> <p>* <u>Enforceable attachment orders ("saisies-arrêts exécutoires")</u>: payment in favour of the creditor of the attached party (= "partie saisissante") (except if the Protocol on Privileges and Immunities apply)</p>
W5a (exclusion cases)	<p>* The Accounting Officer preventively suspends the payments and requests a formal confirmation from the competent authorising officer that the payment must be made</p> <p>* <u>For contracts/grants already signed</u>: competent authorising officer to decide case by case between a) proceeding with the contract/grant with only reinforced monitoring, b) suspension of payment time-limits for further verification, c) suspension of the contract/grant or d) termination of the contract/grant (if it contains a provision to this effect)</p> <p>* <u>For new award procedures</u>: competent authorising officer must exclude from participation in the procedure – no new commitment possible</p>
W5b (CFSP-related financial restrictions)	No new commitment and no payment possible

Annex 2: brief explanation of Belgian rules governing attachment orders ("saisies-arrêts" in French)

Article 15a(1) of the EWS Decision deals with the '**preventive attachment orders**' ("saisies-arrêts conservatoires" in French)²⁰.

In Belgian law, such "saisies-arrêts conservatoires" imply, when they are notified to the Commission as a debtor of a third party, that **the Commission cannot pay the third party** and must keep the necessary monies to pay its debt in its patrimony, without paying it, as long as a final judgement 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). Should the Commission 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 creditor²¹.

The suspension of payment must be **for the whole debt** of the Commission towards the third party, even if the third party's debt towards its creditor is inferior²².

The only possibility to avoid such total suspension of payment is, for the third party, to proceed through a special procedure called "**cantonnement**"²³: "*le saisi est à même de libérer les avoirs saisis en cantonnant, c'est-à-dire en consignnant un montant suffisant pour répondre de la créance, cause de la saisie, en principal, intérêts et frais*"²⁴. This "cantonnement" must be organised in accordance with precise rules²⁵.

²⁰ In contrast with the 'enforceable attachment order' ("saisie-arrêt exécutoire" in French) at stake in Article 15a(2) of the EWS Decision. This last attachment order implies that, when the Commission has a debt towards a third party, the Commission cannot pay directly the third party, but has to pay the creditor of the third party (unless the Protocol on Privileges and Immunities can be invoked).

²¹ See Article 1451 of the Belgian Code judiciaire: "*Dès la réception de l'acte contenant saisie-arrêt, le tiers saisi ne peut plus se dessaisir des sommes ou effets qui font l'objet de la saisie, à peine de pouvoir être déclaré débiteur pur et simple des causes de la saisie sans préjudice des dommages-intérêts envers la partie s'il y a lieu*".

²² See G. de Leval, "Eléments de procédure civile", Collection de la Faculté de droit de l'Université de Liège, 2003, p. 377, n° 293: "*Même si les objets saisis excèdent largement la valeur de la créance, cause de la saisie, ils sont intégralement indisponibles (indisponibilité totale) ... Il peut en résulter de graves inconvénients pour le saisi, par exemple en cas de disproportion entre la valeur des biens frappés d'indisponibilité et celle de la créance justifiant la saisie*".

²³ See Articles 1403 and following of the Belgian Code Judiciaire.

²⁴ G. de Leval, "Eléments de procédure civile", Collection de la Faculté de droit de l'Université de Liège, 2003, p. 377, n° 293.

²⁵ Article 1403 of the Belgian Code Judiciaire: "*Le débiteur sur qui une saisie a été faite ou permise à titre conservatoire, peut, en tout état de cause, libérer les avoirs sur lesquels elle porte ou faire obstacle à la saisie, en déposant soit à la Caisse des dépôts et consignations, soit aux mains d'un séquestre agréé ou commis, un montant suffisant pour répondre de la créance en principal, intérêts et frais. Quand la saisie porte sur des sommes, ce dépôt peut être fait au moyen de fonds saisi (...). Le débiteur se pourvoit préalablement devant le juge des saisies, lequel règle le mode et les conditions du dépôt des fonds (...)*".

Article 1405 of the Belgian Code Judiciaire: "*Dans les cas prévus aux articles 1403 et 1404, et avec les effets qui y sont attachés, le débiteur peut consigner entre les mains de l'huissier de justice instrumentant, une somme suffisante pour répondre des causes de la saisie en principal, intérêts et frais. L'huissier dresse procès-verbal du dépôt des fonds entre ses mains et en remet une copie au débiteur. Il est tenu de verser ces fonds dans les trois jours à un compte qu'il se fait ouvrir à la Caisse des dépôts et consignations et portant le nom de la partie saisie. Mention de ce versement est faite par l'agent de la Caisse des dépôts et consignations sur l'original de l'exploit contenant le procès-verbal du dépôt des fonds dont l'huissier garde la minute. Le retrait des fonds ne peut être fait par l'huissier que de l'accord du débiteur saisi ou en vertu d'une décision qui n'est plus susceptible de recours ordinaire*".