ORDER OF THE GENERAL COURT (Sixth Chamber)

13 April 2011 *

In Case T-320/09,

Planet AE, established in Athens (Greece), represented by V. Christianos, lawyer,

applicant,

v

European Commission, represented by D. Triantafyllou and F. Dintilhac, acting as Agents,

defendant,

* Language of the case: Greek.

APPLICATION for the annulment of decisions of the European Anti-Fraud Office (OLAF) to request the registration of the applicant in the Early Warning System (EWS) by the activation initially of a W1a warning, and subsequently of a W1b warning,

THE GENERAL COURT (Sixth Chamber),

composed of E. Moavero Milanesi, President, N. Wahl (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

1 With a view to combating fraud and any other illegal activity adversely affecting the Community's financial interests, on 16 December 2008 the Commission of the European Communities adopted Decision 2008/969/EC, Euratom on the Early Warning System for the use of authorising officers of the Commission and the executive agencies (OJ 2008 L 344, p. 125). The purpose of the Early Warning System (EWS) is to

ensure the circulation within the Commission and its executive agencies of restricted information concerning third parties who could represent a threat to the Communities' financial interests and reputation or to any other fund administered by the Communities (recital 4 in the preamble to Decision 2008/969).

2 The EWS relies on warnings allowing the identification of the level of risk associated with an entity according to categories ranging from W1, corresponding to the lowest level of risk, to W5, corresponding to the highest level of risk (Article 9 of Decision 2008/969).

3 The European Anti-Fraud Office (OLAF), which has access to the EWS within the framework of the exercise of its functions concerning the carrying out of enquiries and the collection of information with the aim of preventing fraud, is responsible, together with the authorising officers responsible and the Internal Audit Services, for requesting the entry, modification or removal of EWS warnings, which are managed by the accounting officer or his subordinate staff (recitals 5 to 7 in the preamble to and Articles 4 to 6 of Decision 2008/969).

4 Article 4(1) of Decision 2008/969 states that 'the accounting officer shall enter, modify or remove EWS warnings pursuant to requests by the [authorising officer by delegation] responsible, OLAF and the Internal Audit Service'. Article 6(2) states that 'in the case of procurement or grant award procedures the [authorising officer by delegation] responsible or his staff shall verify whether there is a warning in the EWS at the latest before the award decision'.

5 Article 10(1) of Decision 2008/969 states that OLAF 'shall request the activation of a W1a warning where its investigations at an early stage give sufficient reason to believe that findings of serious administrative errors or fraud are likely to be recorded in relation to third parties, especially those who are benefiting or have benefited from Community funds'.

6 Article 10(2) of Decision 2008/969 states, inter alia, that OLAF is to request the activation of a W1b warning where its investigations give sufficient reason to believe that final findings of serious administrative errors or fraud are likely to be recorded in the EWS in relation to third parties, especially those who are benefiting or have benefited from Community funds.

7 Article 16 of Decision 2008/969 states that a W1 warning 'shall be registered for information purposes only and may entail no consequence other than reinforced monitoring measures'.

Background to the dispute

8 The applicant, Planet AE, is a Greek company which provides advisory services in the field of the administration of companies. Since 2006, it has been engaged, in its capacity as a member of three consortiums, in three projects in Syria financed by the Commission. Since 16 October 2007, it has been the subject of an enquiry carried out by OLAF into suspected irregularities within the framework of these three projects.

9 Following a tendering procedure launched within the framework of the seventh Framework Programme for Research and Technological Development, the applicant was invited by the Commission, by a letter dated 18 April 2008, to enter into negotiations with the aim of determining the definitive terms of a contract for a grant regarding its proposal to assume the role of co-ordinator of a consortium concerning the project 'Advancing knowledge — intensive entrepreneurship and innovation for growth and social well-being in Europe' (the 'AEGIS project'). The Commission's letter mentioned that any possible grant from the Community could not exceed an amount of EUR 3 300 000 and that negotiations had to be concluded before 30 June 2008.

10 The findings emerging in the enquiry mentioned in point 8 above led OLAF to request the applicant's registration in the EWS on two occasions. On 26 February 2009, it requested the activation of a W1a warning and, on 19 May 2009, it requested the activation of a W1b warning. The registrations were made on 10 March and 25 May 2009.

11 On 27 February 2009, the Commission sent the applicant the negotiated contract for a grant (the 'contract') so that the applicant and the other members of the consortium to which it belongs could sign it. On 11 March 2009, the applicant returned the signed contract to the Commission so that the latter, in turn, could sign it.

12 On 4 June 2009, the Commission informed the applicant by e-mail that the process of signing the contract had been suspended until a further condition had been satisfied, namely the opening by the applicant of a blocked bank account, through which the applicant would have access only to the part of the advance payment which it was due under the contract, whereas the rest of the advance payment would be transferred directly by the bank to the other members of the consortium. The e-mail mentioned that this new condition was required because of an unexpected event, namely the

registration of the applicant in the EWS by the activation, first, of a W1a warning, and then of a W1b warning.

13 After the applicant had agreed with its bank that the bank undertook to transfer, following the receipt of the advance to be paid by the Commission, to each member of the consortium the amount which it was due, the Commission signed the contract on 3 July 2009.

Procedure and forms of order sought by the parties

14 The applicant brought the present action by application lodged at the Registry of the Court on 14 August 2009.

15 By separate document, lodged at the Registry of the Court on 9 November 2009, the Commission raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of the Court.

16 On 5 January 2010, the applicant lodged its observations on the plea of inadmissibility.

17 In the application initiating proceedings, the applicant claims that the Court should:

— annul the two decisions of OLAF of 26 February and 19 May 2009, of which it became aware on 4 June 2009 which requested its registration in the EWS, by the activation, initially, of a W1a warning, and subsequently of a W1b warning.

— order the Commission to pay the costs.

18 In its plea of inadmissibility, the Commission contends that the Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

19 In its observations on the plea of inadmissibility, the applicant claims that the Court should reject the plea of inadmissibility and declare the action admissible.

Law

20 Under Article 114(1) and (4) of the Rules of Procedure, if a party so requests, the Court may rule on the plea of inadmissibility without going to the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings are to be oral. The Court finds that in the present case it has sufficient information from the case-file and there is no need to open the oral procedure.

The subject-matter of the dispute

21 As a preliminary consideration, it should be stated that, although the applicant formally sought the annulment of the decisions of OLAF of 26 February and 19 May 2009 which requested its registration in the EWS, it is clear from the content of the application that it is also directed at the decisions to activate W1a and W1b warnings.

22 In this respect, it should be borne in mind that, as provided in Article 21 of the Statute of the Court of Justice of the European Union and Article 44 of the Rules of Procedure, the application initiating proceedings must indicate, inter alia, the subject-matter of the dispute and contain the forms of order sought by the applicant. Furthermore, according to the case-law, the forms of order sought must be set out in a precise and unequivocal manner, since otherwise the Court would risk giving a ruling *infra petita* or *ultra petita* and disregarding the rights of the defendant (see, by analogy, Joined Cases 46/59 and 47/59 *Meroni and Others* v *High Authority* [1962] ECR 411, at page 419).

23 However, the contested measure can be identified by implication from the statements and from the whole argument set out in the application (see, to that effect, order in Case C-388/93 *PIA HiFi* v *Commission* [1994] ECR I-387, paragraph 10). It has also been held that an application formally brought against a decision which is part of a group of decisions forming a whole could be regarded as directed also, so far as necessary, against the others (see, to that effect, Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33, at page 43).

24 In this case, it appears from Articles 4 and 5 of Decision 2008/969/EC, first, that, in the EWS, the distinction made between the request for activation of a warning and its activation is of a purely administrative nature and is intended to centralise and standardise the technical management of that system and, secondly, that, in this system, requests for activation of a warning are followed by real warnings without any examination in substance being carried out.

25 Although the management tasks of EWS, such as the registration, modification or the termination of warnings in the EWS, are allocated to a single service within the Commission, namely the accounting officer, or his subordinate staff, Decision 2008/969/EC provides that the conditions giving rise to such measures are to be observed and analysed within the various services of the Commission (the authorising officer responsible, the Director General or a director of OLAF or of the internal audit service), which are required to communicate their conclusions regarding the necessity of a measure to the accounting officer, who is required to implement the requested measure. It follows that, from the point of view of an entity registered in the system, the request for activation of a warning and the actual warning constitute a group of decisions forming a whole.

26 In addition, in the plea of inadmissibility, the Commission starts from the premise that it is the decisions to activate W1a and W1b warnings which are challenged and which form the subject-matter of the dispute, despite the formal claims of the applicant regarding the requests of OLAF to register it in the EWS. In this plea, the Commission is only putting forward arguments with the aim of proving that those

decisions do not constitute measures which can be challenged. It follows that the Commission was not mistaken about the intention of the applicant to request the annulment of the decisions to activate these warnings and that its rights of defence will not be prejudiced by the fact that those decisions also form the subject-matter of the dispute.

27 Therefore, having regard to the case-law cited in paragraphs 22 and 23 above and taking account of the particular facts giving rise to the present dispute, it must be held that the action formally directed against the decisions of OLAF of 26 February and 19 May 2009 which requested the registration of the applicant in the EWS must be regarded as directed also, so far as necessary, against the decisions to activate W1a and W1b warnings ('the contested measures').

The plea of admissibility

Arguments of the parties

28 The applicant contended, both in the application initiating proceedings and in its observations on the plea of admissibility, that the contested measures had binding legal effects and damaged its interests by altering its position in fact and in law.

29 The applicant claims first of all that the contested measures considerably delayed the signing of the contract. That gave rise to extra costs for it, since it had been obliged

to modify the schedule for the performance of the contract and have recourse to a contract for a loan in order to deal with the constraints imposed by the non-transfer of the advance payment promised by the Commission. It also claims to have started to provide its services from 1 January 2009, which was provided for in the negotiations and approved by the Commission, and, as a consequence, to have borne obligations of a financial nature.

30 According to the applicant, the contested measures also gave rise to the imposition of the condition of a blocked bank account, which had not been provided for during the negotiations conducted and concluded before the adoption of the contested measures.

31 Furthermore, the applicant claims that the contested measures are subject to review in so far as they altered its position in fact. In this respect, it asserts that the delay in the signing of the contract and the restriction imposed regarding the distribution of the advance payment transferred to its account have damaged its reputation by placing it in an embarrassing situation in relation to the other members of the consortium of which it is a member, to whom it was required to explain the conduct of the Commission. According to it, the contested measures also affected the position which it held before the contested measures were taken, which was both that of "successful bidder' for the project and that of co-ordinator of the consortium, by reducing this position to a role of 'successful bidder' for the project and co-ordinator of the consortium with conditions attached.

32 In support of the plea of admissibility, the Commission contends that the contested measures by their nature may not be challenged in an action for annulment, since they are merely internal and informative precautionary measures. In that connection, the Commission refers to the case-law of the Court according to which internal measures which do not have legal effects outside the Community administration cannot be the subject of a judicial review under Article 230 EC. In addition, the Commission observes that the contested measures are simply a manifestation of the precautionary

approach that it must take before committing the financial resources of the European Union contractually.

33 According to the Commission, although it is true that the registration of the applicant in the EWS created increased monitoring obligations for the authorising officers responsible, the applicant has not proved that the contested measures had produced legal effects on it by impairing its rights or by imposing new obligations on it. In that connection, the Commission disputes the idea that the delay in the signing of the contract had a legal effect. According to the Commission, such a delay is very common in the world of business where the parties feel the need to protect their respective interests and, moreover, has already occurred, in fact, in the context of the settlement of other questions. Therefore, the delay in question neither created obligations for the applicant nor prejudiced its rights within the meaning of the case-law relating to decisions which are capable of forming the subject-matter of an action pursuant to Article 230 EC.

34 The Commission also contends that there is no direct link between, on the one hand, the contested measures, and, on the other hand, the applicant's recourse to a bank loan and its inability to make advance payments to other members of the consortium. According to the Commission, the applicant's recourse to a bank loan was caused rather by its haste to undertake expenditure well before the signing of the contract and is not a consequence of the contested measures. Similarly, according to the Commission, the solution which was finally agreed on regarding the transfer of the advance payment to the other members of the consortium was the result of 'consultations and deliberations' between them, the applicant and its banks and did not constitute an 'automatic effect' of the contested measures.

35 Furthermore, the Commission contends that the requirement that the applicant should not be permitted to administer the transfer of the advance payment to the other members of the consortium released it from an obligation and consequently cannot be considered to be a loss.

36 Finally, the Commission contends that the questions addressed to the applicant by the other members of the consortium regarding the delay in the signing of the contract and the replies given to these questions do not have legal effects for the applicant.

Findings of the Court

37 It should be borne in mind that, according to settled case-law, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. In particular, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position is considered to be subject to review within the meaning of Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-521/06 *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 29).

38 On the other hand, actions directed against decisions which only constitute measures internal to the administration and which as a consequence have no effect which is external to the administration are inadmissible (see order in Case 78/85 *Groupe des droites européennes* v *Parliament* [1986] ECR I-1753, paragraphs 10 and 11, and Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 9 and the case-law cited). In support of its plea of inadmissibility, the Commission relies on this latter case-law and asserts that the contested measures are not subject to review since they constitute merely internal informative measures.

39 In that regard, it should be pointed out that the fact that the administration processed data for purely internal purposes, inter alia by collecting that data, by managing it

and by using it, in no way rules out the possibility that such activities may damage the interests of the persons concerned, in the sense of the case-law cited in paragraph 37 above. The existence of such damage depends on several factors, inter alia, on the nature of the data processed, on the specific objective of that processing, on the precise consequences to which that processing may give rise and on the correspondence between, on the one hand, the objective and the consequences of the processing in question and, on the other hand, the applicable provisions which define the powers of the administration.

40 As regards the last point above, the Court finds that Decision 2008/969, on which the contested measures are based, makes no reference to primary or secondary law expressly conferring on the Commission the power to create, carry out and manage a database relating to legal or natural persons suspected of representing a risk to the financial interests of the European Union. Although recital 3 in the preamble to Decision 2008/969 refers to Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the Financial Regulation'), it must be stated that Article 95 of this Regulation, in the version applicable to the facts of the case, provides only for the implementation of a central database listing legal or natural persons who have been excluded from funding from the European Union because of insolvency, conviction for serious professional misconduct or for conviction of a criminal offence detrimental to the financial interests of the European Union.

41 Even though the applicant has not raised a plea to this effect, the lack of competence of the author of the contested measures constitutes an issue of public policy which, as such, must be raised by the Court of its own motion (see, to that effect, Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85, paragraph 45, and Case T-160/08 *Commission* v *Putterie-De-Beukelaer* [2010] ECR II-3751, paragraph 61).

42 Therefore, in order to assess whether the contested measures are vitiated by lack of competence *ratione materiae*, it is appropriate, if only for that reason, to examine their content (see, to that effect, Case C-303/90 *France* v *Commission* [1991] ECR I-5315, paragraph 10, and Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraph 9).

43 However, in order to give a ruling on the plea of inadmissibility raised by the Commission and assuming at this stage that the Commission is authorised to carry out the data processing which the contested measures represent, it is appropriate to check whether the entry of a warning about an entity in the EWS and, in particular, in the W1 category is an activity which only concerns relations between a line manager and his subordinates and whose effects are confined to the institutions, organs and agencies of the European Union internally.

44 In this regard, it is apparent from Article 6 of Decision 2008/969 that, in the context of budgetary commitments and in the context of procedures for awarding contracts or subsidies, the authorising officers responsible within the Commission are required to check whether the entities bidding have been the subject of a warning in the EWS. When this is the case, Articles 15 to 17 and 19 to 22 of Decision 2008/969 permit and require the accounting officer or the authorising officer concerned to adopt specific measures against such entities or against the project concerned. Therefore, in light of the objective pursued by Decision 2008/969, which is to protect the financial interests of the European Union in the context of the implementation of budgetary measures, the impact of a warning about an entity in the EWS, even in the W1 category, cannot be confined within the institutions, organs and agencies of the European Union and such a warning necessarily affects relations between the authorising officers concerned and such an entity.

45 Although Article 16 of Decision 2008/969, according to which '[a] W1 warning shall be registered for information purposes only and may entail no consequence other than reinforced monitoring measures', is less restrictive than Articles 15, 17 and 19 to 22 of that decision, it is apparent from the wording of Article 16 and from the

structure of the decision that the fact that there is a W1 warning in reality results in a duty of the authorising officer concerned to adopt reinforced monitoring measures, which is, in any event, recognised by the Commission in the plea of inadmissibility. A W1 warning would lose all purpose if the authorising officer concerned, who is informed about the existence of suspicions of fraud or of serious administrative errors (see Article 10 of Decision 2008/969), was not obliged to ensure the reinforcement of monitoring measures.

46 In this case, the obligation arising from the contested measures for the authorising officer concerned to adopt measures against the applicant can be clearly deduced from the content of the e-mail which was sent to the applicant by the Commission on 4 June 2009. In this e-mail, the member of staff responsible for the documents relating to the award of the AEGIS project informed the applicant that, while the signing of the contract had been suspended and a further condition had been imposed, this was the result of the warning registered and the situation did not depend on them.

47 Therefore, since it has been established that the contested measures had in fact produced effects outside the Commission, it is appropriate to examine whether those effects can be considered to be binding legal effects which are capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.

48 In this connection, it is important to point out that the entities seeking the commitment of financial resources of the European Union are affected by a warning in the EWS, in so far as they are obliged, in order to be able to pursue their financial interests, to comply with the conditions or precautionary measures, which are specific to them and imposed by the authorising officers concerned. Such conditions and precautionary measures can take the form of new contractual obligations and unforeseen economic burdens or even, as in the present case, of repercussions on the internal organisation of a consortium to which they belong.

49 In this case, as from the time of its registration in the EWS by the activation of a W1 warning, the applicant found itself in an unfavourable position compared with that in which it found itself during the period prior to the adoption of the contested measures, since the Commission, as indicated in paragraph 45 above, was required to impose reinforced monitoring conditions. This change in the legal position of the applicant is demonstrated by the e-mail of the Commission dated 4 June 2009 and the correspondence which ensued, from which it is apparent that, in order to be able to conclude a contract relating to the AEGIS project, the applicant was required to give up the management of the distribution of advances amongst the members of the consortium to which it belonged.

50 More precisely, in its e-mail dated 4 June 2009, the Commission set out how an unforeseen problem, namely the warning about the applicant in the EWS, had led to the suspension of the signing of the contract and detailed the measures which the applicant had to undertake in order to satisfy the new condition imposed by the Commission relating to the signing of the contract.

51 It follows from the foregoing considerations that the contested measures affected the applicant's scope for negotiation, the organisation within its consortium and, therefore, its ability actually to conclude the AEGIS project. To deny the applicant the possibility of obtaining a judicial review of the truth of the matters on which the contested measures were based would not be compatible with a European Union governed by the rule of law.

52 This follows *a fortiori* if account is taken of the fact that Decision 2008/969 does not provide for any right for legal and natural persons to be informed, still less to be heard, before their registration in the EWS by the activation of W1, W2, W3, W4 and W5b warnings. Admittedly, a person who, for one reason or another, is informed of his registration in this system may, under Article 8(2)(b) of Decision 2008/969, seek the rectification of the data relating to him. However, the decision to carry out such rectification is entirely at the discretion of the administration, which is the service which requested the registration of that person in the system.

53 Finally, it should be stressed that the contested measures cannot be considered to be intermediate and preparatory measures which are not subject to review. Not only do they reflect the legal characteristics of decisions which can be challenged (see paragraphs 44 to 48 above), but they also constitute the conclusion of a special procedure, namely the registration of an entity in a 'warning' list without it being heard with regard to the reasons for its registration, a procedure which is distinct from the decisions implementing the various specific requirements laid down by Decision 2008/969 (see, to that effect, *IBM* v *Commission*, paragraph 11).

54 It follows from all the foregoing that the Commission is not justified in claiming that the application is inadmissible.

55 As a consequence, the Commission's plea of inadmissibility must be rejected.

Costs

56 Article 87(1) of the Rules of Procedure provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings.

57 At this stage of the proceedings, costs must therefore be reserved.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby orders as follows:

1. The objection of inadmissibility is dismissed.

2. The costs are reserved.

Luxembourg, 13 April 2011.

E. Coulon — Registrar

E. Moavero Milanesi — President