



EUROPEAN COMMISSION

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Mr Bram Vranken
Vredesactie
Patriottenstraat 27
2600 Berchem

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 –Gestdem 2017/7033**

Dear Mr Vranken,

I refer to your email of 8 March 2018, registered on 9 March 2018, in which you submit, on behalf of *Vredesactie*, a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

On 21 November 2017, you submitted an initial application in which you requested access to documents containing the following information:

‘1. Details of all stakeholders consulted (including member states, industry, academia and others) on the decision to establish:

- a) The European Defence Fund; and
- b) The Defence Industrial Development Programme.

2. Details of all meetings, including minutes of meetings, with all stakeholders identified under 1(a) and 1(b) respectively, in relation to:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- a) The European Defence Fund; and
 - b) The Defence Industrial Development Programme.
3. All correspondence with the stakeholders identified under 1(a) and 1(b) respectively, in relation to:
- a) The European Defence Fund; and
 - b) The Defence Industrial Development Programme.’

This application was registered under reference number Gestdem 2017/7033.

I note that on the same day, you submitted another initial application concerning documents relating to the Group of Personalities on Defence Research. That application was registered under the reference number Gestdem 2017/7037.

Both applications were attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs for handling and reply.

On 23 February 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs provided its joint reply to your initial applications Gestdem 2017/7033 and 2017/7037.

In the reply, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the relevant documents, on the basis of the exception protecting the public interest as regards defence and military matters, provided for in the second indent of Article 4(1)(a) of Regulation 1049/2001, as well as the exception protecting the decision-making process, laid down in Article 4(3) of the said Regulation.

In your confirmatory application, you request a review of this position. In particular, you argue that the reply of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs does not provide any proper statement of reasons. You argue that, ‘[t]he reasons [the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs] have put forward to justify the application of the exceptions are strikingly vague and thus unsatisfactory’. Consequently, ‘[the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs] ha[s] not explained how disclosure can “specifically and actually” undermine the public interest [...] as regards defence and public security matters and why this is “reasonably foreseeable and not purely hypothetical”, as required by case law [...]’.

Additionally, you argue that there is an overriding public interest warranting, in your view, the public disclosure of the documents concerned.

This confirmatory decision concerns only the documents identified as falling under the scope of your application Gestdem 2017/7033. You will receive a separate reply to your application Gestdem 2017/7037 in due course.

As regards application Gestdem 2017/7033, the European Commission has identified 39 documents falling under its scope. The complete list of the documents identified is included in the annex to this decision.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Your initial application (point 1 and 2 thereof), relates to '[d]etails of all stakeholders consulted [...] on the decision to establish The European Defence Fund and The Defence Industrial Development Programme' and '[d]etails of all meetings, including minutes of meetings, with the [above-mentioned] stakeholders [...]'.

I consider that by 'details of stockholders consulted' and the 'details of all meetings', you refer to documents containing, respectively, a list of 'stakeholders consulted' and the list of meetings with the latter.

I confirm that the European Commission has not identified any such documents. In line with the provisions of Article 2(3) and Article 10 of Regulation 1049/2001, the right of access guaranteed by that Regulation applies only to existing documents in possession of the institution concerned.

Article 2(3) provides that '[t]his Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union'.

Article 10(3) provides that '[d]ocuments shall be supplied in an existing version and format [...]'.

In the light of the above, given that the European Commission does not hold any of the documents to which you refer to in your application, it is not possible to handle your application, in so far as points 1 and 2 thereof are concerned.

With regard to the documents identified as falling under point 3 of your initial application, after careful review of the initial decision, I conclude that wide partial access is granted to documents 8, 16, 17, 18, 19, 21a, 21b, 21d, 22, 25a, 25b, 25c, 28, 29, 30, 31, 32, 35, 36 and 38. The limited redactions are based on the exception protecting privacy and the integrity of the individual provided for in Article 4(1)(b) of Regulation 1049/2001.

Partial access is granted to documents 21c and 25d. The redacted parts of the documents are covered by the exceptions protecting the public interest, as regards defence and military matters and the decision-making process provided for in Article 4(1)(a), second indent and Article 4(3), first subparagraph of Regulation 1049/2001.

With regard to the remaining documents 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 20, 23, 24, 26, 33, 34, 37 and 39, access is refused. The underlying exceptions are those protecting the public interest, as regards defence and military matters and the decision-making process provided for in Article 4(1)(a), second indent and Article 4(3), first subparagraph of the above-mentioned Regulation 1049/2001.

Additionally, access is refused to document 27, based on the exception protecting the commercial interests of a natural or legal person provided for in Article 4(2), first indent of the said Regulation.

The detailed reasons are set out below.

2.1 Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’.

The undisclosed parts of documents 16, 17, 18, 19, 21a, 21b, 21d, 22, 25a, 25b, 25c, 29, 31, 35 and 36 contain the names, surnames, contact details (email and office addresses and telephone numbers) of the staff members of the European Commission who do not hold any senior management positions. The undisclosed parts of documents 8, 28, 29, 30, 32 and 35 contain also names, surnames, contact details (email addresses and telephone numbers) of representatives and employees of third parties, such as authorities of the Members States, organisations and economic operators.

Furthermore, the relevant undisclosed parts of documents 8, 17, 19, 21a, 21b, 21d, 22, 29, 31, 32, 36, 37, 38 contain biometric data (handwritten signatures of the staff members of the European Commission or third party representatives).

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines it as ‘any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity’.

It follows that public disclosure of all above-mentioned personal information, would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling³, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to

³ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.*, (ECLI:EU:C:2010:378), paragraph 63.

recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative⁴.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject⁵. Indeed, in its recent judgment in the *ClientEarth* case, the Court of Justice ruled that 'whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access'⁶. I refer also to the *Strack* case, where the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data⁷.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in documents 8, 16, 17, 18, 19, 21a, 21b, 21d, 22, 25a, 25b, 25c, 28, 29, 30, 31, 32, 35, 36 and 38.

Therefore, I conclude that the transfer of personal data through the public disclosure of the personal data included in the above-mentioned documents cannot be considered as fulfilling the requirements of Regulation 45/2001. Consequently, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to disclose publicly the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

Furthermore, the handwritten signatures of the staff members of the European Commission and third party representatives are biometric data and there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2.1. Protection of the public interest as regards defence and military matters and of the decision-making process

Article 4, paragraph 1, a), second indent, of Regulation 1049/2001 provides that [t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] defence and military matters [...].

⁴ Ibid, paragraphs 77-78.

⁵ Ibid.

⁶ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

⁷ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

Article 4(3), first subparagraph of Regulation 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

In the case at hand, the two above-mentioned exceptions are interlinked and therefore the corresponding reasons justifying their applicability are closely related.

In the *Kuijer* judgment, the General Court (previously, Court of First Instance) acknowledged that documents containing sensitive military information may have sufficient features in common for their disclosure to be refused⁸.

Documents 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 20, 23, 24 and 34 contain positions of Member States concerning implementation of the European Defence Industrial Development Programme and the European Defence Fund. In particular, the documents concerned include positions regarding the priorities of the work programme of the above-mentioned Funds for 2019 - 2020, together with the description of characteristics of categories of the projects to be financed.

Public disclosure of the above-mentioned documents would reveal information concerning defence-related aspects of the EU, as well as possible actions that particular Member States consider as priorities, thus indirectly revealing the information regarding the lines of the EU and/or Member State domestic defence policies and interests. This type of information is by nature sensitive as it relates to military (defence) needs in light of, for example, present capabilities of the Member States and the political security environment. That in turn would undermine the protection of the public interest as regards defence matters, as provided for in the second indent of Article 4(1)(a) of Regulation 1049/2001.

Indeed, the defence domain is particularly sensitive due to its very nature and its intrinsic link with the Member States and EU security. This is particularly true given the unstable international context and the fact that the EU faces a complex and challenging environment in which new threats, such as hybrid and cyber-attacks, are emerging, and more conventional challenges are returning.

Moreover, the defence domain is relatively recent in the EU context and requires the exchange of information with Member States in order for the European Commission to prepare properly its policy (translated into the work programmes of the European Defence Industrial Development Programme and the European Defence Fund) in this

⁸ Judgment of the Court of first Instance of 7 February 2002 in Case T-211/00, *Kuijer v Council*, ECLI:EU:T:2002:30, paragraph 60.

very specific domain. This exchange takes place in the framework of an atmosphere of mutual trust. The Member States share this type of information with the European Commission with the expectation that it will remain confidential and will not be made publicly available.

Should the dialogue between the Commission and the Member States not remain confidential, the latter would become very reluctant to continue the ongoing discussions. Consequently, the decision-making process linked to the establishment and finalisation of the Work Programmes would be undermined.

Documents 21c and 25d contain scoping papers of the European Commission, circulated to the Member States in order to gather their inputs as regards the Work Programme of the European Defence Industrial Development Programme and the various aspects of the European Defence Fund after 2020. The undisclosed parts of the documents include a description of policy options for the future shape of the above-mentioned programmes. Revealing publically these policy options, would seriously undermine the margin for manoeuvre of the European Commission' in exploring, in the framework of the ongoing negotiations with the Member States, all possible (policy) options free from external pressure. Similar type of information, in particular the description of various policy options with regard to the financial instruments for defence and security purposes, is included in documents 37 and 39.

It should be underlined that, in reply to the scoping papers mentioned above, the Member States provided their views, which are included in documents 12, 13 and 33. Additionally, documents 14 and 15 contain the positions of the Member States concerning the financial issues relating to the European Defence Fund in the context of the Multiannual Financial Framework. They also include the views of the originators regarding various technical aspects concerning funding from the above-mentioned Fund and the European Defence Industrial Development Programme (eligibility of cost, funding schemes, reimbursement rates). The same type of information is included in document 26, originating from the Association of European Research Establishments in Aeronautics.

Public disclosure of the information included therein would undermine the ongoing dialogue between the stakeholders (including the Member States), which, as mentioned above, requires an atmosphere of mutual trust, especially in the context of the sensitivity of the subject matter to which they relate.

Having regard to the above, I consider that the use of the exceptions under Article 4(1)(a), second indent (protection of the public interest as regards defence and military matters) and Article 4(3), first subparagraph, of Regulation 1049/2001 is justified concerning documents 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12,13, 14, 15, 20, 21c, 23, 24, 25d ,26, 33, 34, 37 and 39 and that access thereto must be refused on that basis.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first indent of Regulation 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...], unless there is an overriding public interest in disclosure’.

Document 27, which is the report from the meeting with representatives of the company Safran, includes information about the involvement of the latter in various proposals financed through EU funds, as well as suggestions concerning types of research projects for which EU funding could be considered.

The above-mentioned information has to be considered as commercially sensitive business information of the economic operator in question (Safran).

Its disclosure under Regulation 1049/2001, through the public release of document 27 would clearly undermine the commercial interests of the economic operator in question. It can be presumed that the latter provided the commercially sensitive information contained in document 27 under the legitimate expectation that it would not be publicly released.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operator in question. I conclude, therefore, that access to document 27 must be denied based on the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

3. PARTIAL ACCESS

Wide partial access is granted to documents 8, 16, 17, 18, 19, 21a, 21b, 21d, 22, 25a, 25b, 25c, 28, 29, 30, 31, 32, 35, 36, 38 and partial access is granted to documents 21c and 25d. With regard to the remaining documents, for the reasons explained above, no meaningful partial access is possible as regards the requested documents without undermining the interests described above.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(a) and Article 4(1)(b) of Regulation 1049/2001 do not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) and (3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you refer to the general need of transparency, which, in your view, should be ensured with regard to exchanges between the European Commission and external actors concerning the European Defence Industrial Development Programme and the European Defence Fund. You underline ‘the existence of an overriding public interest in disclosure, stemming from the enhanced public debate

and increased accountability concerning the arms industry's influence on EU defence policy [...]. In your view, '[...] getting a proper overview of the arms industry's lobbying in respect of these initiatives [the European Defence Industrial Development Programme and the European Defence Fund] (ultimately funded by EU taxpayers) is essential for the ability of EU citizens and the civil society to participate more fully in those decision-making processes as well as to oversee that the decisions taken by the European Commission are in the sole interest of EU citizens rather than being beholden to the arms lobby'.

Even if members of the public have expressed an interest in the subject matter covered by the documents requested and have pointed to an alleged general need for public transparency related thereto, I would like to refer to the judgment in the *Strack* case⁹, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to rely merely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure¹⁰.

Based on my own analysis, I have not been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interest of economic operators and ongoing decision-making process concerning various technical aspects of the European Defence Industrial Development Programme and the European Defence Fund, grounded in the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation 1049/2001.

⁹ Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v European Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

¹⁰ *Ibid*, paragraph 129.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaint to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

Annex:

- List of documents covered by your application,
- Copies of the documents to which partial access is granted.