



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) NO 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2020/3149**

Dear Mr Vranken,

I refer to your letter of 25 June 2020, registered on the same date, by which you submitted 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

On 18 May 2020 you submitted an initial application to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission, in which you requested access to, I quote, ‘[a]ll documents related to:

- the reviewing of E[uropean] D[efence] I[ndustrial] D[evelopment] P[rogram] projects’ compliance with international law [and]
- All documents related to the procedures that determine the compliance of E[uropean] D[efence] I[ndustrial] D[evelopment] P[rogram] projects with international law.’

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

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

Your application was attributed to the Directorate-General for Defence Industry and Space for handling and reply.

The European Commission identified the following (categories of) documents as falling under the scope of the first part of your initial application:

1. Submission forms concerning 40 proposals completed and submitted by the consortia in the context of the 2019 calls for proposal under the European Defence Industrial Development Program (hereafter ‘Documents category 1’),
2. Dashboard documents for each of the above-mentioned 40 proposals containing the results of their assessment according to the admissibility, eligibility, exclusion, selection and award criteria (hereafter ‘Documents category 2’),
3. Individual reports prepared by the external experts in the context of the evaluation of the said 40 proposals (hereafter ‘Documents category 3’).

With regard to the second part of your application, the European Commission identified the following document:

4. Guide for applicants in the European Defence Industrial Development Program³ (hereafter ‘Document 4’).

The Directorate-General for Defence Industry and Space replied to your application on 24 June 2020. It refused access to the above-mentioned documents category 1-3. It invoked the exceptions in Article 4(2), first indent, of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person), Article 4(3), first and second subparagraph, of the said regulation (protection of the decision-making process). With regard to the second part of your application, the Directorate-General for Defence Industry and Space provided you with the hyperlink to document 4.

Through your confirmatory application, you request a review of this position.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

As a preliminary comment I would like to underline that your initial application relates to information of a very concrete and specific nature, namely the compliance of the proposals with international law. This aspect, as set out in the publicly available Guide for Applicants, is indeed assessed as one of the eligibility criteria, but is only one of many criteria taken into account in the context of the evaluation of the proposals. Consequently, the European Commission does not possess any dedicated documents that

³ Public document, available at:
https://ec.europa.eu/research/participants/data/ref/other_eu_prog/edidp/guide/edidp-guide-applicants_en.pdf.

would focus on this particular aspect and contain its detailed, substantive assessment. Indeed, the consortia participating in the European Defence Industrial Development Program are not required to submit such dedicated documents. Rather, the issue of compliance with international law is covered in the submitted proposals (documents category 1), as the consortia are required to declare that the proposals are indeed compliant with the requirements of international law. The fulfilment of this criteria is checked by the experts and the European Commission on the grounds of the technicalities of each project proposal. The information you requested is therefore part of the project proposals submitted by the participants. The same information is included in documents category 2 and 3.

It needs to be underlined that documents category 1-3 also contain information unrelated to the aspect referred to in your initial application. Indeed, the documents containing the project proposals contain information such as the description of works, budgetary aspects and subcontracting issues. The same type of information is reflected in documents category 2 and 3. Consequently, only a very limited part of those documents relates to the aspect of compliance of the proposals with international law, while the remaining contents fall outside the scope of your application.

In the light of the above-mentioned considerations and following review, I inform you that I have to confirm the position of the Directorate-General for Defence Industry and Space refusing access to the documents requested. The underlying exceptions are provided for in Article 4(1), second indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regards defence and military matters) and Article 4(2), first indent, of the said regulation (protection of commercial interests of a natural or legal person).

The detailed reasons are set out below.

2.1 Protection of the public interest as regards defence and military matters

Article 4(1)(a), second indent, of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where the disclosure would undermine the protection of the public interest as regards defence and military matters’.

The proposals submitted under the European Defence Industrial Development Program include sensitive information originating from the industry, the organisations or from the Member States.

The proposals in question relate to defence technologies developed by EU companies, mostly with the support of several Member States, and based on common requirements jointly agreed by at least two Member States. The defence capabilities, that can be employed by either military forces or just as deterrence, are based on military capabilities (ability to perform military operations) in the short term, industrial capabilities (ability to obtain/support, repair/upgrade military capabilities) in the medium term and technological capabilities (ability to retain military superiority) in the long term.

The EU technologies submitted in the proposals are at a rather advanced stage of development, and are likely to be developed and used by the Member States, independently of the Commission decision to fund part of the proposals or not. As a consequence, public disclosure of the proposal could provide essential technical information (such as development process, performances or specifications) that could undermine the strength and resilience of the EU defence capabilities. This can cause irreparable harm to the essential defence and military interest of the Member States and of the EU, and goes beyond the mere commercial or economic interest that can affect undertakings or the Member States.

The proceedings of the 40 evaluations qualify the strengths, shortcoming and weaknesses of the proposals, and through them, of the EU defence technology proposed. Divulging this information would expose vulnerabilities and undermine the strength of the capability serving the national or EU defence interest. It would also give a qualified judgment of strengths that could also be used by third parties in order to better design and develop their own defence and protection measures, also undermining the efficiency of the EU capabilities.

Public disclosure of information included in the documents categories 1-3 beyond the information that has already been made publicly available on the nature of the projects selected, can therefore affect essential defence and military interest of the Member States and the EU.

Therefore, I conclude that the refusal of access to documents the documents categories 1-3 is justified based on Article 4(1)(a), second indent, of Regulation (EC) No 1049/2001.

2.2 Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation (EC) No 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’.

The documents category 1 originate from third parties, the members of the consortia participating in the calls organised under the European Defence Industrial Development Program. Therefore, the information you requested forms part of the proposals and is information originating from third parties. Public release of this information under Regulation (EC) No 1049/2001 would require disclosure of (part of) the submitted proposal.

As recognised by the case-law of the General Court, there is a general presumption of non-disclosure of a bid of a tenderer⁴. That general presumption of non-disclosure of a

⁴ For example: judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, EU:T:2016:322, paragraph 30, Judgment of the General Court of 13 November 2015, *ClientEarth v European Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 65.

bid applies, per analogy, also to grant applications. The reason for this analogy lies in the nature of the information contained in grant applications. Indeed, grant applications such as in documents category 1 contain, as does a tender, information relating to methodologies, know-how, specific pricing or business strategies as to how the services will be provided or how the project will be implemented. The same reasoning applies to the information requested in your initial application. Indeed, the issue of compliance (or not) of the proposal with international law, as declared by the participant and as evaluated by the independent experts and the European Commission, can be considered as commercially sensitive business information, as its public disclosure could be instrumentally used by the competitors, or could put the participant in a negative light, thus compromising its public image. It can be presumed that the information concerned, as well as other information included in the proposals, was provided under the legitimate expectation that it would not be publically released.

A significant part of the information included in the documents of category 1 (including the information regarding compliance with international law) is repeated or referred to in the documents category 2 and 3 and constitutes an important share of their contents. Consequently, the reasoning mentioned above applies by analogy to the information included in the documents belonging to categories 2 and 3.

With regard to the exception protecting the commercial interests, in your confirmatory application you refer to the conclusions of enquiry 1529/2019, in which, I quote, ‘[...] the European Ombudsman stated that "it is not evident to the [European] Ombudsman why disclosing this information (related to the E[thics], L[egal and] S[ocietal] A[spects] reviews of P[reparatory] A[ction on] D[efence] R[esearch] projects) would undermine any valid commercial interests."’. You underline that, I quote, ‘[t]he [European] Ombudsman concluded that increased access should be granted "including to the commercial information contained in those reports"’.

Please note, however, that case 1529/2019 related to different documents prepared under a different framework. Indeed, the projects financed through the Preparatory Action on Defence Research were subject to the review of the ethical, legal and societal aspects, while the European Defence Industrial Development Program does not envisage such review. The aspect of compliance with international law (one of the issues evaluated under the review of the ethical, legal and societal aspects in the Preparatory Action on Defence Research) is taken up only in the context of the eligibility criteria of the proposals. For this very reason, as mentioned in point 2 of this decision, there are no specific, dedicated documents that would contain the substantive assessment of this aspect.

Furthermore, the European Ombudsman confirmed in the conclusions of enquiry 1529/2019 that individual assessments of evaluators should not be disclosed, as their disclosure could give rise to pressure being placed on individual evaluators and the risk of self-censorship. In the present case, information concerning the compliance of the proposals with international law is included in the individual assessments of the evaluators (documents category 3). That information is similar to that included in the

project proposals (documents category 1), which, as explained above, are covered by the presumption of non-disclosure confirmed by the case-law.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the members of the consortia participating in the calls organised under the European Defence Industrial Development Program. I conclude, therefore, that access to the documents concerned must be denied, based on the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions in Articles 4(1)(a) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

The exceptions laid down in Article 4(2) of Regulation (EC) No 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 this context, in your confirmatory application you refer again to the conclusions of the European Ombudsman in case 1529/2019. Indeed, you argue that, according to the European Ombudsman, I quote, “[...] "the public has, in principle, a right to be adequately informed about the content of projects financed using public money, including the assessment of their possible ethical, legal and societal implications."”.

In the case at hand, as explained in point 2 and 2.2 of this decision, the dedicated, specific review of ethical, legal and societal aspects is not envisaged. Consequently, the European Commission does not hold any document similar to that referred to by the European Ombudsman and therefore her argumentation may not be applied to the information included in the project proposals and the assessment of the evaluators.

It also needs to be emphasised that the European Commission indeed published a description of the projects selected through factsheets on the website of the European Commission.

Finally, please note that the Court of Justice, in the *Strack* case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance⁵. 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-disclosure⁶.

⁵ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128 (hereafter *Strack v Commission*).

⁶ *Strack v Commission*, cited above, paragraph 129.

4. PARTIAL ACCESS

As stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part⁷. Therefore, no partial access is granted for documents category 1. No partial access is possible with regard to documents category 2 and 3 as their content which falls under the scope of your initial application is covered by the exceptions provided for in Article 4(1)(a), second indent and Article 4(2), first indent, of Regulation (EC) No 1049/2001.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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
Ilze JUHANSONE
Secretary-General

⁷ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.