

EUROPEAN EXTERNAL ACTION SERVICE



DG Budget and Administration
The Director-General

Brussels, 09 April 2021
eeas.sg.affgen.2 (2021) 2031917

Mr Tommaso Angelini Battaglia

Subject: Your request for access to documents
Our ref: 2021/036

Dear Mr Angelini Battaglia,

Thank you for your confirmatory application of 12/3/2021, following your request for access to documents.

With regard to the document requested in your initial letter dated 24 February 2021, the EEAS has conducted a new examination of the reply given on 5 March 2021. I take note that the partially disclosed document was made available to you.

Following your confirmatory application, the EEAS has carefully considered and examined whether *full* public access to the requested document can be granted in the framework of the Regulation 1049/2001. When assessing a request under the Regulation 1049/2001, it is important to consider if one of the exceptions provided for in the Article 4 is applicable.

Public release of the above mentioned document was refused since its release to the public domain would undermine the protection of the public interest as regards international relations, as described in Article 4(1)(a), third indent, of the Regulation 1049/2001.

In this context, the EEAS would like to recall that, according to the established case law of the Court of Justice, the public interest exceptions laid down in Article 4(1)(a) of the Regulation 1049/2001, including the protection of the public interest as regards international relations, are subject to a particular regime as compared to the other exceptions included in Article 4.

In line with the above, the EEAS enjoys a wide discretion in determining whether the disclosure of documents would undermine the public interests protected by Article 4(1)(a) of the Regulation 1049/2001.

Moreover, once the EEAS has come to the conclusion that the release would indeed undermine the public interest in this area, then it is mandatory to refuse access to the documents. In such a situation there is no balancing exercise between the public interest protected by the exemption and other reasons for granting access invoked in order to override the exemption.

Contrary to the allegation in your email, that 1) the harm test applicable to Article 4(1)(a) has not been sufficiently proven, as it was not sufficiently demonstrated how full disclosure of the document would cause a reasonable foreseeable, non-hypothetical harm to international relations; 2) that the Union institutions must conduct their work as openly as possible and 3) that the disclosure of this document in full is within the public interest because PESCO projects represent a significant proportion of collective defence spending and that civil society is able to scrutinise their performance and evaluate whether they represent value-for-money, the EEAS maintains its views that:

- 1) disclosing the document in full would allow hostile third parties and entities to anticipate the instruments the EU will be able to deploy and to improve their own capabilities in order to counteract EU external political and strategic approach, thus undermining the EU and the participating Member States' efforts to optimize the PESCO cooperative framework. This risk is not hypothetical, insofar the effectiveness of all EU's action in this field is strictly interrelated with its Member States' capacity to improve their defence and military standards, as they have a direct impact on their capacity to guarantee the protection of their military and civilian staff involved in the CSDP operations and the overall successful outcome of the EU's missions.
- 2) The Union institutions enjoy a wide discretion in assessing the impact of the release of documents on defence and military matters and international relations, but is barred from taking into account other legitimate interests in order to override the conclusion that giving access to a document would harm the protected interests and grant access nonetheless.
- 3) the confidentiality of information contained in the document must be maintained, as it is the pre-condition to guarantee the cross-border exchange of this sensitive data in a climate of absolute mutual trust among national authorities involved in PESCO and between them and EU agencies and their international partner organisations. Therefore, the EEAS maintain its opinion that it is crucial to ensure an ideal confidential framework and operating within a safe and trustworthy model of cooperation. Hence, releasing this report to the wide public would be detrimental to the climate of mutual trust among the PESCO participating Member States and with all the EU's international players committed to cooperate in this framework.

The re-examination of the document you requested confirmed that only the partially redacted version can be disclosed. I confirm that a *full* release of the 'High Representative of the Union for Foreign Affairs and Security Policy Annual Report on the Status of PESCO Implementation 2020' under Regulation 1049/2001, would indeed undermine the protection of defence and military matters, as well as international relations as per Article 4(1)(a), second and third indents of the Regulation.

If you are not satisfied with this response you may, in accordance with Article 8 of the Regulation, institute court proceedings against the European External Action Service or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the Treaty on the Functioning of the EU respectively.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'G. Di Vita', with a stylized flourish at the end.

Gianmarco Di Vita