

Chief Executive

Mr. Bram VRANKEN
Vredesactie
Patriottenstraat 27
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Belgium

Ref: Doc N° 201801110/CSD/CR

Brussels, 24th Jan 2018

Subject: Decision of the EDA Chief Executive pursuant to Article 7.2 of EDA Decision No. 17/15 of 09 November 2017 adopting the EDA policy on public access to documents implementing Regulation 1049/2001.¹

Dear Mr. Vranken,

I refer to your email of 04 January 2018, registered on 05 January 2018, by which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001"), requesting EDA to review its decision to refuse disclosure of documents you requested.

1. Scope of your Request

In your initial application of 15 November 2017, registered on 16 November 2017, you requested access to all documents held by EDA 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 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.”*

In the processing of your initial application, my services identified the following documents, held by EDA, as falling within the scope of your request:

- (1) Invitations to attend part of Friends of the Presidency group meetings organised by the Estonian Presidency on the proposal for the EDIDP;
- (2) EDA Steering Board Document No.2017/25; and
- (3) Opinion of Council Legal Service of 23 November 2017 (Doc No. 14876/17).

In our response to your application, we indicated that *“even though some documents addressed to EDA participating Member States have been identified, these are produced and disseminated to government officials only and therefore fall under Article 4.1 of Regulation 1049/2001 as their disclosure would undermine the protection of the public interest as regards defence matters.”*²

We also indicated *“that some documents related to the aforementioned topics originate from other institutions, in particular the European Commission and the EU Council of Ministers and that following internal consultation, in accordance with Article 4.4, these have also been found to fall under the exceptions of Article 4 of Regulation 1049/2001.”*³

You now request, by your confirmatory application of 04 January 2018, that EDA reconsider its position as regards its decision not to disclose the above mentioned documents.

2. Assessment and Conclusions under Regulation 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, I ask my services to perform a review of the reply given by the Agency at the initial stage.

Based on this review, I regret to inform you that I have to confirm the initial decision to refuse access to the documents referred under (2) and (3), based on the exception of Article 4(1) and Article (2) of Regulation 1049/2001, for the reasons set out below.

² Email from EDA to Mr. Vranken of 22 December 2017.

³ Idem.

However, I am pleased to inform you that the documents under (1) are publicly available on the Council website, under the heading 'meetings'.⁴ Please note in that respect that EDA was only invited to attend parts of the meetings as an observer and was not provided with any additional documents relating to Member State discussions in this forum.

3. Protection of Defence and Military Matters

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

The European Defence Agency was established in accordance with and pursuant to Articles 42.3 and 45 of the Treaty on European Union.

In accordance with Article 2 of Council Decision 2015/1835,⁵ the mission of the EDA *"is to support the Council and the Member States in their effort to improve the Union's defence capabilities in the field of crisis management and to sustain the CSDP as it currently stands and as it develops in the future."*

In order to fulfil its mission, EDA *"operates under the authority and the political supervision of the Council, to which it shall provide reports and from which it shall receive guidelines or guidance (...)"* (Article 4). Its decision-making body is the Steering Board, which is composed of representatives of participating Member States and a representative of the Commission (Article 8).

It stems from above that EDA is an EU Agency under the authority of the Council with a mission in the field of defence.

Because of the sensitive nature of its mission and its specific governance, Steering Board documentation is, as a rule, prepared for and distributed only to authorised representatives of the Steering Board and marked as *"government eyes only"*. This is to ensure that sensitive Steering Board level discussions and decisions are given the appropriate level of protection.

The document identified as falling within the scope of your request is EDA Steering Board Document No.2017/25 – referred under (2) above – entitled *"Steering Board tasking for the upstream phase of the EDA support to the European Defence Industrial Development Programme (EDIDP)"*. It is a document prepared for the Steering Board which concerns sensitive defence-related elements and, as a result, bears the marking *"for Government use only"* indicating that its content is not intended for public release.

⁴ <http://www.consilium.europa.eu/en/meetings/calendar/>

⁵ Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (OJ L 266, 13.10.2015, p.55).

In that respect, we would argue that EDA, similarly to the Council, and in line with CJEU case law, *"must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation (EC) No 1049/2001 could undermine the public interest"*⁶

I would also recall that the public interest exception laid down in Article 4(1)(a) of Regulation 1049/2001 is subject to a particular regime compared to the other exceptions included in Article 4, in that *"it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests"*.⁷

In light of the above and based on EDA's assessment, I must conclude that the disclosure of the document referred to under (2) above would undermine the protection of the public interest as regards defence and military matters. As a result, I confirm the original decision taken by EDA in respect of this document.

4. Protection of Legal Advice

Article 4(2) of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection of [...] legal advice.*

The document identified under (3) is a legal opinion of the Council Legal Service entitled *"Proposal for a Regulation establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry - questions related to the legal basis."*

The document was provided to EDA by the Council and is marked as 'LIMITE' with the indication that *"This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication."*

As a result, EDA declined to disclose the document which it considers to fall under the exception of Article 4(2) second indent of Regulation 1049/2001.

I would recall that the exception under Article 4(2) of Regulation 1049/2001 must be

⁶ ECJ case C-266/05, Sison, para. 35.

⁷ ECJ case C-266/05, Sison, para. 46.

waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, second, outweigh the harm caused by disclosure, i.e. outweigh the protected interest.

In your confirmatory application, you do not mention any overriding public interest that would outweigh the protection under Article 4.2 of Regulation 1049/2001. Nor have I been able to identify any public interest in the full disclosure of the documents that would outweigh the protection of the legal advice. Consequently, I consider that in this case there is no overriding public interest that would outweigh the protection provided for in Article 4(2), second indent of Regulation 1049/2001.

5. Partial Access

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, no meaningful partial access is possible without undermining the EDA's approach to ensuring the protection of its Steering Board's documentation, as described above.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

6. 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 complaints 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,



Jorge Domecq