

Decision in case 1839/2020/OAM on how the European Commission dealt with a request for public access to documents concerning the European Defence Industrial Development Programme

Decision

Case 1839/2020/OAM - Opened on 27/10/2020 - Decision on 08/03/2021 - Institution concerned European Commission (No maladministration found) |

The case concerned the European Commission's refusal to grant public access to documents concerning the evaluation of project proposals under the European Defence Industrial Development Programme. The complainant sought public access to evaluations of how proposed projects complied with international law, in particular in view of the impact of defence technologies on human rights. The Commission identified various categories of documents that fell partially under the request. It refused to provide access, arguing that disclosure could undermine the public interest as regards defence and military matters and the protection of commercial interests.

The Ombudsman inspected a sample of the documents and found that the Commission's decision to refuse access was reasonable, given the specific nature of the documents. She thus closed the inquiry, finding no maladministration. However, she noted the importance of reassuring the public that the Commission carefully examines whether EU-funded defence projects comply with international law. Given that the projects cover areas like drone technology, maritime surveillance, and defensive capabilities for military end-users, the public should be confident that a rigorous assessment has been conducted. To that end, she welcomes the fact that for the upcoming European Defence Fund 2021-2027 an ethics assessment is envisaged. She encourages the Commission to conduct this assessment as transparently as possible.

Background to the complaint

1. The European Defence Fund is an EU-funded programme, launched in 2017, to foster innovation and develop state-of-the-art defence technology and products through cross-border cooperation between EU Member States, and between companies, research centres, national administrations, international organisations and universities. Two pilot programmes were set-up under the European Defence Fund: the Preparatory Action on Defence Research (PADR) and



the European Defence Industrial Development Programme (EDIDP). [1]

2. The EDIDP was set up in 2018 [2] to support the competitiveness and innovation capacity of the defence industry in the EU. It co-finances collaborative defence development projects with a budget of EUR 500 million for 2019-2020. Two calls for proposals have been published under the EDIDP, one in 2019 and one in 2020.

3. Under the EDIDP rules, proposals failing to meet the eligibility criteria are rejected. [3] One of these criteria is 'compliance with international law', which includes rules to limit the effects of armed conflict, covering also restrictions on the means of warfare. [4]

4. In May 2020, the complainant, the Belgian NGO Vredesactie (Peace Action), made a request for public access to the Commission [5] concerning:

1) *"All documents related to the reviewing of EDIDP projects' compliance with international law;*

2) *All documents related to the procedures that determine the compliance of EDIDP projects with international law"* .

5. In June 2020, the Commission replied. Regarding the first set of documents, it informed the complainant that the evaluation and the grant award procedure was still ongoing. Disclosing any related documents would undermine its decision-making process, it said. With regard to the second set of documents, it identified one public document, the guide for applicants under the EDIDP, and provided the complainant with a link to where it is published online. [6]

6. The complainant asked the Commission to review its decision (by making a so-called 'confirmatory application'). The request for review concerned only the first set of documents, related to the evaluation of compliance with international law.

7. In September 2020, the Commission replied, maintaining its initial decision to refuse public access (it adopted a so-called 'confirmatory decision'). The Commission explained that it had identified three categories of documents concerning 40 proposals falling under the scope of the first point of the complainant's request. The documents were (i) submission forms of the applicants, (ii) the Commission's assessment against eligibility and selection criteria under the call for proposals and (iii) individual reports produced by external experts. The Commission invoked an exception provided under the EU's rules on public access to documents to justify withholding access, arguing that disclosing the documents could risk undermining the protection of the public interest as regards defence and military matters [7] and the protection of commercial interests. [8]

8. Dissatisfied with the Commission's response, the complainant turned to the Ombudsman in October 2020.

The inquiry



9. The Ombudsman opened an inquiry into the Commission's decision to refuse public access to the documents.

10. At the time of the initial request, the 2019 call for proposals under the EDIDP was completed. The Ombudsman's inquiry therefore focused on the documents related to the 2019 call for proposals, and not the 2020 call for proposals. The Commission published on its website short descriptions of the projects selected for funding. [9]

11. In the course of the inquiry, the Ombudsman's inquiry team met with the representatives of the Commission and inspected a sample [10] of the requested documents. The report on the inspection was sent to the complainant for comments.

Arguments presented to the Ombudsman

12. The **Commission** explained that compliance with international law is one of the eligibility criteria for the projects to be considered for funding. As a first step, applicants need to declare that the proposals comply with international law. As a second step, the Commission and the external experts check the fulfilment of this criterion based on the details of each project proposal. The documents identified by the Commission contained only very limited information concerning the compliance of the proposals with international law. The remaining contents of the documents fell outside the scope of the request.

13. The Commission considered that disclosing the identified documents could undermine the protection of the public interest as regards defence and military matters. The technologies submitted in the proposals were at a rather advanced stage of development and were likely to be developed and used by the Member States, independently of EDIDP funding. Making public the evaluations of the proposals could expose potential vulnerabilities of these technologies.

14. The Commission argued that there is a 'general presumption' of non-disclosure for grant applications. [11] The information in the applications was repeated or referred to in the assessment of the Commission and in the experts' reports, and therefore those documents could not be disclosed either. The Commission further explained that information concerning the proposals' compliance with international law, contained in both the participants' proposals and in the Commission's and experts' evaluations, can be considered as commercially sensitive business information. If disclosed, such information could be used by competitors or influence the public image of the participant that submitted the proposal.

15. The **complainant** referred to EU case-law [12] and argued that the Commission had not given sufficient justification as to why it has applied the exceptions to public access. In particular, he considered that the Commission had not explained how disclosing the very limited part of the documents falling within the scope of the request would "specifically and actually" undermine the public interest as regards defence and military matters and why this was "reasonably foreseeable and not purely hypothetical".



16. The complainant is of the view that there is an overriding public interest in knowing how EU money is spent. [13] In addition, the public should know how the Commission is assessing the compliance with international law of new military technologies that receive EU funds, given the adverse impact these might have on human rights.

17. During the inquiry, the complainant raised additional concerns that the Commission's assessment of the compliance of the proposals with international law was not adequate. [14] Having access to the requested documents would allow for further scrutiny.

The Ombudsman's assessment

18. The purpose of the Ombudsman's inquiry is to assess whether the Commission's decision to refuse access to the relevant documents was reasonable, given the specific nature of the documents.

19. The EU Court has found that the EU institutions enjoy wide discretion when determining whether disclosing certain information could pose a risk to the protection of the public interest as regards defence and military matters. [15]

20. The inspection of a sample of the requested documents by the Ombudsman's inquiry team confirmed that the proposals contain detailed information related to defence projects. The Commission's view that this information is highly sensitive, and that disclosing these documents could undermine the public interest as regards defence and military matters, is thus reasonable.

21. As the Commission was justified in invoking the exception for defence and military matters as regards the project proposals, the Ombudsman has not conducted an assessment as regards whether the exception for the protection of commercial interests also applies to these documents.

22. While public access to the proposals is not possible, the Ombudsman notes that the Commission has made a certain amount of information about the successful projects publicly available. The Commission publishes factsheets on the projects approved for financing. [16] These include relevant information, such as a short description of the project, the duration, the types of activities covered (e.g., studies, design), the members of the consortium and their countries of establishment.

23. The complainant would like to know more about the assessment conducted by the Commission and external experts of the projects' compliance with international law. Public access to the documents reviewed by the Ombudsman's inquiry team would have been unlikely to satisfy that interest, however. As set out in the inspection report, the documents contain only very limited information on the compliance of the proposals with international law — the documents contain only the 'yes/no' conclusion on a project's compliance with the international law criterion (indicated by an 'X' by the project officer in the relevant cell). The Commission



representatives explained to the Ombudsman's inquiry team that whenever a positive evaluation was given, no further details were recorded explaining why this conclusion was drawn.

24. Apart from this very limited information, the Commission does not possess any documents that contain information on the compliance of the proposals with international law.

25. The Ombudsman did consider whether it would be useful to ask the Commission to give access to the 'tick-box' conclusions on compliance with international law. While granting access to the 'tick-box' conclusions would not give rise to any disclosure of defence-related confidential information, making a proposal to release the 'tick-box' conclusions would not serve any useful purpose. Granting such access would only have provided information that the complainant and the public already know, namely that the Commission considers that the funded projects comply with international law.

26. In light of the above, the Ombudsman considers that there was no maladministration by the Commission in this case.

27. The Ombudsman is of the view, however, that the Commission has an interest in reassuring the public that the EDIDP projects fully respect international law. The fact that there is no detailed assessment of the compliance of projects with international law is thus a cause for some concern.

28. The Ombudsman notes, in this regard, that a new regulation governing the European Defence Fund is expected to be adopted for the period 2021-2027, which will govern funding of around EUR 7 billion. [17] The regulation establishing the fund, currently being negotiated by the co-legislators, envisages that actions implemented under the fund will be subject to an 'ethics assessment' by the Commission, which the Ombudsman understands will include an assessment of compliance with international law obligations. The Ombudsman welcomes this development. She suggests that, once the regulation is adopted, the Commission puts in place an adequate procedure to perform such assessments, thus ensuring that the funded projects comply with international law and have no adverse impact on human rights. Transparency — to the extent possible — of the outcome of its assessments would reassure the public and address any concerns raised by stakeholders.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the European Commission.

The complainant and the Commission will be informed of this decision.



Emily O'Reilly European Ombudsman

Strasbourg, 08/03/2021

[1] More information is available at:

https://ec.europa.eu/growth/sectors/defence/european-defence-fund_en [Link]

[2] Regulation (EU) 2018/1092 on competitiveness and innovation in defence, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1092> [Link]

[3] In accordance with Article 6.6 of Regulation (EU) 2018/1092 actions for the development of products and technologies the use, development or production of which is prohibited by international law shall not be eligible for funding under the programme.

[4] More information is available at: <https://www.icrc.org/en/war-and-law> [Link]

[5] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link]

[6] Guide for applicants in the European Defence Industrial Development Program, available at:

https://ec.europa.eu/research/participants/data/ref/other_eu_prog/edidp/guide/edidp-guide-applicants_en.pdf [Link]

[7] Article 4(1)(a) second intent of Regulation 1049/2001

[8] Article 4(2) first intent of Regulation 1049/2001

[9] https://ec.europa.eu/info/publications/european-defence-industry-results-calls_en [Link]

[10] The Ombudsman's inquiry team had sight of two project proposals, the relevant entry in the dashboard relating to those proposals, and the assessment of one external expert on compliance with the international law criterion.

[11] The Commission referred to EU case-law under which there is a general presumption of non-disclosure of a tenderer's bid, which applies by analogy to grant applications. See for example Judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, paragraph 30:

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9812C90E9011A02DC9171F828FD3D9C4?text=&do> [Link]

[12] The complainant referred to EU case law, for example, judgment of the Court of 28 November 2013, *Jurašinović v Council of the EU*, C-576/12 P, paragraph 45:



<http://curia.europa.eu/juris/document/document.jsf?text=&docid=144988&pageIndex=0&doclang=EN&mode=lst&dir>
[Link]

[13] The complainant refers to the European Ombudsman case 1529/2019/MIG on the European Defence Agency's refusal of public access to documents concerning the ethics reviews of proposals for the EU's Preparatory Action on Defence Research, available at: <https://www.ombudsman.europa.eu/en/decision/en/126035> [Link]

[14] The complainant referred to Article 36 of Additional Protocol I of 1977 to the Geneva Conventions (1949) which stipulates that governments are obliged to carry out legal reviews of new weapons, means and methods of warfare. The International Committee of the Red Cross has published a guide to clarify the obligations under Article 36, available at: https://www.icrc.org/en/doc/assets/files/other/irrc_864_icrc_geneva.pdf [Link]

[15] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission*, T-644/16, paragraphs 23 -25:
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&dir>
[Link]

[16] See reference in footnote 9

[17] See for example information available on the website of the Council of the European Union:
<https://www.consilium.europa.eu/en/press/press-releases/2020/12/14/provisional-agreement-reached-on-setting-up>
[Link]