

## **Decision on the European External Action Service's (EEAS) refusal to give full public access to its annual report on the implementation of the Permanent Structured Cooperation (PESCO) of the EU in 2020 (case 786/2021/LM)**

Decision

**Case 786/2021/LM - Opened on 29/04/2021 - Decision on 08/07/2021 - Institution concerned** European External Action Service ( No maladministration found ) |

The complainant sought public access to the annual report on the implementation of the Permanent Structured Cooperation (PESCO) of the EU in 2020.

The European External Action Service (EEAS) disclosed introductory and general statements from the report and redacted the remaining parts. It said that disclosure of the redacted parts could undermine the protection of the public interests as regards international relations and as regards defence and military matters.

The inspection of the document confirmed that the report contains highly sensitive information liable to jeopardise defence and military matters. The Ombudsman found that full disclosure of the information contained in the document would allow hostile third parties and entities to anticipate the resources the EU will be able to deploy and to improve their own capabilities in order to counteract the EU's external political and strategic approach. The Ombudsman also found the EEAS's reliance on the international relations exception to be convincing. Thus, the Ombudsman concluded that the EEAS was justified in refusing access and closed the inquiry finding no maladministration.

## **Background to the complaint**

1. Permanent Structured Cooperation (PESCO) is a framework and process to deepen defence cooperation between the 25 EU Member States participating in the programme. It was established by the Council in December 2017. The 25 Member States have signed up to legally binding commitments to invest, plan, develop and operate defence capabilities together, within the EU framework.

2. Under PESCO, each year the participating Member States are required to communicate a



National Implementation Plan (NIP), informing the other participating Member States about the progress made on the binding commitments it has undertaken as regards defence and military capabilities, including information on contribution on projects. The NIPs then form the basis of the assessment process by the European External Action Service (EEAS), which presents an annual report on PESCO to the Council of the EU, based on an assessment of the NIPs. On the basis of this report, the Council reviews annually whether the participating Member States continue to fulfil their binding commitments as regards defence and military capabilities [1] .

3. In February 2021, the complainant, a researcher, made a request for public access [2] to the EEAS, seeking access to the document “ *High Representative of the Union for Foreign Affairs and Security Policy Annual Report on the Status of PESCO Implementation 2020* ”.

4. In March 2021, the EEAS replied to the complainant’s request. It disclosed some introductory statements from the report, as well as some general statements, but redacted large parts. The EEAS refused access to the remaining parts of the document, arguing that disclosure would undermine the protection of the public interest as regards international relations [3] .

5. The complainant then asked the EEAS to review its decision to grant only partial access (making what is known as a ‘confirmatory application’).

6. In April 2021, the EEAS replied to the complainant (‘confirmatory decision’). The EEAS confirmed its initial decision on the basis that disclosure of the full report could undermine the protection of the public interest as regards defence and military matters, as well as international relations [4] .

7. Dissatisfied with the EEAS’s decision, the complainant turned to the Ombudsman on 22 April 2021.

## **The inquiry**

8. The Ombudsman opened an inquiry into the EEAS’s refusal to provide full public access to the annual report on the implementation of PESCO in 2020.

9. In the course of the inquiry, the Ombudsman’s inquiry team met with representatives of the EEAS and of the European Defence Agency (EDA) and inspected the report. The complainant provided comments on the inspection meeting report.

## **Arguments presented to the Ombudsman**

### **Arguments by the complainant**

10. The complainant contended that, in line with EU Treaties [5] , EU institutions must conduct



their work as openly as possible. According to the complainant, the EEAS had not sufficiently demonstrated how full disclosure of the

document would cause a reasonably foreseeable, non-hypothetical harm to international relations and defence and military matters. In addition, some information contained in the report was already in the public domain [6] .

**11.** The complainant questioned how disclosure of the document could affect the international relations of the EU, as PESCO is an intra-EU integration project with no third-country involvement. According to the complainant, the fact that the EEAS relied on the exception pertaining to defence and military matters in the confirmatory decision, in addition to the protection of international relations invoked in the initial decision, indicated that the protection of international relations was not at stake.

**12.** In the complainant's view, the public should know about the content of this report, because PESCO projects represent a significant proportion of collective defence spending. Civil society should be able to scrutinise the performance of these projects and evaluate whether they represent value-for-money.

## **Arguments by the EEAS**

**13.** The EEAS explained that, as defence policy in the European Union is predominantly a competence of the Member States, PESCO is based on voluntary cooperation. The cooperation within the framework of PESCO relies mainly on the mutual trust amongst the participating Member States, and between the participating Member States and the EU institutions involved. The confidentiality of information contained in the document is the pre-condition to guarantee the cross-border exchange of sensitive data in a climate of absolute mutual trust among national authorities involved in PESCO and between them, EU agencies and their international partner organisations. It is for this reason that the EEAS invoked the international relations exception in the public access rules.

**14.** Disclosure of the document would also undermine the public interest as regards defence and military matters. Full disclosure 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 the EU's external political and strategic approach. This risk is not hypothetical, as the effectiveness of all EU action in this field is strictly interrelated with its Member States' capacity to improve their defence and military standards.

**15.** The EEAS said that no public interest in disclosure could override the interests protected by the exceptions as regards international relations and defence and military matters.

## **The Ombudsman's assessment**



**16.** When an institution examines a confirmatory application for a document it carries out a complete review of the request for public access. It may, when doing so, identify alternative or additional reasons for refusing public access. The fact that an institution identifies, when it makes a confirmatory decision, alternative or additional reasons why a document cannot be released does not imply that the reasons eventually given for refusing access are not valid. Whether or not they are valid will depend upon whether, on the facts, it is reasonably foreseeable that public access would undermine the interests set out in the exceptions invoked, which in this case were the public interests as regards defence and military matters and as regards international relations.

**17.** The EU Courts have 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 and international relations. This is due to the complexity and delicate nature of the decision that the institution has to take and to the sensitive and fundamental nature of those interests [7] .

**18.** The inspection of the redacted parts of the report by the Ombudsman's inquiry team confirms that they contain sensitive defence and military information throughout. The EEAS's view that disclosing those parts of the report could ultimately have an impact on cooperation as regards defence and military matters is reasonable. It is reasonable to maintain that full disclosure of such information would allow hostile third parties and entities to anticipate the resources the EU will be able to deploy and to improve their own capabilities in order to counteract the EU's external political and strategic approach.

**19.** Therefore, it is reasonably foreseeable that releasing the document in full would undermine defence and military matters.

**20.** In order for a decision refusing access to a document to be well founded in law, it is sufficient if one of the exceptions put forward by the institution in order to refuse access to the requested documents is justified [8] . That having been said, the Ombudsman finds it relevant to set out the considerations below on the international relations exception invoked by the EEAS.

**21.** The protection of the public interest as regards international relations cannot be invoked to cover the relations between the EU and the Member States insofar as they concern matters falling within the competence of the EU. The matters discussed in the document in question relate, however, to defence and military matters, in which the participating Member States cooperate with each other, and with the EU institutions, on a voluntary basis. The EU does not have competence over these matters. Participating Member States provide the EU institutions, and each other, with very sensitive information voluntarily and on the understanding that it will not be disclosed without their consent. The Ombudsman's inquiry team confirmed that Member States have given the EEAS the information contained in the document on the condition that it would not be disclosed outside the context of PESCO. Therefore, it is reasonably foreseeable that releasing the document in full would undermine international relations between the Member States, and between the Member States and the EU.



**22.** The complainant argues that some information in the report is already in the public domain. While some participating Member States publish limited information on their defence and military resources, the Ombudsman has found no evidence that the precise information in the report is in the public domain.

**23.** Concerning the complainant's argument that there is a strong public interest in disclosing the information, it is important to note that, under the EU's rules on public access to documents [9], the protection of the public interests as regards international relations and defence and military matters cannot be overridden by any other public interest.

**24.** The Ombudsman thus concludes that the EEAS was justified in refusing full disclosure of the report.

**25.** In light of the above, the Ombudsman finds that there was no maladministration by the EEAS.

## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion [10] :

**There was no maladministration by the European External Action Service in refusing full public access to the “ High Representative of the Union for Foreign Affairs and Security Policy Annual Report on the Status of PESCO Implementation 2020”.**

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

Rosita Hickey Director of Inquiries

Strasbourg, 08/07/2021

[1] See Article 6(3) of COUNCIL DECISION (CFSP) 2017/2315 of 11 December 2017, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017D2315&qid=1621950265424> [Link].

[2] In line with the provisions of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, available at: <https://eur-lex.europa.eu/legalcontent/EN/ALL/?uri=celex%3A32001R1049>. [Link]

[3] In accordance with Article 4(1)(a), third indent, of Regulation 1049/2001.

[4] In accordance with Article 4(1)(a), second and third indent, of Regulation 1049/2001.



[5] Article 15 of the Treaty on the Functioning of the European Union.

[6] Certain participating Member States, like Finland, already publish their NIPs. Furthermore, the Council Recommendation of 15 June 2020 assessing the progress made by participating Member States to fulfil commitments undertaken in the framework of PESCO is already publicly available.

[7] 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>**

[8] See, to that effect, judgment *ClientEarth v Commission*, paragraph 78.

[9] Pursuant Article 4, paragraph 1 read in conjunction of paragraph 2, Regulation 1049/2001.

[10] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of [the Decision of the European Ombudsman adopting Implementing Provisions](#) [Link]