Decision in joint cases 85/2021/MIG and 86/2021/MIG on the European Commission's refusal to give public access to documents concerning the purchase of vaccines against COVID-19

Decision
Case 85/2021/MIG - **Opened on** 22/01/2021 - **Decision on** 12/05/2021 - **Institution concerned** European Commission (No further inquiries justified) |

Case 86/2021/MIG - **Opened on** 22/01/2021 - **Decision on** 12/05/2021 - **Institution concerned** European Commission (No further inquiries justified) |

The complainant sought public access to the 'advance purchase agreements' (APAs) concluded between the European Commission and pharmaceutical companies for the future purchase of COVID-19 vaccines and to other documents related to those negotiations. The Commission identified one agreement as falling under the scope of the first request and refused access, and also failed to take a decision within the prescribed time limits on the request related to the negotiations.

In the context of the inquiry, the Commission told the Ombudsman that it is taking steps to ensure the greatest transparency possible regarding the vaccine negotiations, and that it was consulting with the pharmaceutical companies concerned with a view to disclosing all APAs. The Commission also provided the complainant with a list of 365 additional documents it had identified as falling within the scope of the requests. It promised that it would publish these documents, to the greatest extent possible, once it had finalised assessing each document or category of documents.

Given the Commission's efforts towards greater transparency around the vaccine negotiations, and the fact that the Commission has now published redacted versions of all APAs it has concluded thus far, the Ombudsman closed the inquiry. However, the Ombudsman urges the Commission to keep the complainant informed about the publication of any additional documents. The Ombudsman also renewed her call for the Commission to ensure transparency requirements form part of ongoing and future vaccine negotiations, given the important public interests at stake.

Background to the complaint

1. To help address the COVID-19 pandemic, the European Commission developed a 'Vaccine Strategy' [1] . The strategy stipulates that, in order to support companies in the swift development and production of a vaccine, the Commission would enter into agreements with individual vaccine producers on behalf of the Member States. In return for the right to buy a specified number of vaccine doses in a given timeframe and at a given price, part of the upfront costs faced by vaccine producers would be financed from the 'Emergency Support Instrument' [2] . The contracts concluded between the Commission and the pharmaceutical companies securing this procedure are called 'advanced purchase agreements' (APAs). The Commission coordinates a team, including experts from the national administrations of EU Member States, which negotiated these APAs with the relevant pharmaceutical companies. [3]

2. In September 2020, the complainant, a civil society organisation, made two requests [4] for public access to documents to the Commission. It sought access to (i) all APAs concluded with pharmaceutical companies and (ii) all meeting reports and correspondence related to the negotiations of APAs with pharmaceutical companies, including a list of these documents.

3. Concerning the APAs, the Commission initially identified one document as falling within the scope of the complainant's access request, namely the agreement with AstraZeneca, which was the only agreement that had been concluded at the time. In November 2020, Commission refused to give access to this agreement. In doing so, it invoked exceptions provided for under the EU's rules on public access to documents [5] , arguing that disclosure could undermine the commercial interests of the pharmaceutical company and the ongoing procurement procedure for the purchase of vaccines.

4. The complainant then asked the Commission to review this decision (by making a so-called 'confirmatory application'), arguing that there is an overriding public interest in disclosure and that the Commission should give access to parts of the document at least. Specifically, the complainant contended that the public should be able to access important information about the vaccine negotiations that are conducted on its behalf and involve a significant amount of public money. Given that secrecy around the negotiations might undermine public confidence in the EU and in the vaccines, information with clear relevance for public health, such as information on liability for adverse effects, should be released.

5. In December 2020, the Commission extended the time limit for its reply to the complainant's confirmatory application, but then failed to reply within the extended period.

6. Concerning the requested meeting reports and correspondence related to the vaccine negotiations, the Commission did not reply to the complainant, which constitutes an implicit negative decision under the EU's rules on public access to documents [6] . The complainant therefore made a confirmatory application also in relation to their second access request.

7. Having not received a reply to either confirmatory application within the prescribed time limit, the complainant turned to the Ombudsman in January 2021.

The inquiry

8. The Ombudsman opened an inquiry into (i) the Commission's refusal to give public access to the documents at issue and (ii) the Commission's failure to deal with the complainant's access requests within the prescribed time limit.

9. In the course of the inquiry, the Ombudsman received the reply of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's reply. The Commission also informed the complainant about its progress in dealing with their access requests and provided it with a list of 365 documents, which it identified as falling within the scope of the requests.

Arguments presented to the Ombudsman

10. The **Commission** acknowledged the considerable delay in its handling of the complainant's access requests. It said that it had received more than 50 requests for public access to documents related to the vaccine negotiations. In addition, the complainant's requests covered over 300 documents, some of which originated from third parties or Member States. The complainant's requests were therefore particularly complex, involving consultation with a number of stakeholders and other interests. Due to the sensitivity of the matter and the significant workload caused by the pandemic, the Commission's department [7] responsible for dealing with those requests had not been able to reply within the prescribed time limit.

11. In reviewing the documents the Commission stated that it had to take into account the ultimate objective of the negotiations, namely to swiftly provide the Member States with a range of vaccines, which is in the highest public interest. However, the Commission also acknowledged the strong need for transparency in the negotiation process, saying that it was consulting all pharmaceutical companies concerned with a view to giving the widest access possible to the APAs. So far, the Commission had published on its website redacted versions of the APAs concluded with CureVac [8] , AstraZeneca [9] and Sanofi [10] . It was hoping to publish redacted versions of all APAs very soon. It would then also reply to all access requests it had received in relation to the APAs, including the complainant's.

12. In addition, given that the complainant's second access request concerned a large number of documents and that the assessment of these documents could not be finalised within the prescribed time limit, the Commission provided the complainant with a list of the 365 documents it had thus far identified. It was assessing these documents and would gradually publish them on its website, to the extent it deems possible, and inform the complainant accordingly. In addition, where it considers that full disclosure is not possible, the Commission promised proactively to re-assess such documents over time and remove redactions, if they are no longer deemed necessary.

13. The **complainant** generally welcomed the Commission's response, and that it had

acknowledged the importance of transparency in relation to the vaccine negotiations. However, the complainant pointed to the significant delay that had already occurred and the fact that the Commission had not provided an indicative time line. It argued that public scrutiny could happen only once the documents are disclosed, and demanded that this should happen soon.

14. The complainant also said that the many access requests the Commission had received were likely to concern the same documents. In any case, had the Commission been more proactive in providing transparency about the vaccine negotiations, it could have avoided such requests.

15. The complainant also argued that the decision whether to publish the documents should not be determined by the preferences of the pharmaceutical companies concerned.

The Ombudsman's assessment

16. The Ombudsman notes that there is a strong public interest in the vaccine negotiations, which are being coordinated by the Commission. As she has stated previously, while it is in the highest public interest that safe and effective vaccines are developed, they will only be effective in achieving public health goals if the public can trust that the vaccines offered to them are indeed safe and effective. [11] It is therefore of utmost importance that the negotiations with manufacturers are carried out as transparently as possible. Secrecy surrounding the negotiations could create mistrust or lead to speculation, and might undermine these goals.

17. The Ombudsman welcomes that the Commission has acknowledged the need for transparency, as well as its efforts towards disclosing a considerable amount of information. The Ombudsman welcomes, in particular, that the Commission has now published redacted versions of all six advance purchase agreements it has thus far concluded. [12] This clearly illustrates that the Commission is indeed taking steps towards greater transparency around the vaccine negotiations.

18. The Ombudsman is satisfied that the Commission will now continue these efforts to deal with the complainant’s access requests promptly and to make swiftly available as many documents as it deems possible, including on its website. As such, she considers that further inquiries are not justified on this aspect of the inquiry.

19. The Ombudsman agrees that it would have been preferable if the Commission had proactively disclosed documents related to the vaccine procurement process much earlier in the negotiations. However, given the considerable number of documents covered by the complainant’s request and the additional workload faced by the relevant department in the context of the COVID-19 pandemic, it is understandable that the Commission could not process the requests within the applicable time limit of 15 working days [13] . The Ombudsman therefore welcomes that, rather than refusing to deal with the access request [14] , the Commission recognised the importance of providing transparency around these documents and has continued to evaluate them with a view to making publicly available as many of the documents

as it deems possible.

20. While it is also understandable that the Commission is consulting the pharmaceutical companies concerned, the Ombudsman calls on the Commission — given the important public interests at stake, and to avoid similar situations in future —to ensure that transparency requirements form part of ongoing and future negotiations on the purchase of vaccines.

Conclusion

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

There are no further inquiries justified.

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

Emily O'Reilly European Ombudsman

Strasbourg, 12/05/2021

[1] Communication from the Commission of 17 June 2020, EU Strategy of COVID-19 vaccines, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1597339415327&uri=CELEX:52020DC0245 [Link].

[2] The Emergency Support Instrument helps Member States respond to the coronavirus pandemic by addressing needs in a strategic and coordinated manner at European level. More information is available at: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/emergency-support-instrument_en [Link].

[3] For more information, visit: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en [Link].

[4] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&from=EN [Link].

[5] In accordance with Article 4 of Regulation 1049/2001.

[6] In accordance with Article 7(4) of Regulation 1049/2001.

[7] The Commission's Directorate-General for Health and Food Safety ('DG SANTE').

[8] See https://ec.europa.eu/info/sites/info/files/curevac_-_redacted_advance_purchase_agreement_0.pdf [Link].

[9] See https://ec.europa.eu/info/sites/info/files/apa_astrazeneca.pdf [Link].

[10] See https://ec.europa.eu/info/sites/info/files/apa_with_sanofi_gsk.pdf [Link].

[11] See the European Ombudsman's decision in case 1525/2020/MIG, available at:

https://www.ombudsman.europa.eu/en/decision/en/139507 [Link].

[12] Available at the following link under 'documents': https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en [Link].

[13] Article 7(1) of Regulation 1049/2001. In accordance with Article 7(3) of Regulation 1049/2001, this time limit can be extended once by another 15 working days.

[14] The Court of Justice of the EU has recognised that EU institutions can refuse to process requests for public access to documents if their processing would cause an excessive administrative burden, see, for example, judgment of the Court of 2 October 2014, *Strack v Commission* , C-127/13 P, para 28: https://curia.europa.eu/juris/document/document.jsf?text=&docid=158192&pageIndex=0&doclang=EN&mode=lst&d [Link].