Comments of DG SANTE on a request for information from the European Ombudsman - Complaint by M[redacted](MEP), ref. 0175/2021/DL

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

1.1) Background of the Vaccine Strategy

All Member States have endorsed the approach set out by the Vaccines Strategy[1] and signed up to an agreement for its implementation.

On this basis, the European Commission together with Member States has engaged in intensive simultaneous negotiations to build a diversified portfolio of vaccines for EU citizens at fair prices.

This is an inclusive and centralized process, carried out on behalf and in the name of the Member States and in very close cooperation with them. These collective efforts involve several participants from every Member State and strive to take decisions in a coordinated and collegial manner.

All Member States take part in the Steering Board for the joint European approach to COVID-19 vaccines procurement. The Steering Board is co-chaired by a representative of the Commission and a Member State. It discusses and steers the process and reviews all aspects of the contracts before signature.

Experts from some Member States with production capacities for vaccines were designated by the co-chairs as members of the Joint Negotiation Team of which also Commission officials are part.

Contracts have been concluded with several vaccine manufacturers, including with AstraZeneca (up to 400 million doses).

1.2) The requests for access to documents under Regulation (EC) No 1049/2001

The Directorate-General for Health and Food Safety received more than 50 access to documents requests related directly or indirectly to the procurement of COVID-19 vaccines. In the context of the increased workload for services generated by the pandemic, the Directorate-General for Health and Food Safety was not always able to reply to those requests by the deadlines set by Regulation (EC) No 1049/2001.

More than 320 documents have been identified so far as falling under the scope of the requests. Some of those documents originate from third parties, including from Member States. The Commission has been consulting them on the disclosure with a view to assessing

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1597339415327&uri=CELEX:52020DC0245

whether an exception shall apply in accordance with Article 4(4) of Regulation (EC) No 1049/2001. The consultation process is currently ongoing.

1.3) The complainant's request for access to documents

The current complaint to the Ombudsman relates to one of these requests, submitted to the Commission on 4 September 2020 and registered under reference number Gestdem 2020/5249 (Annex 1). The applicant requested:

- access to the contract the European Commission has negotiated and signed on behalf of all Member States with the pharmaceutical company AstraZeneca for the purchase of a vaccine against Covid-19 and
- the transmission of the names of the persons negotiating on behalf of the EU Member States

On 24 September 2020, the Directorate-General for Health and Food Safety informed the complainant that due to the need to conduct internal consultations and perform a thorough analysis of his request, it would not have been in a position to provide a reply within the 15 working days deadline; thus, on the basis of Article 7(3) of Regulation No 1049/2001, it extended the deadline until 16 October 2020.

On 20 October 2020, the Directorate-General for Health and Food Safety replied (Annex 2) to the applicant that it had identified the relevant document, namely the Advance Purchase agreement signed with AstraZeneca. The Directorate-General for Health and Food Safety came to the conclusion that no access could be granted to the requested document, as its disclosure was prevented by the exception provided for in Article 4(2) first indent (protection of the commercial interests) of Regulation (EC) No 1049/2001.

In the same letter, the Commission also informed the applicant that the second part of his request, referring to the names of the persons negotiating on behalf of EU Member States, does not refer to a specific document, and is therefore treated as a request for information under the basis of the Code of Good Administrative Behavior and not as an access to documents request under Regulation (EC) No 1049/2001.

In this regard, the applicant was informed that the Commission is represented in the negotiation team by Ms Sandra Gallina, Director General for Health in the Directorate General for Health and Food Safety.

The Commission's initial reply further explained that Member States designated members of the Steering Board and that experts from some Member States with productions capacities for vaccines were designated by the co-chairs as members of the negotiation team. The reply further stated that given that negotiations were still ongoing, in order to

- protect the personal data of members of the Steering Board and the Joint negotiation team, and
- maintain their independence and safeguard them from undue external pressure and influence,

the Commission was not in a position to disclose their names, except for the name of the member Director General of DG SANTE.

On 29 October 2020, the complainant submitted a confirmatory application (Annex 3), providing a number of arguments and claiming that public interest outweighs **the commercial interests in question.**

The applicant in his confirmatory application neither contested the Commission's reply to the request for information nor claimed that the public interest would also outweigh the right on protection of personal data of members of the Steering Board and Joint negotiation team.

On 20 November 2020, the Commission informed the complainant that not all the elements needed to carry out a full analysis of the request and to take a final decision had yet been gathered. Therefore, it would not have been in a position to provide a reply to the confirmatory application within the prescribed time limit, and, in accordance with Article 8(2) of Regulation No 1049/2001, it extended the deadline until 11 December 2020.

On 10 December 2020, the Commission informed the complainant that due to the internal consultations that were still ongoing in relation to his request, the Commission was not in a position to reply to the confirmatory request within the prescribed time limit.

In addition, on 29 December 2020, the complainant, in his capacity as a Member of the European Parliament, asked several written questions to the European Commission regarding the European vaccine procurement policy and the deployment of the vaccination strategy. One of his questions concerned a 'priority question' (reference P-007096/2020), which, as the applicant argued, should in principle be answered within three weeks.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The applicant turned to the European Ombudsman to challenge the European Commission's alleged refusal to reply to his confirmatory application for access to documents.

The complainant further argued that the lack of transparency on vaccine contracts is very problematic for public trust and it harms citizens' willingness to have themselves vaccinated.

He further suggested that the lack of timely responses undermines citizens' trust in the democratic functioning of the EU. Furthermore, according to the complainant, the failure to provide a timely response to written questions by a Member of the European Parliament undermines the democratic control exercised by the European Parliament over the European Commission.

Therefore, the complainant requests that the Commission provides a reply to his confirmatory application and to the written questions he has submitted as soon as possible.

In the letter sent by the Ombudsman to the Commission of 29 January 2021, the former welcomed the recent publication of the advance purchase agreement with AstraZeneca and took note of the Commission's statement to be able to publish all contracts under the Advance Purchase Agreements in the near future.

Consequently, the Ombudsman stated **that it will only pursue the complainant's second access request to the names of the persons negotiating on behalf of the EU Member States.**

The Ombudsman noted that the Commission decided to deal with this request as a 'request for information' and that it has released the name of the Director-General negotiating on behalf of the Commission, but refused to release the names of the other Members of the Steering Board and of the Joint Negotiation Team to protect their personal data and to maintain their independence in the ongoing negotiations.

The Ombudsman suggested that it would be helpful if the Commission could elaborate on its refusal to disclose the names of the experts. In particular, the Ombudsman would ask the Commission to consider whether disclosing some information might be feasible, such as, for example, the individuals' titles or the Member State public service to which they belong and at what level they are. According to the Ombudsman, knowing that the Commission is represented by its Director-General for Health and Food Safety is already helpful and relevant.

III. THE COMMISSION'S COMMENTS TO THE COMPLAINANT'S ARGUMENTS

The Commission notes and appreciates that the Ombudsman acknowledged the fact the Commission published the redacted version of the advance purchase agreement signed with AstraZeneca[2] and that the Ombudsman decided to pursue only the second part of the complaint's request regarding the names of persons negotiating on behalf of Member States. **Therefore, in its comments below, the Commission will solely focus on this issue.**

The reply to the request for information was for practical reasons merged into one letter together with the reply to the request for access to documents, but both matters were clearly distinguished.

When handling requests for information, the Commission staff is bound by the Code of Good Administrative Behaviour (the Regulation No 1049/2001 does not apply). The Code sets out certain principles that must guide administrative conduct. Several of these principles are applicable at the case at stake.

The rule on non-discrimination and equal treatment states that the Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand.

Even though not specifically mentioned by the Code, it is in its spirit, that neither status nor function of a citizen should grant it a right to a preferential treatment. Therefore, a request for information send by a Member of European Parliament is treated in the same manner as a request of other EU citizens.

[2] To this date the Commission has also made public, in redacted form, the advance purchase agreements with CureVac and Sanofi. The Commission has already informed the other companies on transparency obligations it is subject to, notably in accordance with Regulation (EC) No 1049/2001, and is currently consulting them in order to grant the widest possible public access to the remaining advance purchase agreements. Furthermore, the Commission has organized reading rooms, providing MEPs with the opportunity to consult the redacted versions of the contracts with CureVac and Johnnson & Johnson.

The rules regarding correspondence set up a deadline of 15 working days for replying to letters from the public. If a reply cannot be sent within the deadline mentioned above, and in all cases where the reply requires other work on it, a holding reply must be sent, indicating a date by which the addressee may expect to be sent a reply in the light of this additional work, taking into account the relative urgency and complexity of the matter.

Due to the complexity of the reply that required extensive consultations between Commission services, the Commission was unable to provide the requested information within 15 working days deadline (both for the original and the confirmatory request). However, it always informed the complainant about it and established a further deadline.

The Code also mentions the necessity to protect personal data. In this regard, the Commission is bound by the provisions of the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (EUDPR).

To properly implement the provisions of the EUDPR and ensure the respect of the principle of consistency that stipulates that the Commission shall be consistent in its administrative behaviour and shall follow its normal practice, when treating requests for access to documents, the Commission has developed internal administrative practices that relate to handling of personal data and **are relevant also for treating requests for information.** Such practices have been designed to strike an appropriate balance between the general interest to transparency and the protection of privacy and personal data of the Commission staff and of third parties involved.

According to those internal administrative practices, access should be granted, in principle, to the names and functions of Commissioners and their Cabinet members (AD officials) and staff in senior management positions, as well as to the Heads of the Commission's Representations in the Member States of the EU, as these persons enjoy a prominent role in representing the Commission vis-à-vis the public.

Regarding third-parties' personal data, this administrative practice, which was developed taking into account EUDPR, relevant case-law relating to the protection of personal data and the opinion of the European Data Protection Supervisor, establish the following:

Names of third parties, who are not public figures acting in their public capacity, are normally withheld, unless the following (successive) conditions are fulfilled:

- the applicant substantiates a necessity for a specific purpose in the public interest (demonstrated by express and legitimate justifications or convincing arguments) to obtain access to these names;

- the institution considers that there is no reason to think that the transmission would prejudice the legitimate rights of the individuals concerned (for instance, if the data subject has unambiguously given his/her consent);

- or, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, the institution considers the transmission proportionate for the

specific purpose brought forward by the applicant, after having demonstrably weighed the various competing interests; there must be no less invasive measures available, taking into account the principle of proportionality.

If these conditions are not fulfilled, the names should not be disclosed. The same applies to functions to the extent that these enable the individuals to be identified.

As regards the names of a public figures acting in their public capacity (such as President, Head of State, Minister, State Secretary, Ambassador, Permanent Representative, head of the regional administration, mayor, Ombudsman, MEP, Secretary-General, Director-General, etc.), their names are in principle disclosed, as indicated by the 2010 opinion of the European Data Protection Supervisor.

When handling the original request for access to information, the Commission made the following assessment.

First it disclosed, according to its internal provisions, the function and name of the Director-General of the Directorate-General for Health and Food Safety. It further established and hereby confirms that none of the members of the Steering Board and of the Joint negotiation team falls into the category of 'public figures'.

Then the Commission considered if the applicant substantiated a necessity to obtain the requested personal data for a specific purpose in the public interest (as stipulated in Article 9(1)(b) of EUDPR. It concluded, that the applicant did not presented any legitimate justifications or convincing arguments to obtain access to these names.

Further, the Commission assumes that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of their identity, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts and pressure.

The Commission also explained that the negotiations were still ongoing and it was Commission's obligation to protect personal data of members of the Steering Board and the Joint Negotiation Team as in this case, the obligation to protect their privacy and personal data in addition coincided with the requirement to protect their independence and safeguard them from undue external pressure and influence.

In the light of the above-mentioned reasons, the Commission refused to disclose the functions and names of the members of the Steering Board and of the Joint Negotiation Team.

The applicant in his confirmatory application neither contested the Commission's reply to the request for information nor claimed that the public interest would also outweigh the right on protection of personal data of members of the Steering Board and of the Joint Negotiation Team.

Finally, the Ombudsman asked the Commission "to consider whether disclosing some information might be feasible, such as, for example, the individuals' titles or the Member State public service to which they belong and at what level they are".

In that regard, the Commission considers that the disclosure of individuals' titles and or the public service to which they belong would likely make those individuals clearly identifiable on the basis of information publicly available (e.g. organigrams/directories of public services), thus defeating the objective of protecting their privacy that the Commission was seeking to attain[3].

IV. CONCLUSIONS

The Commission attaches great importance to ensuring as much transparency as possible in procuring the COVID-19 vaccines. However, it must respect also the rules applicable to the protection of personal data, as stipulated in the EUDPR.

The Commission does not see any public interest that would outweigh the potential prejudice to the legitimate interest of the individuals concerned, if their identity was disclosed or otherwise made identifiable, and therefore keeps its original position not to disclose the identity of the Members of the Steering Board and of the Joint Negotiation Team or other information that is highly likely to identify them.

List of annexes

- Annex 1 – Request for access to documents Gestdem 2020/5249
- Annex 2 – Negative reply
- Annex 3 – Confirmatory application

[3] The Commission further notes that the purpose for making certain information regarding public officials publicly available (in Member States' administrations or the Commission alike) may not be the same as the purpose for which the complainant is seeking the access, having regard, among others, to the circumstances of the case and the above-mentioned need to preserve the independency of those persons in the performance of their tasks.