Reply of the European Commission to the proposal for a solution and recommendation from the European Ombudsman on how the European Commission dealt with a request for public access to documents concerning meetings between its President and industry representatives

- Complaint by Mr [redacted] ref. 1525/2020/MIG

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 5 May 2020, the complainant submitted an initial application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')[1]. The complainant's request was registered under reference GESTDEM 2020/2570.

In his initial application, addressed to the Secretariat-General of the European Commission, the complainant requested access to all documents - including but not limited to minutes, (hand-written) notes, audio recordings, verbatim reports, operational conclusions, lines to take, briefings, e-mails, and presentations - related to video conference meetings President von der Leyen has held with organisations and self-employed individuals. This includes the videoconference of 16 March 2020 with CureVac representatives and of 25 March 2020 with CEOs, but also any other videoconferences with companies that have not been made public yet.

At the initial stage, the request was attributed to the former unit D.3 of the Secretariat-General of the European Commission.

A request for clarification was sent to the applicant asking him to specify the object of his request. On 6 May 2020, the applicant has specified that he is asking for documents related to videoconferences held with organisations and self-employed individuals (lobbyists), including those not yet uploaded in the President's calendar. The videoconference meetings concerned covered the period before the date of submission of the initial request (i.e. 5 May 2020).

In its initial reply of 19 June 2020, the former unit D.3 of the Secretariat-General identified twelve documents as falling under the scope of the complainant's request. It provided full access to two documents and partial access to nine documents, and partially refused access to one document. The (partial) refusal of access was based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), and Article 4(2), second indent (protection of the commercial interests) of Regulation (EC) No 1049/2001.

The applicant contested the initial reply of the European Commission, as far as the full identification of documents in relation to one videoconference meeting of 16 March 2020 with CureVac is concerned. Furthermore, the applicant contested the redactions of the document originating from CureVac (a presentation) identified at initial stage, made under the basis of the exception provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001.

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[1] Official Journal L 145 of 31.5.2001, p. 43.

Finally, the applicant contested the scope of the request, arguing that it should have included any other videoconferences with companies that have not been made public on the President's calendar yet (i.e. up until the date of submission of the applicant's request - 5 May 2020). More specifically, the applicant contested the fact that some videoconference meetings[2] were not included in the temporal scope of application of the request, as they were not uploaded in the President's calendar on time.

At the confirmatory stage, the European Commission conducted a renewed search for the documents requested. Following this search, it identified three additional documents, in relation to the videoconference meetings mentioned in the confirmatory application and granted wide partial access subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 to them. The European Commission informed the complainant that no further documents could be identified in relation to the videoconference meeting with CureVac. Finally, the European Commission has confirmed the initial position to refuse access (with limited exceptions) to the presentation from the company CureVac under the basis of the exception provided for in Article 4(2) first indent (protection of the commercial interests) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN AND THE INQUIRY

On 7 September 2020, the applicant complained to the European Ombudsman that the European Commission failed to provide the widest access possible to the presentation by CureVac, failed to identify all documents in relation to the videoconference held with CureVac, and wrongly limited the scope of his request for public access, by excluding the videoconferences that took place in April 2020.

By that time, the European Commission had not yet issued the confirmatory decision. The latter was sent to the applicant on 11 November 2020, who acknowledged receipt on 30 November 2020.

In the course of the European Ombudsman's inquiry, the European Commission provided the presentation originating from CureVac to the European Ombudsman. The European Commission also sent a copy of the confirmatory decision it had taken in the context of the request on 7 December 2020.

III. THE EUROPEAN OMBUDSMAN'S PROPOSAL FOR A SOLUTION

On 24 November 2020, the European Ombudsman proposed that the European Commission reassess the presentation from CureVac with a view to providing increased public access. In the Ombudsman's view, this would be justified taking into account that some information that

[2] Namely, the videoconference with Volvo, Siemens and Maersk, Air Liquide of 17 April 2020 and 30 April 2020 and the videoconference with Deutscher Gewerkschaftsbund of 21 April 2020.

has been redacted is already in the public domain[3], the importance of the principle of transparency during such a crisis particularly where the Commission is taking decisions via accelerated or emergency procedures and the fact that the Commission offered a biopharmaceutical company financial support of a significant amount[4]. Therefore, the European Ombudsman is of the view that '[…] the public has a right to know on what basis the offer was made. There would seem to be a very strong argument that there is an overriding public interest in disclosing additional parts of the presentation at issue. While the public interest in disclosure may not outweigh the interest in protecting the company's intellectual property in its technology and its research, the remaining information, such as information on the timeline of the development of the vaccine or the capacity of the production facility, should be disclosed'[5].

The European Ombudsman has also proposed that the Commission searches its records again with a view to identifying possible additional documents related to the videoconference meeting with the company on 16 March 2020. In her proposal for a solution, the European Ombudsman stated, with regard to the videoconference meeting with CureVac, in relation to which the complainant expressed doubts that there were only two related documents, namely the presentation and a press release that was published after the meeting, that '[...] the financial support offered by the Commission to the company during the meeting concerned a significant amount'. The Ombudsman therefore considers the complainant's argument, that the Commission surely based this offer also on information other than that exchanged during the meeting, to be reasonable[6].

The European Ombudsman further proposed that the Commission searches its records again with a view to identifying possible documents related to the videoconferences held by the Commission's President with organisations in April 2020, and to provide the complainant with public access to any additional document the Commission identifies in the context of this proposal for a solution, where it deems disclosure to be justified under Regulation (EC) No 1049/2001. The European Ombudsman noted that '[…] the complainant formulated his access request as precisely as he could have at the time, given the President's April meetings had not been made public when he made the request'[7] and that '[…] it was clear from the complainant's statements that his access request concerned all videoconferences held between the beginning of March (when the President started to hold meetings with organisations via videoconference) and the date of the request (5 May)'[8].

[3] Proposal for a fair solution, point 13.
[4] Ibid, points 14 and 15.
[5] Ibid, point 16.
[6] Proposal for a fair solution, point 20.
[7] Ibid, point 24.
[8] Ibid, point 25.

IV. THE REPLY OF THE EUROPEAN COMMISSION TO THE PROPOSAL FOR A SOLUTION

The European Commission hereby submits the following comments regarding the European Ombudsman's proposal for a solution.

The redaction of the document originating from CureVac

At the outset, the European Commission carried out a concrete and individual assessment of the document in question and of the foreseeable impact of its release in the situational context and taking into account the existing case law at the time of the request. In this regard, the European Commission has granted limited partial access to the presentation in question, while the main part has been redacted based on the exception protecting the commercial interests provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001.

Indeed, the European Commission considered that the presentation contains commercially sensitive information known to a limited number of people relating, in particular, to the know-how of the company in question, such as information on its production processes. Moreover, it provided information on estimated costs and timelines for vaccine development. In the proposal for a fair solution, the European Ombudsman has also noted that the redacted parts of this document mainly consist of commercial information that may be sensitive[9]. Finally, it should highlighted that, compared to the EIB press release referred to by the European Ombudsman, the document at stake contains more detailed commercially confidential information, in particular concerning the company's production facilities of vaccines.

Furthermore, it has to be taken into account that the company operates in a highly competitive context. The subject matter of the presentation relates to vaccine development against COVID-19, which is a particularly sensitive and important topic in the present situation, as in the context of the current pandemic, vaccination will play a crucial role to reduce the spread of the disease. In this context, the European Commission has adopted an EU 'Vaccines' Strategy'[10] on 17 June 2020 and engaged in high-value negotiations with selected vaccine manufacturers (including, but not exclusively with, CureVac) in order to support all the companies engaged in the process in the swift development and production of a vaccine. A joint action at EU level on vaccine procurement against COVID-19 was considered the surest, quickest and most efficient way of achieving that objective, as no Member State on its own has the capacity to secure the investment in developing and producing a sufficient number of vaccines.

Due to the sensitive nature of the negotiations and the highly competitive global context in which these companies operate, public disclosure of business related information regarding one of the companies, providing financial information, as well as details on its vaccine development process, production facilities and timeline, would have undermined the

[9] Proposal for a fair solution, point 12.

[10] COM(2020)245 final, available at the following link: https://ec.europa.eu/info/sites/info/files/communication-eu-strategy-vaccines-covid19_en.pdf

protection of the commercial interests of the company. Mutual trust between the companies involved in the procurement process and the European Commission is of crucial importance for making available a safe and effective vaccine against COVID-19 to the public as soon as possible, which is itself an objective in the highest public interest.

Against this background and in light of the relevant case law of the Courts[11], the Commission considered that the full disclosure of the presentation to the public at large at this stage, would cause serious harm to the company that has provided it with the legitimate expectation that it would not be publicly released and would lead to a situation where the company would lose its trust in the Commission's reliability and become reluctant to cooperate with the institution in the future. Finally, the Commission has not been able to establish, based on the arguments presented by the applicant in the confirmatory application and its own assessment, the existence of an overriding public interest in disclosure of the document in question that would outweigh the public interest in safeguarding the protection of commercial interests protected by the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

The scope of the request for access to documents

Following the renewed search for documents conducted by the European Commission at confirmatory stage, three additional documents in relation to the videoconference meetings, published with a delay on the President's calendar, were identified as falling within the scope of the applicant's request, namely the minutes of the videoconference meeting of 17 April 2020[12], the minutes of the videoconference meeting of 30 April 2020[13], and a letter from Deutscher Gewerkschaftsbund of 4 December 2019 in relation to the videoconference meeting of 21 April 2020[14]. Furthermore, wide partial access subject to the protection of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 has been granted to those documents.

In addition, the European Commission has informed the applicant that the documents identified at initial stage in relation to the President's videoconference meeting of 16 March 2020 with CureVac were indeed the only existent documents for this meeting.

It follows from the above that the European Commission identified the missing documents at confirmatory stage, in the light of the terms of the request.

[11] For example judgment of the General Court of 25 September 2018, *Amicus Therapeutics* v *European Medicines Agency EMA*, T-33/17, EU:T:2018:595, paragraph 75.
[12] Reference Ares(2020)5608542.
[13] Reference Ares(2020)5608544.
[14] Reference Ares(2020)161632.

IV. CONCLUSIONS

For the reasons set out above, the European Commission considers it had correctly interpreted the scope of the complainant's request for access to documents, by including the missing documents at confirmatory stage and that it had made a correct assessment of the document originating from CureVac. Therefore, the European Commission considers that its confirmatory decision was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken.

For the Commission
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