EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2020/2570**

Dear Mr Teffer,

I refer to your letter of 25 June 2020, registered on the same day, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 5 May 2020, addressed to the Secretariat-General of the European Commission, you requested access to '[a]ll 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 the following video conference meetings President Von der Leyen has held with organisations and self-employed individuals. This includes the 16 March 2020 videoconference with CureVac representatives and the 25 March 2020 with CEOs, but also any other videoconferences with companies that have not been made public yet'.

1 OJ L 345, 29.12.2001, p. 94.
2 OJ L 145, 31.5.2001, p. 43.

The European Commission has identified 12 documents as falling under the scope of your request:

- A presentation of CureVac activities of 16 March 2020, reference Ares (2020)3207536), (hereafter 'document 1');
- A press statement published following the video meeting, reference Ares(2020)3207536 (hereafter 'document 2');
- A press release of 22 March 2020 (Philips), reference Ares(2020)1798488 (hereafter 'document 3');
- A letter of 24 March 2020 to the President of the Commission (Philips), reference Ares(2020)1798488 (hereafter 'document 4');
- An overview of global ventilators manufacturers (Philips), reference Ares(2020)1798488 (hereafter 'document 5');
- A cover email of 27 March 2020 (Medtronic) reference Ares(2020)1815184 (hereafter 'document 6');
- A letter to the President of the Commission sent with the email of 27 March 2020 (Medtronic), reference Ares(2020)1815184 (hereafter 'document 7');
- A cover email of 2 April 2020 (Medtronic), reference Ares(2020)1897860 (hereafter 'document 8');
- A letter to the President of the Commission sent with the email of 2 April 2020 (Medtronic), reference Ares(2020)1897860 (hereafter 'document 9');
- A cover email of 25 March 2020 (Siemens), reference Ares(2020)1795794, (hereafter 'document 10');
- A letter to the President of the Commission sent with the email of 25 March 2020 (Siemens), reference Ares(2020) 1795794, (hereafter 'document 11');
- A reply by the Commissioner Breton to the letter of 25 March 2020 (Siemens), reference Ares(2020) 1795794 (hereafter 'document 12').

In its initial reply of 19 June 2020, the Secretariat-General granted full access to documents No 2, 3 and partial access under the basis of the exceptions provided for in Article 4(1)(b) and Article 4(2) first indent to documents No 1, 4, 6, 7, 8, 9, 10, 11, 12.

It fully refused access to document 5, under the basis of the exception provided for in Article 4(2) second indent (protection of the commercial interests) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of this position. In particular, you contested the correct identification of documents in relation to the 16 March 2020 videoconference meeting with CureVac representatives and argued that more documents should exist. Furthermore, you contested the redactions of the document originating from CureVac under the basis of the exception provided for in Article 4(2) first indent of Regulation (EC) No 1049/2001.

Finally, you contested the scope of your request, arguing that it should have included any other videoconferences with companies that have not been made public yet (i.e. up to the date you submitted your request – 5 May 2020).

More specifically, you contested the fact that some videoconference meetings[3] were not included in the temporal scope of application of your request, as they were not uploaded in the President's calendar on time.

I note that you did not contest the assessment made with regard to the rest of the documents identified at initial stage. Consequently, they are not included in the scope of the present confirmatory review.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, the following documents have been identified as falling within the scope of your request, in relation to the videoconference meetings specifically mentioned in your confirmatory application:

- Minutes of meeting of 17 April 2020, reference Ares(2020)5608542 (hereafter 'document 13');
- Minutes of meeting of 30 April 2020, reference Ares(2020)5608544 (hereafter 'document 14');
- Letter from Deutscher Gewerkschaftsbund of 4 December 2019, reference Ares(2020)161632 (hereafter 'document 15').

I can inform you that:

- Wide partial access, subject to the redaction of personal data, is granted to documents 13, 14 and 15.

Please note that documents 13 and 14 were drawn up for internal use. They solely reflect the author's interpretation of the interventions made and do not set out any official position of the third parties, which were not consulted on their content. They do not reflect the position of the European Commission and cannot be quoted as such. Furthermore, please note that document 15 originates from a third party and is disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released document without the agreement of the originator, who may hold an intellectual property right on it. The European Commission does not assume any responsibility from the reuse.

[3] 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.

As regards document 1 (a presentation of CureVac activities), I regret to inform you that I have to confirm the initial decision of the Secretariat-General of the European Commission to refuse access, based on the exceptions of Article 4(2) first indent (protection of the commercial interest) of Regulation (EC) No 1049/2001, for the reasons set out below.

I would like to confirm that the documents identified at initial stage in relation to the videoconference meeting of 16 March 2020 with CureVac, are indeed the only existent documents for this meeting.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

Given that the European Commission does not hold any additional documents corresponding to the description given in your application, it is not in a position to fulfil your request.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'.

In its judgment in Case C-28/08 P (*Bavarian Lager*) [4], the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[5] (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [6] (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

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4 Judgment of the Court of Justice of 29 June 2010, *European Commission* v *The Bavarian Lager Co. Ltd* (hereafter referred to as *'European Commission* v *The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

5 OJ L 8, 12.1.2001, p. 1.

6 OJ L 295, 21.11.2018, p. 39.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 'requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation'[7].

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'[8].

The requested documents contain personal data such as the names and initials of third parties. Moreover, they contain handwritten notes and signatures.

The names[9] of the persons concerned, as well as other data from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data[10]. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest.

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7 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 59.

8 Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others* v *Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

9 *European Commission* v *The Bavarian Lager* judgment, cited above, paragraph 68.

10 Judgment of the Court of Justice of 16 July 2015, *ClientEarth* v *European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects' legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the commercial interests

Article 4(2) first indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property […]'.

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the European Commission consulted the third party (CureVac) on disclosure of the document originating from it. Please note that the third party objected to the disclosure of the document.

Firstly, I note that Article 4(2), first indent of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (TFEU), which requires staff members of the EU institutions to refrain from disclosing 'information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering the Article 339 of the Treaty on the Functioning of the European Union, over which it does not have precedence, ineffective.

As the Court of Justice explained, 'in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person.

That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations […]'[11]. Furthermore, the Court of Justice recognised that, '[i]n order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible.'[12]

The withheld parts of the presentation from CureVac explain in detail the production process, which is the core of the company's special know-how. The presentation was made based on the special skills and knowledge of the entity concerned and a specific reasoning in which considerable intellectual and technical expertise was invested. It contains confidential information about the business model, the financial situation as well as the strategic and economic planning of the company, a provisional timeline for vaccine development, various costs and dosages.

Indeed, as a knowledge society the biggest asset of the company in question is its data, the intellectual property and its special know-how. Please note that this information is known to a limited number of people.

Full disclosure of the presentation, would seriously undermine the commercial interests of the company, including its intellectual property, as it would negatively affect its commercial activity, in particular in the competitive context. Disclosure of such information would be particularly likely to disrupt and adversely affect the business operations and the commercial interest of the company.

The General Court has specifically confirmed on several occasions, that giving access to information particular to an undertaking, which reveals its expertise, is capable of undermining the commercial interests of this undertaking[13].

Furthermore, I note that the subject matter of the presentation (COVID-19 vaccine development) is particularly sensitive and important in the current context. Therefore, the trust of vaccine companies which have received financial support from the European Commission is essential for the performance of the task of developing a vaccine.

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11 Judgment of the General Court of 5 February 2018, *PTC Therapeutics International* v *European Medicines Agency (EMA)*, T-718/15, EU:T:2018:66, paragraph 85.

12 Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt* v *Commission*, T-198/03, EU:T:2006:136, paragraph 71.

13 See Judgment of the General Court of 11 July 2018, *Rogesa* v *Commission*, T-643/13, EU:T:2018:423, paragraph 70 and 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.

The companies have a legitimate right to expect that the information they supply to the European Commission will not be disclosed to the public. Disclosure of the document would lead to a situation where the companies would lose their trust in the European Commission's reliability and would become reluctant to cooperate with the institution.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of CureVac. I conclude, therefore, that access to the withheld parts of the requested document must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argued I quote '[…] it is very much in the public interest to be able to assess why CureVac was selected to receive this sum of €80 million of financial support. It is in the public interest of Europeans that a vaccine is made, and that the limited financial resources of the Commission and the EIB go to the companies that have the highest chance of succeeding. By redacting whole pages of the presentation, the Commission is severely limiting the public to assess whether CureVac is a company that deserves that trust - and by extension public funds'.

While I agree that information on vaccine development is in the public interest, I do not share the view that information on the production processes, timelines or financial matters strictly internal to the company in question should be revealed to the public at large. I note that the European Commission regularly publishes information in relation to COVID-19 vaccine development in order to inform the public on this important matter.

I would like to refer you to the judgment in the *Strack* case[14], where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.

I have not been able to establish the existence of any overriding public interest in disclosure of the document in question. In consequence, I consider that in this case there is no overriding public interest 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.

[14] Judgment of the Court of Justice of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 128-131.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[15], provides further support to this conclusion.

Please also note that Article 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to document 1.

However, for the reasons explained above, no meaningful further partial access is possible without undermining the interests described above.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

For the Commission
Ilze JUHANSONE
Secretary-General

Enclosures: (3)

[15] Judgment of the Court of Justice of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission* v *Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.