

Brussels, 18 April 2017

Mr Alexander Italianer
Secretary-General
European Commission

Dear Mr Italianer,

Herewith, I acknowledge the receipt of letter, ref. Ares (2017) 1677956-29/03/2017, in reply to my request of 10th of March, 2017 for *full public access to all Commission documents related to the infringement proceedings NIF/2011/2054 against the United Kingdom regarding transposition of Directive 2004/38/EC in the UK from 2011 until present and on NIF/2012/4106 based on Article 21 TFEU from 2012 until present.*

By means of this letter, the European Commission justified its refusal to grant access to the requested documents on the basis of the exception, enshrined in Article 4(2) third indent of Regulation No 1049/2001, according to which: *"The institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."*

Furthermore, the European Commission argues that the disclosure of requested documents *'would undermine the protection of the purpose of the investigation under Article 258 TFEU'* in light of the still ongoing nature of the investigation on both infringement proceedings, and that *'there is no overriding public interest in disclosing the documents despite the protection under Article 4(2) third indent of Regulation No 1049/2001'*.

With this confirmatory application, on the basis of Article 7 (2) of the Regulation 1049/2001, I would like to request the European Commission to reconsider its decision of refusal to grant access to the initially requested documents, for the reasons outlined below.

First of all, the European Commission claims that the requested disclosure *'would undermine the protection of the purpose of the investigation under Article 258 TFEU'*, but it does not provide an assessment as to how such disclosure would *'specifically and actually undermine the protected interest'* in these particular cases. Therefore, it fails to prove that the risk of a protected interest being undermined is *'reasonably foreseeable and not purely hypothetical'* - requirements, clearly stipulated by the General Court in the *In 't Veld versus Council*-case (T-529/09):

"[...] the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be reasonably foreseeable and not

purely hypothetical (see Case T-36/04 *API versus Commission* [2007], ECR II-3201, paragraph 54 and the case-law cited)." Therefore, I would like to object the arguments of the European Commission as based on very general considerations and to question its refusal to consider even "partial" access to documents.

Secondly, the European Commission argues that *'there is no overriding public interest in disclosing the documents'*, but it fails to justify why there is a lack of *'an overriding public interest'* in these specific cases as indicated by the relevant case law (e.g. *In 't Veld versus Council*-case T-529/09, point 20). Moreover, given that the initial request was made for *public* access to documents under Regulation 1049/2001, and not in the framework of an interinstitutional dialogue between the European Commission and the European Parliament, the statement that the information provided in publically available documents and communications *'strikes the right balance between protecting the above interests and informing Honourable Members of the European Parliament'* seems to be inappropriate.

Hereby, contrary to the conclusion of the European Commission, I would argue that there is a very strong case of *'an overriding public interest in disclosure'* which is compatible with the provisions of Article 4(2) third indent of Regulation No 1049/2001, namely: the interest of more than 3 million European citizens in the UK who need to know urgently what their situation is, especially in light of the official notification of Brexit under Article 50, which now triggers the 2 year time limit.

In April, 2012 the European Commission launched infringement proceedings against the UK regarding the application of Directive 2004/38/EC, ensuring the rights of European citizens to freely travel, live and work everywhere in the European Union. The directive stipulates that EU citizens who settle in another Member State but do not work there may be required to have sufficient resources and to take out sickness insurance. The UK, however, is using restrictive interpretation of these requirements as it does not consider entitlement to treatment by the UK public healthcare scheme (the National Health Service or NHS) as sufficient, e.g. as a *'comprehensive sickness insurance'* for the purposes of securing residence rights for non-economically active individuals.

On the 26th of April, 2012, the European Commission stated that *'this breaches EU law'* and that it *'has given the United Kingdom two months to comply with European Union rules on the free movement of EU citizens and their families across the EU or face an EU court case'*. Five years later the infringement procedure is still pending and the situation is not rectified. The consequence of the inaction of the European Commission results in enormous uncertainty and insecurity that millions of European citizens are facing as to enforcement of their rights under the Directive 2004/38/EC. The recent UK government migration data showed that in the last two quarters of 2016, more than 12,800 EU citizens had their permanent residency requests refused with a further 5,500 declared invalid, e.g. a rejection rate of around 28%. Since, until the withdrawal agreement comes into force, the UK remains a Member State of the European Union - it is bound by its duties and commitments arising therefrom. The failure by a Member State to respect its obligations under EU law could lead to a situation where citizens in contravention of EU law could lose their essential rights and suffer serious and irreparable harm, unless the Commission proceeds with enforcement action. A failure by the Commission to act now will have dramatic consequences for citizens which could not be corrected later.

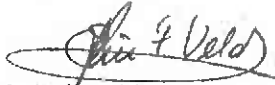
Furthermore, given that the infringement proceedings against the UK were launched in 2011 and 2012 respectively, I would argue that a "reasonable" period for the Commission and the UK to settle this issue amicably has clearly passed. In light of the abovementioned risk of serious harm likely to be suffered by the European citizens, there is a clear *'overriding interest in disclosure'* of documents

related to the assessment of the European Commission as to the applicability of the Directive 2004/38/EC by the UK as well as its considerations for not advancing or concluding the infringement proceedings. Disclosure of the documents could potentially provide affected citizens with ways of further action to ascertain their rights as enshrined in European law.

After five years of investigations by the European Commission, the citizens are entitled to know why no further action has been taken to put an end to a clear violation of EU law. The European Commission is responsible for the enforcement of EU law. The full discretion of the European Commission to start, suspend or terminate infringement proceedings against Member States shall never lead to situations where the latter are kept pending ad aeternam. Even less so, where there is an urgent need of citizens to avoid serious and irreparable harm.

On the basis of the reasons outlined above, I urgently request the European Commission to reconsider its position and grant access to the requested documents.

Kind regards,



Sophie in 't Veld

Member of the European Parliament