



EUROPEAN COMMISSION  
LEGAL SERVICE

The Director General

Brussels, 19. 05. 2014

By e-mail  
By certified mail

Mr. Michael Blackwell  
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**Subject: Your request for access to documents**

Ref.: Your emails of 4 March 2014, registered under reference number  
GestDem 2014/2160

Dear Mr. Blackwell,

I refer to your e-mail mentioned above requesting access, under Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>, to the following documents regarding the infringement proceedings 2007/4026 (Sweden):

- (I) The reasoned decision of the Commission to refer the United Kingdom (UK) to the Court of Justice over its alleged failure to implement the ECJ ruling in Marks & Spencer on cross-border loss relief (Case C-446/03);
- (II) The text of the reference to the European Court of Justice;
- (III) The grounds on which the Commission alleges the ruling in Case C-446/03 has not been implemented.

As regards point I of your request, as you are aware, on 29 September 2012 the Commission took the decision to refer the UK to the Court of Justice (ECJ) for improper implementation of the ECJ ruling in Marks & Spencer on cross-border loss relief (Case C-446/03). The decisions taken by the Commission on 29 September 2012 relating to the application of the European Union Law have been published by the Secretariat-General of the European Commission at the address:  
[http://ec.europa.eu/eu\\_law/eulaw/decisions/dec\\_20120927](http://ec.europa.eu/eu_law/eulaw/decisions/dec_20120927).

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<sup>1</sup> Official Journal L 145, 31.05.2001, page 43.

Following this decision, on 5 April 2013 the Commission lodged an Application at the Court of Justice against UK, pursuant to Article 258 of the Treaty on the Functioning of the European Union (TFUE), seeking that the Court of Justice declare that by imposing conditions on cross-border group relief that make it virtually impossible in practice to obtain such relief and by restricting such relief to periods after 1 April 2006, the UK has failed to comply with its obligations under Article 49 TFUE and Article 31 of the Agreement on the European Economic Area. This case was entered in the register of the Court under number C-172/13.

However, the Application lodged at the Court by the Commission (point II of your request), which contains the grounds on which the Commission considers that the UK has failed to properly implement the ruling in Case C-446/03 (point III of your request), cannot be made available to you. Indeed, since case C-172/13 is still pending before the Court of Justice, the pleadings submitted to the Court of Justice are covered by the exception foreseen in Article 4(2) second indent ("*protection of court proceedings*") of Regulation 1049/2001.

The purpose of the exception "*protection of court proceedings*" is to maintain the independence of the EU institutions in their dealings with the Court and to ensure the proper course of justice. In this regard, the Court of Justice has stated in its judgment in joined cases C-514/07P, C-528/07P and C-532/07P that the pleadings lodged before the Court of Justice in court proceedings are wholly specific since they are inherently part of the judicial activities of the Court and that these activities are as such excluded from the scope of the right of access to documents without any distinction being drawn between the various procedural stages, in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity<sup>2</sup>.

In addition, the Court has recognized that "*[i]t is therefore appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, [...], while those proceedings remain pending*"<sup>3</sup>.

In the light of the above, since case C-172/13 is still ongoing before the Court of Justice, I consider that the Commission's Application to the Court is clearly covered by the exception provided for in Article 4(2) second indent of Regulation 1049/2001 and, consequently, cannot be disclosed at this stage of the proceedings.

Pursuant to Article 4(2) of Regulation 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected under Article 4(2), second indent.

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<sup>2</sup> Judgment of the Court of 21 September 2010 in joined cases C-514/07P, C-528/07P and C-532/07P Sweden v API and Commission, API v Commission and Commission v API (paragraphs 77, 79 and 92), European Court reports 2010, Page I-08533.

<sup>3</sup> Paragraph 94.

In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the requested document that would outweigh the public interests in the protection of court proceedings.

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

The Secretary General will inform you of the result of this review within 15 working days from the date of registration of your request. You will either be given access or your request will be rejected in which case you will be informed of how you can take further action.

All correspondence should be sent to the following address:

The Secretary General  
European Commission  
B-1049 BRUSSELS  
Sg-Acc-Doc@ec.europa.eu

Yours sincerely,

  
M. HETSCH  
DIRECTEUR GÉNÉRAL ADJOINT

Luis ROMERO REQUENA