



EUROPEAN COMMISSION

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Ms Pia Eberhardt
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2020/0316**

Dear Ms Eberhardt,

I refer to your email of 25 February 2020, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation (EC) No 1049/2001').

On 15 January 2020, you submitted an initial application for access to documents under Regulation (EC) No 1049/2001 to the Directorate-General for Trade, in which you requested access to the following documents:

- *Minutes and other reports of meetings of DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and the Secretary General as well as other representatives of the Energy Charter Secretariat (since January 2019);*
- *All correspondence (including emails, letters, phone conversations) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and the Secretary General as well as other representatives of the Energy Charter Secretariat (since January 2019);*
- *Minutes and other reports of meetings between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies and business associations, in which the modernisation of the Energy Charter Treaty was discussed (since January 2019);*

¹ OJ L 345, 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- *All correspondence (including emails, letters, phone conversations) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies and business associations, in which the modernisation of the Energy Charter Treaty was discussed (since January 2019).*

This application was registered under reference number GESTDEM 2020/0316.

In its initial reply dated 19 February 2020, the Directorate-General Trade informed you that no documents had been found that matched your request. The Directorate-General Trade explained that ‘[i]n 2019, the EU and the other Contracting Parties of the ECT gave priority to concluding the preliminary talks on the modernisation process. The Commission also focused very much on preparing and presenting its proposal for negotiation directives to the Council. As a result, there have been no meetings with external stakeholders during this particular phase of the modernisation process.’

In your confirmatory application, you question the absence of any meetings and any documents. You indicate that you ‘find it hard to believe that there was no correspondence ... and no meetings’, given the ‘leading role [of Directorate-General Trade] within the Commission when it comes to the modernisation negotiations.’

Against this background, the European Commission has carried out a renewed, thorough search for meetings and documents that would fall within the scope of your confirmatory application.

Following this renewed search, I confirm that no documents have been found that match your request.

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. I would like to refer in this respect to the judgment of the Court of Justice in Case C-127/13 P (*Strack v European Commission*), according to which ‘[n]either Article 11 of Regulation 1049/2001 nor the obligation of assistance in Article 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist’.³

The above-mentioned conclusion has been confirmed in Case C-491/15 P (*Typke v European Commission*), where the Court of Justice held that ‘the right of access to documents of the institutions applies only to existing documents in the possession of the institution concerned and [...] Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, [...], an application for access that would require the Commission to create a new document, even

³ Judgment of the Court of Justice of 2 October 2014, *Strack v European Commission*, C-127/13 P, EU:C:2014:2250, paragraph 46.

if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001'.⁴

Furthermore, the General Court held in Case T-468/16 (*Verein Deutsche Sprache v European Commission*) that there exists a presumption of lawfulness attached to the declaration by the institution asserting that documents do not exist.⁵ This presumption continues to apply, unless the applicant can rebut it by relevant and consistent evidence.⁶ Your general argument that you find it hard to imagine that there was no correspondence or meetings cannot be construed to constitute such relevant and consistent evidence. The Court of Justice, ruling on an appeal in Case C-440/18 P, has recently confirmed the earlier conclusions by the General Court.⁷

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

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,



For the Commission
Ilze JUHANSONE
Secretary-General

⁴ Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

⁵ Judgment of the General Court of 23 April 2018, *Verein Deutsche Sprache v European Commission*, T-468/16, EU:T:2018:207, paragraphs 35-36.

⁶ *Ibid.*

⁷ Order of the Court of Justice of 30 January 2019, *Verein Deutsche Sprache v Commission*, C-440/18P, ECLI:EU:C:2019:77, paragraph 14.