EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001

Subject: Your confirmatory application for access to documents – Gestdem 2018/6110

Dear

I refer to your email of 26 November 2018, registered on the same day, in which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation 1049/2001’).

In your initial application of 13 November 2018, you requested a copy of the certificates of origin provided by the company Infosoft System Sh.p.k. following the implementation of the supply contract awarded following the call for tenders EuropeAid/137465/IH/SUP/AL – IPA – Supply and installation of an audiovisual system for plenary sessions of the Albanian Parliament.

By letter of 21 November 2018, the Directorate-General for Neighbourhood and Enlargement Negotiations informed you that it was not in the possession of the documents falling within the scope of your request. Furthermore, it informed you that the European Commission was not a party to the contract pertaining to the tender procedure in question and that the certificates of origin had been directly submitted by the contractor, Infosoft System Sh.p.k., to the contracting authority, the Central Finance and Contracting Unit of the Albanian Ministry of Finance and Economy, in order to process the final payment.

In your confirmatory application you question the absence of any documents. You refer to a previous reply by the Directorate-General for Neighbourhood and Enlargement

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2 Official Journal L 145 of 31.05.2001, p. 43.
Negotiations, dated 7 May 2018, in response to an earlier request from you regarding the same documents, registered under reference number GestDem 2018/2460.

In that reply, the Directorate-General for Neighbourhood and Enlargement Negotiations had granted partial access to the declaration of origin provided by Infosoft System Sh.p.k., which according to your confirmatory application, contained ‘almost the same data’ as the certificates of origin to which you now request access.

You claim that the European Commission should be consistent in its actions regarding disclosure. You argue that the European Commission requested the declaration of origin from the Central Finance and Contracting Unit of the Albanian Ministry of Finance and Economy despite the fact that the former was not a party to the contract. You allege that the European Commission did not have the declaration of origin at the time of your request and therefore had specifically asked for it.

Regarding the declaration of origin that had been previously disclosed to you following your first request for access to documents GestDem 2018/2460, I would like to point out that in this case, and contrary to what is the case at hand, the European Commission was materially in possession of the above-mentioned document. As the Central Finance and Contracting Unit of the Albanian Ministry of Finance and Economy is the holder of the declaration, and was therefore the ‘third-party author’ of the document held by the Commission in the meaning of Article 4(4) of Regulation 1049/2001, it was duly consulted on the question whether access could be granted to this document.

Following its agreement, the document was subsequently partially disclosed. Therefore, contrary to what you argue in your confirmatory application, I note that the procedure for access to documents held by the European Commission under Regulation 1049/2001 was duly respected and the actions of the European Commission are coherent with regard to both the previous request registered under the reference number GestDem 2018/2460 and the current one.

With regard to your confirmatory application, please note that the European Commission has carried out a renewed, thorough search for the documents requested, namely the certificates of origin provided by the company Infosoft System Sh.p.k.

As a preliminary remark, I would like to point out that different ways exist in order to implement the EU budget or European external aid funds, depending on the variable level of implication of the European Commission.

Under the indirect management mode, which was applicable for the tender procedure in question, the European Commission has the power to entrust budget implementation tasks, such as the conclusion of contracts and their operational and financial management, to different entities, like partner countries or bodies designated by them. The role of the European Commission in this case is to either carry out ex-ante or ex-post control. Please note that the contract in question has already been subject to ex-ante control.
As the final payment will consequently not be subject to an additional *ex-post* control, the European Commission has not received, and is not expected to receive, the certificates of origin that are the subject of your request for access to documents. Indeed, these documents have been sent by the contractor, Infosoft System Sh.p.k., directly to the contracting authority, which for this specific tender procedure is the Central Finance and Contracting Unit of the Albanian Ministry of Finance and Economy. Hence, the latter is the holder of the documents and should normally be in possession of them.

In its reply to your request GestDem 2018/2460 from 7 May 2018, the Directorate-General for Neighbourhood and Enlargement Negotiations informed you that ‘the certificates of origin will be available only after the provisional acceptance (delivery of goods), which has not yet occurred for this contract, as it is still under implementation’. Please note in this respect that this did not, however, imply any obligation or commitment on the part of the European Commission to provide such documents and that another analysis of the above-mentioned statement would amount to a misinterpretation. Furthermore, there is no obligation incumbent on the European Commission to request the certificates of origin from the Central Finance and Contracting Unit of the Albanian Ministry of Finance and Economy solely for the purpose of replying to an application for access to documents.

In light of the above, I confirm that the European Commission does not hold any documents that would correspond to the description given in your application.

Indeed, as specified in Article 2(3) of Regulation 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 such documents, 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

Martin SELMAYR
Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AVET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION