



## EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Director General

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Brussels,  
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Mr Michael Ebeling  
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Spain

Email: [team@asktheeu.org](mailto:team@asktheeu.org)

**Subject: Your request for access to documents – Notification 2015/288/D –  
GESTDEM 2015/4853**

Dear Mr Ebeling,

Thank you for your e-mail of 12 September 2015 wherein you request access to the detailed opinion issued by the Commission in the framework of the notification 2015/288/D concerning the Draft Act introducing a storage obligation and a maximum retention period for traffic data.

After having carefully examined your request, I hereby inform you that unfortunately, we cannot disclose the requested document because its disclosure at this stage would undermine the purpose of the investigation still ongoing in this case. I refer you to the exception to the right of access provided for in Article 4(2), third indent of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, according to which access shall be refused “where disclosure would undermine the protection of ... the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.”

In particular, I would like to draw your attention to the applicability of the exception regarding the protection of the purpose of inspections, investigations and audits to the proceedings under Directive 98/34/EC. During the procedure established by Directive 98/34/EC, the Commission collects information and proceeds to conformity checks of a notified measure with the EU law. This complex task involves a thorough review of the notified measure. The purpose of the Commission's activity in this context is to avoid new barriers to the free movement of goods and Information Society services by verifying compliance of draft technical rules with the Internal Market. Ultimately, the purpose of this procedure is the same as in the pre-litigation stage of the infringement procedure, namely to ensure, through dialogue with the Member States, compliance with the EU law. Indeed, the objectives and the procedure under Directive 98/34/EC are very similar to the objectives and procedure under the EU Pilot which precedes the infringement procedure.

The Commission activities in the framework of notifications under Directive 98/34/EC are of an investigative nature. This is recognised by the Directive itself. Indeed, recital 20

of Directive 98/34/EC refers to Article 337 TFEU, according to which the Commission may collect any information and carry out any checks required for the performance of the tasks entrusted to it. Article 8(5) second indent of Directive 98/34/EC states that “[t]he absence of a reaction from the Commission under this Directive to a draft technical regulation shall not prejudice any decision which might be taken under other Community acts”. It may therefore be concluded that the legislator, after considering the similarities between the procedure under Directive 98/34/EC and the infringement procedure, decided to state explicitly that the absence of a reaction from the Commission under Directive 98/34/EC shall not prevent it from taking decisions under other EU acts.

During the procedure established by Directive 98/34/EC and with the purpose of ensuring compliance of draft regulations with European Union law, the Commission and the other Member States dialogue with the notifying Member State. The spirit of co-operation and mutual trust between the Member States and the Commission requires these exchanges to be kept out of the public domain. Hence, as long as the dialogue is ongoing, the requested document shall not be disclosed. On 7 September 2015, the Commission issued a detailed opinion in relation to this notification which extended the standstill period until 6 October 2015. As the technical regulation has not yet been adopted the dialogue with the Member State is thus ongoing.

The possibility of granting partial access in accordance with Article 4(6) of Regulation (EC) No 1049/2001 has also been examined. However, this has not been considered to be possible since the document in question is covered by the above-mentioned exception in its entirety.

According to Regulation (EC) No 1049/2001, an exception to the right of access must be waived if there is an overriding public interest in disclosing the document concerned, which has to outweigh the interest protected by the exception to the right of access. In the present case, the services of the Commission have reached the conclusion that there appears to be no overriding public interest in its disclosure in the sense of the Regulation.

I hope the above information will be helpful. Moreover, I would like to inform you that in accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to submit a confirmatory request to the Secretary-General of the Commission within fifteen working days of receiving this letter.

All correspondence should be sent either electronically to [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu) or by regular mail to the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
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Yours sincerely,



Lowri Evans