

Fiche 7

Access to documents issued in the framework of Directive 98/34/EC and Directive 2015/1535

Main issues:

- Directive 98/34/EC, which was replaced in October 2015 by Directive 2015/1535, introduces a notification procedure for the Member States which intend to adopt measures relating to technical standards and regulations. These measures have to be notified to the Commission and the other Member States before their adoption at the national level. Both the Commission and the Member States have the possibility to make detailed comments or issue detailed opinions to draw attention to aspects that are liable to affect the proper functioning of the internal market. In case where a detailed opinion is issued, the notifying Member State has to postpone the adoption of the measure for a certain period of time, which is called 'standstill' period. The notifying Member State does not have to observe a 'standstill' period, if only comments are issued.
- Detailed comments or detailed opinions are not exempted from the application of Regulation 1049/2001, but the possible application of the exceptions provided for in that Regulation has to be considered.

Current administrative practice:

Although the notification procedure introduced by Directives 98/34/EC and 2015/1535 are not identical to an infringement procedure (as it concerns a measure which is not yet adopted at national level), it has certain similarities to the infringement procedure: during the notification procedure both the Commission and the Member States examine the notified measure that could affect the proper functioning of the internal market; the purpose of their detailed comments and/or opinion is to allow the notifying Member State to remove or reduce obstacles that the intended measure could create. The purpose of this investigative activity is therefore the same as in an infringement procedure, namely to ensure the smooth functioning of the internal market. Commission services therefore refuse access to such documents on the basis of the exception of Article 4(2), third indent of Regulation 1049/2001 (protection of the purpose of investigations). In particular:

- if concrete indications point to the forthcoming opening of an infringement or EU Pilot procedure, the application of the exception of Article 4(2), third indent of Regulation 1049/2001 should be considered for documents issued in the framework of the notification procedure under Directives 98/34/EC and 2015/1535 as soon as the notified measure is adopted;
- if public access to detailed opinions and/or detailed comments issued by the Commission and/or the Member States is requested during the 'standstill' period, services should consider the application of the exceptions of Article 4(2), third indent of Regulation 1049/2001 and Article 4(3), first paragraph pertaining to the protection of the purpose of the investigation and of the on-going decision-making process, for example, when the Commission has not yet issued detailed comments and/or an opinion;
- if the notified measure is adopted and published in the Official Journal of the Member State and there is no upcoming/pending infringement or EU Pilot procedure, under the condition that no other exception of Regulation 1049/2001 applies, access must be considered to the detailed opinions/comments, where applicable following consultation of the Member State(s) who issued the opinions/comments.

In its judgement of 16 April 2015, *Schlyter/Commission*, in Case T-402/12, the General Court considered that *disclosure, during the standstill period, of a detailed opinion delivered by the Commission in the context of the procedure laid down by Directive 98/34 does not necessarily adversely affect the purpose of that procedure. On the contrary, such disclosure will be perceived by the Member State concerned as an additional incentive to make sure that its technical regulation is compatible with the EU rules governing such fundamental freedoms.*

This judgment is currently under appeal (*France v Schlyter*, Case C-331/15 P) and the Commission is supporting France's arguments. With a view to not compromising the position which the Commission is defending before the Court, Commission services are advised to continue to deal with access-to-documents requests in the framework of Directives 98/34/EC and 2015/1535 as explained above until the final judgment of the Court is rendered.

Case-law:

- [T-402/12](#) *Schlyter v Commission*
- Appeal *France v Schlyter* Case C-331/15 P

- Ordonnance du Président du Tribunal du 1er septembre 2015, dans l'affaire T 344/15 R, République française v Commission européenne
- Link: [Ordonnance FR/Commission](#)

Reference documents/links:

- Examples of confirmatory decisions and the summary of the case-law are available on the Commission's access-to-documents webpages on *My Intracomm*¹;
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu

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¹ <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>;