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 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;

- Comments or detailed opinions are not exempted from the application of Regulation 1049/2001. Thus the possible application of the exceptions provided for in that Regulation has to be considered on a case-by-case basis;

- In its recent judgment of 7 September 2017 in case C-331/15 P, France v Schlyter, the Court of Justice acknowledged that the requirement of transparency underlying these directives applies to detailed opinions issued by the Commission or Member States as a matter of principle. This principle applies mutatis mutandis also for comments issued by the latter;

- No general presumption of non-disclosure can apply to documents held by the Commission in the context of notification procedures according to Directive 98/34 and Directive 2015/1535. Instead, the documents should be identified and assessed individually;

- The requirement of transparency that underlies Directive 98/34 and Directive 2015/1535 does not, however, prevent the Commission, on the basis of the circumstances of the particular case, from relying on the third indent of Article 4(2) of Regulation 1049/2001 (protection of the purpose of investigations) in order to refuse access to a detailed opinion or comments (or parts thereof) delivered by itself or by a Member State, when the Commission is able to demonstrate that access to the said (parts of the) document would specifically and actually undermine the objective of preventing a technical regulation that is incompatible with EU law from being adopted (paragraph 81 of C-331/15 P). In that regard, the argument that there is a risk of less cooperation from the Member State is not sufficient justification for denying access to the comments or detailed opinion (paragraph 82 of C-331/15P);

- For comments or detailed opinions issued by (a) Member State(s), the services should, in case of doubt at initial level whether access can or cannot be granted, consult the Member State(s) which issued the comments or detailed opinions (consultation letter available below);

- If the Member State(s) oppose(s) disclosure of documents originating from it/them, the services shall enter in a constructive dialogue with the Member State(s) in order to obtain detailed explanations on this opposition and/or partial access, but should not overrule the opposition at initial level.
Current administrative practice:

The Court of Justice has acknowledged that the notification procedure as laid down in the above-mentioned directives is to be considered as an investigation in the meaning of Article 4(2), third indent of Regulation 1049/2001, as it provides for a structured and formalised procedure for the collection and analysis of the information in order to enable the institution to take position. However, the Court stated that no general presumption of non-disclose can apply for the entire notification file. Instead, a case by case assessment of each individual document must be made. In principle, full access must be granted to detailed opinions or comments issued by the Commission or Member States. However:

- If there is a pending infringement or EU Pilot procedure or if concrete indications point to the forthcoming opening of an infringement or EU Pilot procedure by the Commission, the application of the exception of Article 4(2), third indent of Regulation 1049/2001 could be considered for individual documents or parts thereof issued in the framework of the notification procedure under Directives 98/34/EC and 2015/1535;

- As a precondition for applying the exception, the said (parts of the) documents would, if released, undermine the purpose of the latter investigations and there should be no overriding public interest in disclosure;

- If public access to detailed opinions and/or comments issued by the Commission and/or the Member States is requested during the 'standstill' period, the services should consider, in exceptional circumstances, for individual documents or parts thereof, the application of the exceptions of Article 4(2), third indent of Regulation 1049/2001 and Article 4(3), first subparagraph, pertaining, respectively 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 and the deadline for the Commission reaction has not expired;

- 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 from those in Article 4 of Regulation 1049/2001 applies, access must be granted 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. The Court of Justice confirmed this judgment on 7 September 2017 (C-331/15 P, France v Schlyter).

Case-law:

- 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](http://www.curia.eu)