



EUROPEAN COMMISSION

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

Director-General

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Subject: Your request for access to documents – Notification 2017/135/I – GESTDEM 2017/4276

Dear Mr Dongo,

Thank you for your request of 18 July 2017 for access to the detailed opinion issued by the Commission and the comments issued by Denmark, Germany, Spain and Austria within the framework of notification 2017/135/I.

After having carefully examined your request, I hereby inform you that unfortunately, we cannot disclose the requested documents because their 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) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents¹, 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 (EU) 2015/1535². During the procedure established by Directive (EU) 2015/1535, the Commission collects information and proceeds to conformity checks of a notified measure with EU law. This complex task involves a thorough review of the notified measure and possible comments and/or detailed opinions from Member States. 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 EU law.

¹ O J L145 of 31.5.2001, p. 43.

² Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1–15.

The Commission activities in the framework of notifications under Directive (EU) 2015/1535 are of an investigative nature which is similar to the infringement procedure. This is recognised by the Directive itself. Article 5(5) second indent of Directive (EU) 2015/1535 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 Union acts”. It may therefore be concluded that the legislator, after considering the similarities between the procedure under Directive (EU) 2015/1535 and the infringement procedure, decided to state explicitly that the absence of a reaction from the Commission under Directive (EU) 2015/1535 shall not prevent it from taking decisions under other EU acts.

During the procedure established by Directive (EU) 2015/1535 and with the purpose of ensuring compliance of draft regulations with EU 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 documents shall not be disclosed. As the standstill period will expire on 2 October 2017, we consider that the dialogue with the Member State is still 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 documents in question are covered by the above-mentioned exception in their 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 documents 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 their disclosure in the sense of the Regulation.

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 or by regular mail to the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Brussels.

Yours sincerely,


Lowri Evans