

Comments of the Commission on a closing decision with suggestions for improvement from the European Ombudsman
- Complaint by Mr ██████████ ref. 2204/2018/TE

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 19 September 2019, the European Ombudsman addressed a letter to the President of the European Commission in relation to complaint 2204/2018/TE. In her letter, the European Ombudsman communicated that she had decided to close the complaint and shared her conclusions with regard to that file:

“The Ombudsman has found no maladministration in how the Commission handled comments submitted by the complainant under the notification procedure set out in the Single Market Transparency Directive regarding German draft technical regulations.

As regards the alleged failure to provide the complainant with the date the standstill period ended, the Commission did provide this information to the complainant on request.

As regards the alleged failure to provide the complainant with the title of the notified measures, no further inquiries are justified since the complainant was, from other sources, aware of the title”.

Moreover, the European Ombudsman shared a copy of her decision, addressed to the complainant, Dr ██████████.

In the light of the inquiry carried out, the European Ombudsman considered it useful to make a number of suggestions for improvement to the Commission:

“The Commission should explain clearly what interested parties can expect in terms of the Commission’s reply after comments have been submitted under the notification procedure, both in the acknowledgement of receipt and on the TRIS website.

The Commission should carefully monitor Member States’ use of confidential notifications under Article 5(4) of the Single Market Transparency Directive, and take the necessary measures in case of suspected abuse of that provision”.

II. THE COMMISSION’S COMMENTS TO THE EUROPEAN OMBUDSMAN’S SUGGESTIONS

The Commission thanks the European Ombudsman for the constructive suggestions made for the improvement of the implementation of Directive (EU) 2015/1535¹ and is pleased to share with the European Ombudsman the different actions that it intends to carry out in the shortest possible timeframe.

¹ 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.

The Commission is honoured to inform the European Ombudsman that it will take the following actions to implement the suggestions made in her letter of 19 September 2019:

Increased transparency vis-à-vis interested parties submitting comments

1. The Commission website <https://ec.europa.eu/growth/tools-databases/tris/en/> will be updated in all languages to indicate, in the tab where contributions are received, the following:

The TRIS website makes it easy for you or your organization to share your views on any given notification.

You may submit your position in any of the official languages of the EU. We encourage you to submit your opinion at least one month before the end of the standstill period to make sure that your views are duly considered taking into account the time needed for analysis and internal processing. In any event, your contributions will be accepted until 23:59:59 CET of the date of end of the standstill period. Your contribution will be made public in TRIS (translations into other languages will not be publicly available) unless you signal that you wish to keep them confidential.

The views by the interested parties are important for the Commission and the Member States in the context of an assessment of notifications submitted under Directive (EU) 2015/1535. However, any Commission reaction is taken independently, in the light of the information in its possession and in line with its internal decision-making rules.

Please note you will not receive any further feedback concerning the content of your contribution.

At the end of the standstill period, you will find on the webpage <https://ec.europa.eu/growth/tools-databases/tris/en/>, under the notification file, the information about the form of the reaction of the Commission and/or the Member States, if any, to the notification.

2. The standard reply addressed to the stakeholders making contributions alongside any notification procedure will be adjusted to read as follows:

Dear Mr/Ms XXX,

Thank you for sharing your views in the context of notification XXX/XXX/XX. Your comments have been forwarded to the Commission departments in charge of assessing that notification. The information about the modalities of publication or not of contributions under Directive (EU) 2015/1535 are explained, for each notification file, under the tab 'Contributions'.

The views by the interested parties are important for the Commission and the Member States in the context of an assessment of notifications submitted under Directive (EU) 2015/1535. However, any Commission reaction is taken independently, in the light of the information in its possession and in line with its internal decision-making rules.

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if any, to the notification.

For any further query, please do not hesitate to contact the responsible Unit at the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs at the European Commission (GROW-DIR2015-1535-CENTRAL@ec.europa.eu).

Yours sincerely,

TRIS Team

Measures in case of suspected abuse in the use of confidential notifications

3. The Commission officials responsible for the coordination of the implementation of Directive (EU) 2015/1535 have received a formal Note to the file (Annex 1) indicating how confidential notifications made by Member States have to be processed. That note clarifies the steps that have to be taken when an abuse of the use of confidential notifications is suspected.
4. During the 132th meeting of the Technical Regulations Committee, held in Brussels on 14 October 2019, the following explanations have been given orally to the representatives of Member States and subsequently recorded in the minutes:

The Commission reported about the conclusions of the European Ombudsman in the recent case 2204/2018/TE and in particular, the need for the Commission to carefully monitor Member States' use of confidential notifications under Article 5(4) of the Single Market Transparency Directive, and to take the necessary measures in case of suspected abuse of that provision.

Although the Directive does not provide elements to interpret how the term "confidential" in Article 5(4) should be understood, it is apparent that the ultimate objective of the Directive is to prevent barriers to the free movement of goods and to the provision of information society services, namely by guaranteeing a high level of transparency in the Single Market. Therefore, when implementing the Directive, Member States have to interpret exceptions to the transparency principle in a restrictive manner.

Moreover, the confidentiality has to be explicitly justified with grounded arguments, in the light of the proportionality principle. A clear distinction should be made between (i) cases in which the need for confidentiality is inherent to the substance of the draft legislation (e.g. fight against terrorism) and (ii) other cases in which economic grounds are evoked to justify the confidentiality, including the copyright protection, which is frequently raised by Member States.

Any general economic ground put forward by the notifying Member State substantiating the need of confidentiality will be rejected by default.

In the case of justification based on copyright protection, even if the confidentiality was deemed to be justified and proportionate, some information will still be made publicly available in TRIS, such as at least (i) the reference number of the given notification and the date on which it was done; (ii) the title and the summary of the draft measure; (iii) the reason why only a summary is made available (e.g. copyright) and information about where the relevant document in its entirety can be obtained from (if appropriate, against payment); and (iv) the date when the standstill period elapses.

In case of access to documents related to confidential notifications, the Commission will apply the general procedures as for other TRIS notifications (including consulting the Member State author of a document), taking into consideration that the confidentiality provision of Directive (EU) 2015/1535 does not cover reactions (e.g. detailed opinion) but only TRIS notifications.

As part of the regular meetings of the Technical Regulations Committee, the Commission will inform periodically the representatives of the Member States about any developments with regard to confidential notifications. In particular, the responsible Commission services will present information on relevant notifications, including best practice examples.

5. In case of suspected abuse in the use of confidential notifications, the Commission will remind the notifying Member State about the relevant principles and will act as explained in the Note to the file (attached). Should an abuse become manifest, and when a reasonable solution cannot be identified in the dialogue with the notifying Member State, the Commission services will explore the possibility of taking further legal action.

The Commission trusts that those actions address effectively the concerns of the European Ombudsman and encounter her satisfaction.

*For the Commission
Thierry BRETON
Member of the Commission*

List of enclosures

Annex 1: Note to the file “Internal rules for processing confidential notifications made by Member States” (Ares(2019)6188478).



EUROPEAN COMMISSION
 DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP
 AND SMES
 Single Market Policy, Regulation and Implementation
Prevention of Technical Barriers

Brussels, 07.10.2019
 GROW.B.2/ARP (2019)6905535

NOTE FOR THE ATTENTION OF THE MEMBERS OF UNIT GROW B.2

Subject: Internal rules for processing confidential notifications made by Member States

Further to the Decision of the European Ombudsman made in the file 2204/2018/TE, *“the Commission should carefully monitor Member States’ use of confidential notifications under Article 5(4) of the Single Market Transparency Directive, and take the necessary measures in case of suspected abuse of that provision”*.

In those conditions, I would appreciate that you take into account the following when processing confidential notifications:

Article 5(4) of Directive (EU) 2015/1535 reads: *“Information supplied under this Article shall not be confidential except at the express request of the notifying Member State. Any such request shall be supported by reasons. In cases of that kind, if the necessary precautions are taken, the Committee referred to in Article 2 and the national authorities may seek expert advice from physical or legal persons in the private sector”*.

First of all, it is essential to underline that the responsibility of the notification under the Directive lays with the Member States. National authorities are therefore responsible to decide whether they should notify a given draft national measure and, when appropriate, under which modalities. This clear allocation of responsibilities is essential considering the case law of the Court of Justice. In its judgment *CIA Security* (judgment of 30 April 1996, in Case C-194/94, points 54 and 55), the Court concluded that: *“[...] breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are unenforceable against individuals. [...] individuals may rely on them before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the directive.”*

Although the Directive does not provide elements to interpret how the term “confidential” in Article 5(4) should be understood, it is apparent that the ultimate objective of the Directive is to prevent barriers to the free movement of goods and to the provision of information society services, namely by guaranteeing a high level of transparency in the Single Market. Therefore, when implementing the Directive, Member States have to interpret exceptions to the transparency principle in a restrictive manner.

Moreover, the confidentiality has to be explicitly justified with grounded arguments, in the light of the proportionality principle. A clear distinction should be made between (i) cases in which the need for confidentiality is inherent to the substance of the draft legislation (e.g. fight against terrorism) and (ii) other cases in which economic grounds are evoked to justify the confidentiality, including the copyright protection, which is frequently raised by Member States.

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(e-signed)


Head of Unit

c.c.: Members of Unit GROW B.2