

Report of meetings with RO and DE on the reimplementation of the Data Retention Directive (DRD) on 21 January 2011

## GENERAL

DG HOME (Director A, HoU and staff of A3 and representative of unit 01) met with RO and DE officials to discuss the status of the transposition of the Data Retention Directive in these two countries.

The Commission's main messages were that

- it allowed and will allow for some breathing space for these two Member States to enact the legislation to fully transpose the Directive, but will at a certain point have to start infringement procedures

- data retention will not be abandoned by the Commission; Commissioner Malmström, who is responsible (not VP Reding), is convinced that data retention can be implemented in way that respects the Directive and constitutional requirements, and will maintain the Directive, although some amendments will be made (e.g. length and harmonisation of retention period, more precise definition of crimes, better data security guarantees)

- it will aim at full transposition of the Directive; the review of the Directive does not justify absence of transposition

- data freeze is not an alternative to data retention.

- COM will think about sending a "strong letter" to RO/DE to make them aware of their obligation under the Lisbon Treaty.

## SPECIFICS

### Meeting with Romania (10:00-11:45 hrs)

(A3) and HOME 01) met with 5 RO delegates: Mr. [redacted] the Ministry of Justice, [redacted] Secretary in the telecommunications, information society and postal sector of the Permanent Representation and

RO expressed its serious (constitutional) problems to implement the DRD, as its Court had given a strong negative opinion: data retention *per se* violates the Romanian Constitution, and the law was annulled "in its entirety". This opinion would be consistent with other CC jurisprudence (cf the judgment on the Integrity Agency), and not likely to change overtime. The binding nature of the Charter of Fundamental Rights under the Lisbon Treaty strengthened the impact of the judgment.

RO stated it wanted to include prevention of crime and access to retained data by security services.

COM stated that EU law does not interfere with tasks of national security services, and that crime prevention is a matter of interpretation/legislating under Article 15 ePrivacy.

RO undertook to send draft law to COM when ready for comments, if any.

RO and COM discussed legislative options without conclusion: separate databases for personal and other data; UK model by which not all operators would have to retain data;

access to data limited to those that are retained for commercial purposes or those that must be retained under regulation of Ministry of Finance; exemption of certain numbers from the retention obligation.

RO stated it would help to receiving a "strong letter" from the Commission, prior to an infringement procedure. COM undertook to reflect on it.

COM acknowledged the problem that RO is facing, and the absence of the wish to dodge obligations under the DRD. COM encouraged RO to enact a new law even though a risk that a new case would be brought to the Constitutional Court.

### Meeting with Germany (12:00-13:30 hrs)

COM met with representatives of the Ministry of Justice, the Ministry of Economics and Technology, and the permanent Representation (A

DE stated that the BVeG had rejected the transposition law in its entirety, and had included very detailed requirements in its judgement that a law should include.

Some of these requirements can not be met. In the current state of technology, for instance, the data security requirements (asymmetric encryption-searching through encrypted databases takes too long) can not be transposed. Also the obligation to exempt certain communications from being accessed by police (psychological counselling, lawyer-clients, etc). would be very hard to implement (fixed numbers could be listed, but dynamic IP addresses can not). Alternative ways to satisfy the high data protection standards of the BVeG must be found.

The big impact that the BVeG judgement of 2 March 2010 has made, and a very active civil society curtails the legislator's options. A Eckpunktepapier (key issues paper) was adopted (by the FDP) on 17 January 2011 that sets out the main issues for future legislation (see annex) and which would be reflected in legislation that was now being prepared. The main features of the paper are:

- introduction of "data freeze" of telecommunication traffic and location data; a freezing order could be issued by police on the basis of a low level of suspicion of involvement of an individual in certain criminal acts ; access to the data would require a judicial authorisation.
- IP addresses have to be retained for 7 days only.

The Commission stated that such transposition would amount to a partial implementation of the Directive, and is based on an interpretation that is narrower than what the BVeG requires; it would result from a political choice rather than from legal/jurisprudential requirements.

DE admitted that this was just an opening gambit and that the relevant legal text would be sent into inter-ministerial discussion. DE undertook to keep COM informed about developments.

DE reported about the study commissioned at the Max Planck Institute that had made an analysis of cases where data retention played a role. It found that this is mainly the case in the field of internet.