



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL HOME AFFAIRS

Director General

Brussels, 10 MAI 2011  
home.a.3(2011)547783

**NOTE FOR THE ATTENTION OF MR LUIS ROMERO REQUENA,  
DIRECTOR GENERAL OF LEGAL SERVICE**

**Subject: Infringement proceedings against Germany for non-compliance with Directive 2006/24/EC**

Since the judgment of its Constitutional Court of 2 March 2010 which annulled national legislation transposing Directive 2006/24/EC (the Data Retention Directive), Germany has failed to provide the Commission with any firm indication of how it intends to ensure the adoption of appropriate new legislation. (For your information, I attach a copy of the analysis of the judgment submitted to the Commission by Germany dated 23 June 2010.)

When officials from DG Home Affairs last discussed the matter with officials from the German government on 25 January, it was made clear that, in the Commission's view, the Constitutional Court's judgment did not preclude compliance with the Directive, and that the proposal which had been previously outlined by the German Minister for Justice for a system of 'quick freeze plus' could not, if adopted, be considered to represent sufficient transposition. The German delegation undertook to keep the Commission informed about developments. Over three months later, however, I regret that no further notifications have been forthcoming from Germany.

Against this background, it is proposed to send an Article 258 letter of formal notice to Germany. We would be grateful for your opinion on this matter within the next ten working days.

Stefano Manservigi

Cc: Mr Søren Schønberg, Member of Cabinet of Commissioner Cecilia Malmström  
Mr Legal Service



EUROPEAN COMMISSION

SECRETARIAT-GENERAL

Brussels,

SG-Grefte(YEAR)D/

PERMANENT REPRESENTATION  
OF GERMANY TO THE  
EUROPEAN UNION  
Rue Jacques de Lalaing 8-14  
B-1000 Brussels

**LN 258 TFEU/cases other than non-communication**

**03**

**Subject:** Letter of formal notice  
- Infringement No [insert infringement number]

The Secretariat-General would be obliged if you would forward to the Minister for Justice a letter from the Commission on the above subject.

For the Secretary-General,

Annex: C(YEAR)



EUROPEAN COMMISSION

Brussels,

[insert infringement number]  
C(YEAR)

Dear Minister,

I would draw your attention to Germany's ongoing failure, following the ruling of your Constitutional Court of 2 March 2010, to adopt new legislation to implement Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

The European Commission consequently takes the view that Germany has failed to fulfil its obligations under the Data Retention Directive.

The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing within two months of receipt of this letter.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

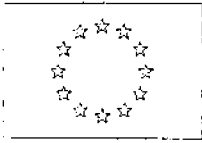
Yours faithfully,

For the Commission

[Insert Commissioner name]  
Member of the Commission

(NAME OF THE MINISTER)  
Ministry of Foreign Affairs  
(ADDRESS)





EUROPEAN COMMISSION

SECRETARIAT-GENERAL

Brussels,

SG-Grefe(2011)D/

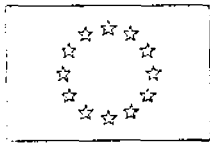
PERMANENT REPRESENTATION  
OF GERMANY TO THE  
EUROPEAN UNION  
Rue Jacques de Lalaing 8-14  
B-1000 Brussels

**Subject:** Letter of formal notice  
- Infringement No 2011/2091

The Secretariat-General would be obliged if you would forward to the Minister for Justice a letter from the Commission on the above subject.

For the Secretary-General,

Annex: C(2011)



EUROPEAN COMMISSION

Brussels,  
2011/2091  
C(2011)

Dear Minister,

I would draw your Government's attention to Germany's failure to adopt new legislation to implement Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereafter as "Directive") was adopted by the Council on 15 March 2006.

Article 15(1) of Directive 2006/24/EC provides that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by no later than 15 September 2007, and that they shall inform the Commission thereof.

Article 15(3) allowed Member States to postpone application of the Directive until 15 March 2009 to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail. Any Member State that wanted to make use of that paragraph had to notify a declaration to that effect, upon adoption of the Directive, to the Council and the Commission. Germany made use of this possibility.

Because Germany had not communicated any national transposing measures to the Commission by the said deadline, the Commission launched a procedure under Article 258 of the Treaty on the Functioning of the European Union (former Article 226 TEC) against Germany by sending a letter of formal notice on 27 November 2007 (reference SG(2007) D207204). Germany responded to the letter of formal notice on 18 January 2008 notifying the Telecommunications Surveillance Law of 31 December 2007 (SG(2008) A/00731), which it declared to be the complete transposition of the Directive.

Seiner Exzellenz Herrn Guido WESTERWELLE  
Bundesminister des Auswärtigen  
Werderscher Markt 1  
D - 10117 Berlin

After examination of the legislation notified, the Commission closed the case in September 2008.

On 2 March 2010, the German Constitutional Court annulled the transposition legislation on the basis that it violated German Basic Law. As a result, there is no longer any German legislation implementing the Directive since this annulment.

On 16 June 2010, the Commission sent a letter to Germany through EU Pilot (file number 1174/10/JLSE) requesting clarifications with regard to the transposition of the Directive. In its letter of 23 June 2010, Germany confirmed that the Constitutional Court had declared the national law transposing the Directive to be unconstitutional in its entirety and has included very detailed requirements in its judgment that a law should include.

On 21 January 2011, the Commission last discussed the matter with officials from the German government. During the meeting it was made clear that, in the Commission's view, the Constitutional Court's judgment did not justify non-transposition of the Directive, and that the proposal which had been outlined by the German Minister for Justice for a system of 'quick freeze plus' could not, if adopted, be considered to represent sufficient transposition.

The German delegation undertook to keep the Commission informed about developments. Over four months later, however, no further notifications have been forthcoming from Germany.

The European Commission consequently takes the view that Germany has failed to fulfil its obligations under the Treaties, in particular under Article 15(1) of the Directive and Article 4(3) of TEU.

In fact, it flows from Article 15(1) that Member States have not only to enact laws and measures necessary to comply with the Directive, but also to take all appropriate steps to maintain such laws and measures in force as long as the Directive is in force. Given the fact that there is no longer any German legislation implementing the Directive since annulment by the Constitutional Court, the Commission is of the opinion that Germany has failed to fulfil its obligations under Article 15(1) of the Directive.

This obligation to maintain such laws and measures in force derives also from Article 4(3) TEU, which reads as follows: "*pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flows from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the Institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*".

The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing within two months of receipt of this letter.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission

Cecilia Malmström

Member of the Commission