



EUROPEAN COMMISSION

SECRETARIAT-GENERAL

Brussels,

SG-Greffe(2011)D/

PERMANENT REPRESENTATION
OF GERMANY TO THE
EUROPEAN UNION
Rue J. de Lalaing, 8-14
1040 - BRUXELLES

RO 258 TFEU/failure to notify measures

02

Subject: Reasoned Opinion – Infringement No 2011/2091

Please find attached a reasoned opinion addressed to GERMANY in accordance with Article 258 TFEU.

For the Secretary-General

Encl. C(2011).... final



EUROPEAN COMMISSION

Brussels,

Infringement No 2011/2091
C(2011).... final

REASONED OPINION

addressed to GERMANY

under Article 258 of the Treaty on the Functioning of the European Union,

on account of failure to notify measures necessary to comply with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [L 105/54 of 13.4.2006]

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1. Paragraph 1 of Article 15 of Directive 2006/24/EC stipulates 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. They shall forthwith inform the Commission thereof.
2. Paragraph 3 of Article 15 of Directive 2006/24/EC stipulates that until 15 March 2009, each Member State may postpone application of this Directive to the retention of communications data relating to internet access, internet telephony and internet email. GERMANY made use of this paragraph.
3. 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 Act for the Amendment of Telecommunications Surveillance of 21 December 2007 (SG(2008)A/00731), which it declared to be the complete transposition of Directive 2006/24/EC.
4. After examination of the legislation received, the Commission closed the case in September 2008.
5. On 2 March 2010, the German Federal Constitutional Court held that the provisions of the Telecommunications Act and of the Code of Criminal Procedure on data retention are not compatible with the German Basic Law.
6. By letter of 23 June 2010, GERMANY confirmed that the German Federal Constitutional Court had annulled the national measures transposing Directive 2006/24/EC.
7. In view of the fact that GERMANY has not informed the Commission of any new provisions adopted to comply with Directive 2006/24/EC following the ruling of the German Federal Constitutional Court and the Commission had no other information enabling it to conclude that GERMANY had adopted the necessary provisions, the Commission had to assume that GERMANY had not yet adopted such new provisions.
8. By letter No K(2011)4112 of 17 June 2011 (ref. SG-Greffe(2011)D/9667), and in accordance with the procedure set out in Article 258 of the TFEU, the

Commission consequently gave GERMANY the opportunity to submit its observations on the matter within two months.

9. By letter of 15 August 2011, GERMANY expressed its view that Directive 2006/24/EC is partially transposed in GERMANY by applicable laws and regulations. In GERMANY's view, parts of the obligations of Articles 1, 2, 4, 5, 6, 7, 9 and 13 of Directive 2006/24/EC are transposed in GERMANY by applicable laws and regulations even after the judgement of the German Federal Constitutional Court (p.5).
10. Paragraph 1 of Article 1 of Directive 2006/24/EC stipulates that the Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them.
11. Paragraph 1 of Article 3 of Directive 2006/24/EC stipulates that Member States shall adopt measures to ensure that the data specified in Article 5 of the Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.
12. It is not disputed that the obligations of Directive 2006/24/EC are not completely fulfilled by the partial transposition of the obligations of Articles 1, 2, 4, 5, 6, 7, 9 and 13 of the Directive in GERMANY as set out by GERMANY by letter of 16 August 2011. By this letter, GERMANY confirmed that the German Federal Constitutional Court had annulled in particular the transposition of the obligations to retain data that follow from Directive 2006/24/EC (p. 6). The partial transposition of Directive 2006/24/EC in GERMANY by applicable laws and regulations as set out by GERMANY by letter of 16 August 2011 does not include all categories of data to be retained as stipulated by Article 5 of the Directive.
13. It follows from Paragraph 1 of Article 15 of Directive 2006/24/EC that Member States shall not only bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, but shall also take the necessary measures to preserve the validity of these laws, regulations and administrative provisions as long as this Directive is in force. Therefore, in the Commission's view, GERMANY has failed to fulfil its obligations under Article 15 of the Directive.
14. It appears from the observations communicated by GERMANY by letter of 15 August 2011 that the authorities in GERMANY are currently preparing new measures for complying with Directive 2006/24/EC. No draft text of these measures and no timetable for the adoption of these measures have been communicated to the Commission.

As far as the Commission is aware, these measures have still not been adopted, no communication having been made to the Commission to this effect.

15. The Commission has made clear on several occasions that, in the Commission's view, 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 of Directive 2006/24/EC.

The Commission considers that it is for the authorities of GERMANY to implement whatever procedures are necessary in order to comply with Directive 2006/24/EC without delay, and to inform the Commission accordingly.

16. The Commission must therefore conclude that GERMANY has still not taken new measures necessary to comply with Directive 2006/24/EC and, in any event, has failed to notify it of any such measures.

FOR THESE REASONS

THE EUROPEAN COMMISSION

after giving the Government of GERMANY the opportunity to submit its observations by letter dated 17 June 2011 (ref. SG-Greffe(2011)D/9667) and in view of the reply of the Government of GERMANY dated 15 August 2011,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

under the first paragraph of Article 258 of the Treaty on the Functioning of the European Union, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provisions of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [L 105/54 of 13.4.2006] or, in any event, by failing to notify such provisions to the Commission, GERMANY has failed to fulfil its obligations under Article 15 of this Directive.

Pursuant to the first paragraph of Article 258 of the Treaty on the Functioning of the European Union, the Commission invites GERMANY to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of this Opinion.

Done at Brussels,

For the Commission
Cecilia MALMSTRÖM
Member of the Commission

