



EUROPEAN COMMISSION
DIRECTORATE GENERAL HOME AFFAIRS

The Director-General

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**NOTE FOR THE ATTENTION OF MS CECILIA MALMSTRÖM,
COMMISSIONER**

As requested by your Cabinet, please find enclosed a background document on the possible application of Article 260(3) TFEU in the infringement case 2011/2091 against Germany for non-transposition of the Data Retention Directive (2006/24/EC).

Stefano Manservigi

cc. Ms Maria Åsenius, Head of Cabinet of Commissioner Cecilia Malmström
Mr Søren Schønberg, Member of Cabinet of Commissioner Cecilia Malmström

DRD infringement case against Germany

D) Proposition to request financial sanctions in the first referral to Court

In view of recent developments in the infringement case against Germany for non-communication of measures transposing the Data Retention Directive (DRD), it is proposed to **apply Article 260(3)** in order to request financial sanctions in the first referral to Court.

a) Recent developments in the DRD infringement case against Germany

Germany's reply to the Reasoned Opinion dated 23 December 2011 suggests that **Germany deliberately refuses to take the necessary steps to fully transpose the DRD** into national law. Germany submitted a draft text of the German Ministry of Justice dated May 2011 for a system of data preservation ("quick freeze") that is still subject to inter-ministerial discussions. The Commission has made clear on several occasions since January 2011 that a system of data preservation could not represent sufficient transposition of the DRD.

The suggested evidence for Germany's deliberate refusal to take the necessary steps to fully transpose the DRD is supported by recent press statements of the German Government. In an interview in January 2012, **the German Justice Minister Leutheusser-Schnarrenberger called into question the need to transpose the DRD** in view of the planned review, announcing to wait for the outcome of the review process before taking the necessary steps.¹ A spokesperson of the German Federal Government stated that Germany does not expect financial sanctions in the first referral to Court.² It thus seems that the missing risk of financial sanctions in the near future removes the incentive for Germany to transpose the DRD.

Regarding the **Commission's decision to depart from the general use of Article 260(3)** in the DRD infringement cases following a constitutional court judgement (DE, CZ and RO), **some of the reasons for this ceased to exist in the case against Germany**. Since the judgement of the German Federal Constitutional Court in March 2010, Germany has been given a considerable amount of time to adopt new legislation transposing the DRD in compliance with the requirements set by the Constitutional Court.³ Furthermore, the suggested evidence for Germany's deliberate refusal to start taking the necessary measures to fully transpose the DRD adds to the seriousness of the infringement of EU law.

c) Proposed next steps

Presumably, a **second Reasoned Opinion** could be sent to Germany with explicit reference to Article 260(3), thus making the potential application of Article 260(3) foreseeable for Germany. The risk of financial sanctions already in the first referral to Court would give Germany a stronger incentive to start taking the necessary steps to fully transpose the DRD into national law.

Irrespective of such a second Reasoned Opinion with a reference to Article 260(3), it would still be in the Commission's discretionary power to decide whether or not to request financial sanctions against Germany in the first referral to Court.

¹ Interview with the "Welt am Sonntag" on 1 January 2012:

<http://www.welt.de/print/wams/politik/article13791723/Wir-muessen-die-Kampfhosen-anziehen.html>

² Article in the "Frankfurter Allgemeine Zeitung" on 30 December 2011:

<http://www.faz.net/aktuell/politik/inland/vorratsdatenspeicherung-berlin-rechnet-nicht-mit-straefe-11585866.html>

³ In this respect, the transposing law adopted by Austria is generally seen as meeting both the requirements of the DRD and the German Federal Constitutional Court.

II) Legal background: Article 260(3)

a) The new Article 260(3)

Article 260(3) TFEU is a substantial innovation to infringement procedures introduced by the Treaty of Lisbon. Article 260(3) allows for imposing financial sanctions on a Member State already in the first judgement of the Court for failure to notify transposing measures. This aims at giving Member States a **stronger incentive to transpose directives** in good time.

When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive (first referral to Court), the Commission may propose to the Court to impose a lump sum or penalty payment on the Member State in the same judgement which finds that the Member State has failed to fulfil its obligation.

b) The Commission's implementation of Article 260(3)

The Commission can use the new instrument provided by Article 260(3) "when it deems appropriate", which confers wide discretionary powers on the Commission. As set out in its Communication of January 2011 on the implementation of Article 260(3), the Commission considers that the **Article 260(3) instrument should be used as a matter of principle in all cases** of failure to fulfil an obligation covered by this provision, i.e. the transposition of directives adopted under legislative procedure.⁴ The failure covered by Article 260(3) concerns both the total failure to notify any measures to transpose the directive and **cases in which there is only partial notification of transposition measures.**

The Commission nevertheless recognises in its Communication that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3).

The implementation of Article 260(3) is guided by three fundamental criteria:

- 1) the **seriousness of the infringement**, its **duration** and the need to ensure that the sanction itself is a deterrent to further infringements must be taken into account;
- 2) the penalties proposed to the Court by the Commission must be **foreseeable for the Member State**;
- 3) the deterrent effect of the sanction must be ensured by an appropriate amount of penalties proposed to the Court by the Commission.

III) Background on the DRD infringement cases against DE, RO and CZ

a) Departure from the general use of Article 260(3)

Before opening the pre-litigation procedure with a Letter of Formal Notice, the **Commission decided not to use the Article 260(3) instrument** in the infringement cases against Germany and Romania concerning the non-communication of measures transposing the DRD. This decision corresponded to the position of the Legal Service.

Three reasons were adduced for this departure from the general use of Article 260(3) as a matter of principle:

- 1) Germany and Romania had notified the national transposition measures, which subsequently have been annulled by their constitutional courts.

⁴ Communication from the Commission – Implementation of Article 260(3) of the Treaty (2011/C 12/01).

2) It is not certain that the Court of Justice will follow the interpretation by the Commission of the application of Article 260(3) in an exceptional situation of annulment a posteriori of the transposition measures.

3) The transposition of the Data Retention Directive is particularly complex due to the fact that the general obligation to retain data requires adoption of national measures whose implementation may raise sensitive questions linked to fundamental rights, in particular the right to data protection.

Consequently, neither the Letters of Formal Notice sent to Germany and Romania on 17 June 2011 nor the Reasoned Opinions sent to both Member States on 28 October 2011 include a reference to the Commission's intention to use this instrument.

b) Recent developments in the DRD infringement cases against RO and CZ

The Commission received **Romania's** reply to the Reasoned Opinion on 27 December 2011. It appears from a prima facie analysis, which is subject to further analysis on the basis of a translation to be received on 1 February 2012, that the Romanian Government adopted a draft law transposing the DRD in November 2011 which is currently discussed in both chambers of the Romanian Parliament in an accelerated procedure. The draft law was annexed to Romania's reply and is currently being translated.

The infringement case against the **Czech Republic** is at a different stage compared to the cases against Germany and Romania. This is due to the fact that the Czech Constitutional Court annulled the Czech law transposing the DRD in March 2011, while the national laws transposing the DRD were already annulled in October 2009 in Romania and in March 2010 in Germany by their Constitutional Courts. A Letter of Formal Notice was sent to the Czech Republic on 25 November 2011 requesting a reply until 25 January 2012.

