

EUROPEAN COMMISSION
DIRECTORATE-GENERAL HOME AFFAIRS

Director General

Brussels, 13 FEB. 2012
home.a.3(2012)168005

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

Subject: Infringement proceedings against Germany (case 2011/2091) and Romania (case 2011/2089) for non-transposition of Directive 2006/24/EC

The Constitutional Court of Romania, with its judgement of 8 October 2009, annulled the national legislation transposing Directive 2006/24/EC (the Data Retention Directive). The Federal Constitutional Court of Germany, with its judgement of 2 March 2010, annulled the national legislation transposing the Directive. Since then, Romania and Germany have failed to adopt new measures necessary to comply with the Directive.

On 17 June 2011, the Commission sent an Article 258 letter of formal notice to Romania (ref. SG-Greffe(2011)D/9861) and to Germany (ref. SG-Greffe(2011)D/9667). Romania and Germany replied by letters of 16 August 2011 and 15 August 2011 respectively. The Commission concluded from these replies that Romania and Germany had still not taken the measures necessary to comply with Directive 2006/24/EC.

On 28 October 2011, the Commission consequently sent an Article 258 reasoned opinion to Romania (ref. SG-Greffe(2011)D/18406) and to Germany (ref. SG-Greffe(2011)D/18335). Romania and Germany replied by letters of 29 December 2011 and 23 December 2011 respectively. It appears from Romania's reply that Romania has still not taken the measures necessary to comply with Directive 2006/24/EC. Romania communicated to the Commission a legislative proposal that had been initiated by two Members of the Chamber of Deputies of Romania on 2 November 2011. It appears from Romania's reply that the legislative proposal is currently being discussed in the Chamber of Deputies as the legislative body in Romania's bicameral Parliament. However, no timetable for the adoption of these measures has been communicated to the Commission.

It appears from Germany's reply to the reasoned opinion that Germany has still not taken the measures necessary to comply with Directive 2006/24/EC. Germany communicated to the Commission a proposal by the German Federal Ministry of Justice for a system of 'quick freeze plus' dated 26 May 2011. The Commission services have made clear on several occasions that, in their view, a proposal for a system of 'quick freeze plus' could not, if adopted, be considered to represent sufficient transposition of Directive 2006/24/EC. **Consequently, DG HOME must conclude that Germany is currently not taking any measures necessary to comply with the Directive.** The suggested evidence for Germany's deliberate refusal to take the necessary measures to transpose the Directive is supported by recent press statements of the German Federal Minister of Justice Sabine Leutheusser-Schnarrenberger.

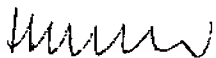
As a matter of principle, the Commission considers that Article 260(3) TFEU on the request of financial sanctions in the first referral to Court should be applied in all cases of failure to

transpose directives adopted under legislative procedure.¹ This aims at giving Member States a stronger incentive to transpose directives in good time. The failure covered by Article 260(3) concerns both the total failure to notify any measures to transpose a directive and cases in which there is only partial notification of transposition measures. However, before opening the pre-litigation procedure by sending a letter of formal notice, the Commission decided to depart from the general use of Article 260(3) in the infringement proceedings against Romania and Germany for non-transposition of Directive 2006/24/EC.

In light of the above developments of the infringement proceedings against Romania and Germany, DG HOME deems it necessary to revoke the decision to depart from the general use of Article 260(3) in the two cases. The fundamental criteria guiding the application of Article 260(3) include the seriousness of the infringement, its duration and the need to ensure that the sanction itself is a deterrent to further infringements. Romania and Germany have already been given a considerable amount of time to transpose Directive 2006/24/EC into national law following the judgements of their Constitutional Courts on 8 October 2009 and 2 March 2010 respectively. The Commission has thus given due regard to the complex situation that arose from these judgements. However, Romania and Germany still fail to adopt national legislation to comply with Directive 2006/24/EC. Furthermore, the non-transposition of Directive 2006/24/EC in Germany constitutes a very serious infringement of EU law, as it appears that Germany deliberately refuses to take the necessary measures to comply with the Directive.

Furthermore, in the infringement proceeding against the Czech Republic (case 2011/1143) for non-transposition of Directive 2006/24/EC, the Commission sent an Article 258 letter of formal notice to the Czech Republic (ref. SG-Greffe(2011)D/21311) on 25 November 2011 with explicit reference to Article 260(3). Similar to the situation in Germany and Romania, the Czech Republic had initially transposed Directive 2006/24/EC into national law but parts of the transposing legislation were annulled by the Constitutional Court of the Czech Republic on 31 March 2011. In this case, however, the Commission did not decide to depart from the general use of Article 260(3).

Against this background, it is proposed to send a supplementary Article 258 reasoned opinion with explicit reference to Article 260(3) to Romania and to Germany in order to ensure that the potential application of Article 260(3) in the first referral to Court is foreseeable for Romania and 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 [redacted] gal Service

¹ Communication from the Commission – Implementation of Article 260(3) of the Treaty (2011/C 12/01).



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: Supplementary 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

SUPPLEMENTARY REASONED OPINION

addressed to GERMANY

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

on account of failure to adopt or maintain in force 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]

SUPPLEMENTARY REASONED OPINION

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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 transposition of Directive 2006/24/EC by annulling § 113(a) and §113(b) of the Telecommunications Act and the first sentence of § 100(g) of the Code of Criminal Procedure to the extent that the latter permits the collection of data stored pursuant to § 113 of the Telecommunications Act.
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, provisions relating in particular to the retention of names and addresses of subscribers or registered users, the passing on of those data for the purpose of law enforcement, the guaranteeing of data protection and data security and the establishment of a supervisory authority, 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 obligation to retain traffic data pursuant to Article 5 of Directive 2006/24/EC. 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. Concerning the categories of data specified in Article 5 of Directive 2006/24/EC, the partial transposition of the Directive in GERMANY by applicable laws and regulations as set out by GERMANY by letter of 16 August 2011 relates to the following provisions: Article 5(1)(a)(1)(ii) on the retention of the name and address of the subscriber or registered user of fixed network telephony and mobile telephony; Article 5(1)(a)(2)(iii) on the retention of the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication; Article 5(1)(b)(1)(ii) on the retention of the name(s) and address(es) of the subscriber(s) or registered user(s) of fixed network telephony and mobile telephony; Article 5(1)(b)(2)(ii) on the retention of the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication.

14. Concerning the categories of data specified in Article 5 of Directive 2006/24/EC, the partial transposition of the Directive in GERMANY by applicable laws and regulations as set out by GERMANY by letter of 16 August 2011 does not include the following provisions: the obligation to retain the calling telephone number in fixed network telephony and mobile telephony pursuant to Article 5(1)(a)(1)(i); the obligation to retain the allocated user ID(s) pursuant to Article 5(1)(a)(2)(i); the obligation to retain the user ID and telephone number allocated to any communication entering the public telephone network pursuant to Article 5(1)(a)(2)(ii); the obligation to retain the number(s) dialled (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed pursuant to Article 5(1)(b)(1)(i); the obligation to retain the user ID or telephone number of the intended recipient(s) of an internet telephony call pursuant to Article 5(1)(b)(2)(i); the obligation to retain the data necessary to identify the date, time and duration of a communication pursuant to Article 5(1)(c); the obligation to retain data necessary to identify the type of communication pursuant to Article 5(1)(d); the obligation to retain data necessary to identify users' communication equipment or what purports to be their equipment pursuant to Article 5(1)(e); the obligation to retain data necessary to identify the location of mobile communication equipment pursuant to Article 5(1)(f).
15. Therefore, in the Commission's view, 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 amount to a full transposition of Articles 3 and 5 of the Directive. Moreover, such partial transposition does not achieve the objectives of the Directive as stipulated in Article 1.
16. By letter No C(2001)7509 (ref. SG-Greffe(2011)D/18335) of 28 October 2011, and in accordance with the procedure set out in Article 258 TFEU, the Commission concluded that 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 and to notify them to the Commission, or, in any event, by failing to maintain such measures in force, GERMANY had consequently failed to fulfil its obligations under Article 15 of this Directive and under Article 4(3) TEU. The Commission invited GERMANY to take the necessary measures to comply with this Reasoned Opinion within two months of receipt of the Opinion.
17. By letter of 23 December 2011, GERMANY communicated to the Commission a draft text ("*Diskussionsentwurf*") by the German Federal Ministry of Justice concerning a law on the preservation of existing communications traffic data and on the granting of internet inventory data requests ("*Gesetz zur Sicherung vorhandener Verkehrsdaten und Gewährleistung von Bestandsdatenauskünften im Internet*") dated 26 May 2011. No timetable for the adoption of these measures has been communicated.

18. In GERMANY's view, the draft text communicated to the Commission by letter of 23 December 2011 would, if adopted, transpose the following provisions of Directive 2006/24/EC into national law: Article 5(1)(a)(2) on the retention of data necessary to trace and identify the source of a communication concerning internet access, internet e-mail and internet telephony; Article 5(1)(c)(2) on the retention of data necessary to identify the destination of a communication concerning internet e-mail and internet telephony; Article 5(1)(e)(3) on the retention of data necessary to identify users' communication equipment or what purports to be their equipment; Article 5(2) on the prohibition to retain data revealing the content of the communication pursuant to the Directive; Article 8 on storage requirements for retained data; Article 10 on statistics.
19. In the Commission's view, the draft text communicated by GERMANY by letter of 23 December 2011 would, if adopted, not amount to a full transposition of Articles 3 and 5 of Directive 2006/24/EC. Moreover, such partial transposition does not achieve the objectives of the Directive as stipulated in Article 1.
20. Therefore, in the Commission's view, GERMANY has failed to fulfil its obligations under Article 15 of the Directive and Article 4 (3) TEU.
21. 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.
22. 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.
23. The Commission draws your Government's attention to the financial sanctions that the Court of Justice may impose pursuant to Article 260(3) of the Treaty and which the Commission will apply as set out in its Communication of 11 November 2010 on the Implementation of Article 260(3) of the Treaty¹.

¹ OJ C 12, 15.1.2011, p.1.

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;

after concluding by letter dated 28 October 2011 (ref. SG-Greffe(2011)D/18335) that 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 and to notify them to the Commission, or, in any event, by failing to maintain such measures in force, GERMANY had consequently failed to fulfil its obligations under Article 15 of this Directive and under Article 4(3) TEU;

in view of the reply of the Government of GERMANY to the Reasoned Opinion dated 23 December 2011

HEREBY DELIVERS THE FOLLOWING

SUPPLEMENTARY 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] and by failing to notify them to the Commission, or, in any event, by failing to maintain such measures in force, GERMANY has failed to fulfil its obligations under Article 15 of this Directive and under Article 4(3) TEU.

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 one month of receipt of this Opinion.

Done at Brussels,

For the Commission
Cecilia MALMSTRÖM
Member of the Commission

