



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL HOME AFFAIRS  
DIRECTORATE A Internal Security

Director

07 MARS 2012

Brussels,  
home.a.3(2012)288581

## NOTE TO THE FILE

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

In the infringement proceedings against Germany and Romania for non-transposition of Directive 2006/24/EC (the Data Retention Directive), DG HOME has proposed to send a supplementary Article 258 reasoned opinion with explicit reference to Article 260(3) TFEU to Romania and to Germany in order to ensure that the potential application of Article 260(3) on the request of financial sanctions in the first referral to Court is foreseeable for Romania and Germany. DG HOME asked the Legal Service for its opinion on this matter on 13 February 2012, requesting a reply with ten working days. On 5 March 2012, the Legal Service informed DG HOME informally that the Legal Service could not support the proposal to send a complementary reasoned opinion in order to include Article 260 (3).

As a matter of principle, the Commission considers that Article 260(3) 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.<sup>1</sup> 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, in the infringement proceedings against Romania and Germany for non-transposition of Directive 2006/24/EC, the Commission decided to depart from the general use of Article 260(3). This decision was taken to give due regard to the fact that the Constitutional Courts of Romania and Germany had annulled the national legislation transposing Directive 2006/24/EC.

In light of the developments of the infringement proceedings against Romania and Germany, DG HOME deems it necessary to revisit the decision to depart from the general use of Article 260(3) in these 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.

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

Furthermore, the non-transposition of Directive 2006/24/EC in Germany constitutes a very serious infringement of EU law, as Germany deliberately refuses to comply with the Directive. It is clear from Germany's reply to the reasoned opinion of 23 December 2011, and further contacts that have taken place with Germany since, that Germany is currently not taking any measures necessary to transpose Directive 2006/24/EC and does not intend to take such measures. 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. The 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.

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 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, DG HOME deems it necessary to send a supplementary Article 258 reasoned opinion with explicit reference to Article 260(3) to Romania and to Germany.



Reinhard Priebe