



EUROPEAN COMMISSION
DIRECTORATE-GENERAL HOME AFFAIRS

Director General

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**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 – proposal for referral to Court by virtue of Article 258 and Article 260(3) TFEU

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, Germany and Romania have failed to adopt new measures necessary to comply with the Directive.

On 17 June 2011, the Commission opened the pre-litigation phase of the infringement procedures against Germany and Romania by sending out Article 258 Letters of Formal Notice (ref. SG-Greffe(2011)D/9667 and SG-Greffe(2011)D/9861), followed by Article 258 Reasoned Opinions on 28 October 2011 (ref. SG-Greffe(2011)D/18335 and SG-Greffe(2011)D/18406).

As Germany and Romania have still not taken the measures necessary to comply with Directive 2006/24/EC, the Commission on 26 March 2012 sent Article 258 Supplementary Reasoned Opinions to Germany (ref. SG-Greffe(2012)D/5218) and Romania (ref. SG-Greffe(2012)D/5264) with a one-month deadline to reply. The Commission sent these Supplementary Reasoned Opinions in order to draw the attention of Germany and Romania to the financial sanctions that the Court of Justice may impose pursuant to Article 260(3) TFEU and which the Commission will apply as set out in its Communication on the Implementation of Article 260(3) TFEU.

Germany replied by letter of 25 April 2012. It appears from Germany's reply to the Supplementary Reasoned Opinion that Germany has still not adopted the measures necessary to comply with Directive 2006/24/EC and that no progress has been made in the preparation of these measures. It appears that the authorities in Germany continue to prepare a legislative proposal on the basis of a text drafted 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. Germany had communicated this draft text, dated 26 May 2011, with its reply to the Reasoned Opinion on 23 December 2011.

The Commission has made it clear on several occasions, inter alia in the Supplementary Reasoned Opinion, that a system of data preservation ("quick freeze") would, if adopted, not amount to a full transposition of Directive 2006/24/EC. This opinion is shared by the German Federal Ministry of Interior. Therefore, the German Government has not agreed upon a legislative proposal for data preservation.

Consequently, DG HOME has to conclude that Germany continues to deliberately refuse to take all the necessary measures to comply with Directive 2006/24/EC. This evidence for Germany's deliberate refusal to transpose Directive 2006/24/EC is supported by several recent public statements of the German Federal Minister of Justice Sabine Leutheusser-Schnarrenberger.

Romania replied by letter of 26 April 2012. It appears from Romania's reply to the Supplementary Reasoned Opinion that the Chamber of Deputies as the legislative body in Romania's bicameral Parliament continues to discuss a legislative proposal that was initiated by two Members of the Chamber of Deputies of Romania on 2 November 2011. Romania communicated this legislative proposal to the Commission by letter of 29 December 2011. However, no date of adoption of these measures has been communicated to the Commission in Romania's reply to the Supplementary Reasoned Opinion.

In light of the above developments of the infringement proceedings against Germany and Romania, DG HOME proposes to refer these cases to the Court of Justice by virtue of Article 258 TFEU and Article 260(3) TFEU. The penalty calculation fiches are sent separately by encrypted email. In accordance with the Communication on the implementation of Article 260(3) TFEU, the calculation fiches propose a daily penalty payment to be imposed by the Court but do not request a lump sum payment. The penalty calculation fiches also provide a detailed analysis of the cases and describe their developments.

DG HOME is aware of the ten working days deadline for consulting the Legal Service and seeks to anticipate consultations as much as possible in view of the monthly infringement cycle. As the deadline for Germany and Romania to reply to the Supplementary Reasoned Opinion expired on 26 April 2012, it has only now been possible to consult the Legal Service on these two important cases.

The infringement proceedings concerning Directive 2006/24/EC are of high political importance for Commissioner Cecilia Malmström. Furthermore, due to Germany's deliberate refusal to fully transpose Directive 2006/24/EC, and aggravated by several recent public statements by the German Federal Minister of Justice that deny any intention to comply with the Directive, there is an urgent need to send a strong signal regarding this very serious infringement of EU law. The urgency was acknowledged by the College in its decision in March 2012 by giving Germany and Romania a shorter deadline to reply to the Supplementary Reasoned Opinion than what is usually the practice.

In view of these circumstances and as requested by Commissioner Cecilia Malmström, I kindly asks for your personal support to enable us to advance these cases in the May 2012 infringements cycle. I would be very grateful for your opinion on this matter at your earliest convenience.



Stefano Manservigi

Cc: Ms Maria Åsenius, Head of Cabinet of Commissioner Cecilia Malmström
Mr Søren Schønberg, Member of Cabinet of Commissioner Cecilia Malmström
Mr _____, Legal Service