



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) – comments on Germany's statement of defence

By note of 26 September 2012 (ref ARES(2012)1120659), the Legal Service requested comments by DG HOME on the statement of defence submitted by Germany in case 2011/2091 on the non-communication of national measures implementing Directive 2006/24/EC (Data Retention Directive). **In particular, the Legal Service requested comments by my services on Germany's argumentation concerning the coefficient for serious as proposed by the Commission, which refers to the level of harmonisation achieved by the Directive and to the impact of the implementation of the Directive on internal security (paragraphs 55 to 59 of the statement of defence).**

Regarding the level of harmonisation achieved by the Directive, the Data Retention Directive only sought partial harmonisation of approaches to data retention by leaving some aspects such as cost reimbursement outside the scope of the Directive. Therefore, it is unsurprising that there are differences in national application of data retention without a common approach in terms of cost reimbursement, and that the Directive has thus not fully created a level-playing field for operators.

However, the Data Retention Directive provides for some level of harmonisation, notably by ensuring that data retention takes place in Member States within the framework provided by the Directive. The non-implementation of the Directive in Germany has a tangible effect on this harmonisation. While the costs for operators in Member States are indeed different due to differences in national application of data retention, the discrepancy between Member States where data retention takes place is less significant compared to the discrepancy resulting from a situation of non-implementation of the Directive or marginal compliance, as is the case in Germany. The partial transposition of Articles 1 and 5 of the Directive in Germany only applies to subscriber data but not to traffic and location data, and thus only to a very marginal part of the data to be retained under the Directive. The burden on German telecommunication operators is thus marginal and they have a competitive advantage compared to providers in other Member States, including providers in Member States where some expenditure is reimbursed.

Regarding the impact of the implementation of the Directive on internal security, the objective of the obligation to retain data is to "ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime" (Art. 1(1)). Recitals 7 to 11 of the preamble to the Directive clearly refer to the importance of data retention as a tool for law enforcement. More specifically, Recital 7 states that "data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime."

Considerable empirical evidence attests that data retention is valuable, and in some cases indispensable, for investigating and prosecuting crime (see generally the Commission evaluation report COM (2011) 225, section 5, pp. 21-25, and sources cited therein). A report of the German Federal Criminal Police Office concludes that the non-transposition of the Directive in Germany leads to considerable limitations in the prosecution and prevention of crime. **The available evidence for the effectiveness of data retention includes investigations into serious crimes affecting two or more Member States, such as Operation Rescue by Europol and eight Member States regarding child sexual abuse online, where the absence of legislation transposing the Data Retention Directive in Germany seriously hindered the investigation.** Therefore, there is a clear and direct consequence of the failure to transpose the Directive for the effectiveness of law enforcement at EU level as well as at national level.

My services are available to provide further support in this matter.

Stefano Manservigi

Cc: Mr Søren Schønberg, Member of Cabinet of Commissioner Cecilia Malmström
Mr [redacted] Mr [redacted] Mr [redacted]
Mr [redacted] Legal Service