EUROPEAN COMMISSION
DIRECTORATE-GENERAL HOME AFFAIRS

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NOTE FOR THE ATTENTION OF MS AND MR
LEGAL SERVICE

Subject: **Infringement proceedings against Sweden for non-compliance with Directive 2006/24/EC – Statement of defence from Sweden – your request for comments from 14 September 2011**

On 18 August 2011 Sweden submitted a statement of defence following the Commission's submission that, because Sweden has failed to fulfil its obligations under Article 260 TFEU in that it has not adopted the measures necessary to comply with the judgement of the Court in case C-185/09, Sweden should be obliged to pay a lump sum as well as a penalty payment.

A lump sum of 9 597 € per day is demanded as from the day on which the judgment in case C-185/09 was delivered (4 February 2010) until the day on which judgement is delivered in the present case or, if earlier, the day on which the necessary measures are taken by Sweden to comply with the judgement in case C-185/09.

A penalty payment of 40 947.20 € per day is demanded from the day on which the judgment in the present case is delivered until the day on which the judgement in case C-185/09 is complied with.

Sweden contests:

1. that it has to pay a lump sum
2. the amount of the financial penalties as fixed by the Commission, and
3. the Commission's claim for reimbursement of the costs of the proceedings.

The present note provides input on the first two points raised by Sweden.

The facts

Sweden acknowledges that it has not yet taken all the necessary measures to comply with the judgement of the Court in case C-185/09 (para 5 of the statement).

Sweden also acknowledges that it would be sufficient to impose one form of financial penalty in order to induce it to put an end to the present infringement (para 9 of the statement). As Sweden takes the view that there are no grounds for obliging it to pay a lump sum, it can be assumed that it does not oppose to having to pay a penalty payment if it does not comply with the judgement in case C-185/09 before the Court delivers its judgement in the present case.

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11,
Office: LX46 06/105. Telephone: direct line (32-2) 29 62033. Fax: (32-2) 297 95 84.

Proportionality of requesting both a lump sum and a penalty payment

General comment

First of all it is to be noted that in its Communication on the application of the then Article 228 of the EC Treaty[1], in point 10.1 the Commission recognised that Member States often complied only at a late stage, sometimes only at the very end of the Article 228 procedure.

In those circumstances, the Commission felt that it needed to re-examine the question of the financial sanctions envisaged in Article 228. In effect, the former Commission's practice only to apply to the Court for payment of a penalty for non-compliance after the Article 228 ruling meant that late compliance before the ruling did not result in any sanction and so was not effectively discouraged.

Sticking to a penalty payment only and not requesting a lump sum payment could mean accepting that, after the Court has found that a Member State has failed to fulfill its obligations, the same State would be allowed to continue the infringement without be sanctioned. The Commission considers that every instance of prolonged failure to comply with a ruling of the Court of Justice in itself seriously undermines the principle of legality and legal certainty in a Union based on the rule of law.

Therefore, in the light of this reasoning, the Commission decided to include in its applications to the Court under Article 228 a specification of:

– a penalty by day of delay after the delivery of the judgment under Article 228, and

– a lump sum penalising the continuation of the infringement between the first judgment on non-compliance and the judgment delivered under Article 228.

Specific comments

Sweden presents a number of reasons why it considers the Commission's position disproportionate.

1. The legislative procedure

Sweden argues it has taken the majority of measures necessary to transpose the Directive (para 17 of the statement). However, this argument is irrelevant in the present case, as those measures have not lead to an adoption of a law fully transposing the Directive into Swedish law. A Member State is required under Article 15 of the Data Retention Directive to bring into force the laws, regulations and administrative provisions to comply with the Directive. .

The argument that there are extraordinary circumstances in the present case that have withheld Sweden from adopting the necessary measures is not convincing either. The circumstances to which Sweden refers, i.e. the constitutional procedure under Chapter 2, Article 20 of the Instrument of Government, are not extraordinary to the extent that they form part of the ordinary Swedish legislative procedure.

The fact that the implementation of the Directive raises issues of fundamental rights and notably of the right to private life, cannot be accepted either as a reason for not yet having transposed the Directive, as the fundamental rights leg of the Directive, being an amendment to the e-Privacy Directive 2002/58/EC, is far from being a new element in the discussion. Recital 25 of the Directive explicitly refers to the respect of fundamental rights as guaranteed by the ECHR when Member States regulate the access to and use of retained communications data. When considering the implementation of the Directive, Sweden thus should have

[1] SEC(2005) 1658

considered and anticipated the possible application of the procedure laid down in Chapter 2, Article 20 of the Instrument of Government. The fact that in some Member States, constitutional courts annulled national implementing legislation, or that criticism has been raised against the Directive for insufficient consideration of fundamental rights, does not in any way change this assessment, as the Directive can be implemented respecting fundamental rights, as noticed by the German Federal Constitutional Court.

2. The seriousness of the infringement

The duration of the infringement

Sweden raises the seriousness of the infringement in relation to the penalties demanded by the Commission (para 20 of the statement). Sweden considers these penalties disproportionate because (i) the failure to implement the Directive has not had the effect on public and private interests that the Commission claims and because (ii) of the short interval between the date of the first judgement and the date on which the infringement may be expected to cease.

Regarding the latter issue Sweden argues that it took the vast majority of the measures required within one year of the judgement in case C-185/09, even though those measures have not yet entered into force.

This argument cannot be accepted. In terms of timelines for adoption of the Swedish legislation, it is unknown how long the adoption process will take. It is not certain if and if so, when such legislation will be adopted. For the time being it is only known that the legislative proposal transposing the Directive cannot be taken any further before the period under Chapter 2, Article 20 of the Instrument of Government has elapsed. According to Sweden, the proceedings are stalled for **at least** 12 months as from 11 March 2011. This means that the transposition of the Directive suffers an unknown delay well beyond one year after the judgement in case C-185/09, as there is no certainty that the procedure under Chapter 2 Article 20 may not last longer than 12 months or any certainty that the necessary measures will be adopted after this procedure has elapsed.

Again, the argument that Sweden has taken the vast majority of measures necessary to transpose the Directive within one year of the judgement in case C-185/09 (para 20 of the statement) is irrelevant in the present case, as those measures have not lead to the adoption of a law fully transposing the Directive into Swedish law, and thus have not lead to putting an end to the infringement as found by the Court in its judgement of 4 February 2010.

The impact on the internal market

Regarding the issue of importance of the Union provisions that have been infringed lacking transposition of the Directive, the Commission continues to take the view that the non-transposition of the Directive and in particular the lack of obligation on the telecommunications operators concerned to retain communications data, puts the latter at a (**potential**) competitive advantage compared to those operators that are obliged to retain such data, since the operators established in Sweden do not have to invest in the storage, retrieval and handing over of the data in the same way as operators established in other Member States that have implemented the Directive. The fact that the Directive does not bring about any far-reaching harmonisation as Sweden alleges (para 31 of the statement) does not change this assessment.

First, it should be noted that the Directive is not meant to achieve any far-reaching harmonisation but limits itself to establishing a minimum harmonisation to which Sweden as member of the Council agreed. In line with Article 1(1) of the Directive, **the core element of the harmonisation brought about by the Directive is the obligation to store the**

categories of data listed in the Directive to ensure that the data are available for the purpose of the investigation, detection, and prosecution of serious crime, as defined by each Member State in its national law. Without such an obligation, it remains uncertain if certain categories of data are available to law enforcement authorities and if so, during which period of time. The obligation to retain certain categories of data for a certain amount of time thus forms an essential component of the Directive and ensures that those telecommunications operators to which the Directive applies are put in the same position across the EU. The fact that the introduction of an obligation to retain data, the purposes for the retention, the length of the retention period and/or the access to the data vary amongst Member States does not diminish in any way the importance of guaranteeing that the obligation to store, which forms the heart of the Directive, is ensured in all Member States.

The absence of a cost reimbursement scheme that could have further fostered harmonisation should not be used to argue that non-transposition of those obligations in the Directive that constitute a minimum harmonisation of the internal market do not have much of an impact on the internal market. Such an approach would not only further diminish the level of harmonisation that the Directive aims to achieve, and have a negative impact on the internal market to the extent the Directive aims to regulate the internal market. Furthermore, such an approach would risk diminishing the instrument of minimum harmonisation as a way of regulating the internal market in areas where complete harmonisation is not possible or appropriate. Such an approach would imply the argument that national transposition of minimum harmonisation rules is not necessary due to the low level of harmonisation to be achieved by these measures. This would be contrary to Member States' obligation to comply with EU law. This would give excessive discretion to Member States when transposing EU law: Member States would make the national transposition dependent on the level of harmonisation which they expect to result from the measure at hand.

The Commission thus takes the view that to the extent a Directive has harmonised the internal market, any infringement of those rules that aim to achieve harmonisation has to be taken seriously. This is particularly the case if, like in the present situation, Sweden, by failing to transpose the Directive, has not implemented the core harmonising element of the Directive. According to the Commission this in itself is significant enough to demand both a lump sum as well as a penalty payment. The fact that, according to the evaluation report of the Commission, the implementation of the Directive varies on a number of points, as raised by Sweden (paras 37-41) does not in any way diminish the importance of this EU-wide retention obligation.

The argument raised by Sweden that the significance of the obligation to retain traffic data should be viewed in the light of the possibilities given under Article 6 of Directive 2002/58/EC already allowing for obligatory retention of traffic data under certain conditions (paras 33 to 36 of the statement) cannot been accepted. Neither Article 6 nor any other provision in Directive 2002/58/EC establishes an EU wide obligation to retain certain categories of communications data for a certain period of time. Directive 2002/58/EC only allows Member States if they so wish to derogate from the obligation to erase data or make them anonymous, as laid down in Articles 6 and 15 of that Directive. However, this does not equate in any way to the obligation to retain data as laid down in the Data Retention Directive; neither does Directive 2002/58/EC, for example, list the categories of data to which the obligation applies or lay down a period during which the data should be retained.

Also the argument of Sweden that, lacking a definition of serious crime in either of these Directives, it is difficult to distinguish which measures taken at national level concern the transposition of the Data Retention Directive and which ones are based on Directive

2002/58/EC (para 37 of the statement), does not convince, as this issue has no direct bearing on the fact that the obligation to retain has only been laid down in the Data Retention Directive, hence any national measure that transposes such an obligation into national law can be understood as forming part of the transposition of the Data Retention Directive.

Sweden further argues that there is no evidence for the Commission's claim in paragraph 36 of its writ of summons that Sweden's failure to transpose the Directive has resulted in financial or other damages in the EU and other Member States that have transposed the Directive (paras 43 and 44 of the statement). Sweden also reiterates that its failure to transpose the Directive has not lead to a competitive advantage for Swedish companies as claimed by the Commission in paragraph 37 of its writ of summons. These arguments are not convincing. The Commission continues to hold the view that, with the failure to transpose the Directive and notably the obligation to retain, telecommunications operators established in Sweden are under no obligation to retain the categories of communications data as listed in the Directive and hence are not required to invest in technology and personnel to meet that obligation. Furthermore, the Commission wishes to stress that it is already sufficient if there is a **potential** distortion of the competition on a given market. *This needs to be checked through ECJ case law, see however paragraph 35 of the Commission's writ of summons where it refers to a potential distortion, mentioned in para 29 of the Swedish statement.*

In this respect, Sweden also argues that currently telecommunications operators established in Sweden do provide communications data where such data have been retained (para 46 of the statement). However, those national regulations do not impose on those operators the obligation to retain data. The availability of communications data under the current Swedish legislation thus entirely depends on the commercial policy of the operator to retain certain data or not. This does not equate to the retention obligation as laid down in the Directive, which concerns not only the obligation to retain, but also the obligation to retain certain categories of data and to retain them for a period of at least six months. As Sweden acknowledges (para 46 of the statement), there is currently no statutory obligation to retain data and the availability of data thus depends completely on the operator. Such a situation is already sufficient to generate a **potential** distortion of competition between operators established in Sweden and those established in Member States that have transposed the Directive.

The Commission thus strongly disagrees with the position taken by Sweden that the **fundamental** aim of the Directive is largely achieved in Sweden on the basis of existing regulations (para 48 of the statement). If that were to be the case, it is difficult to understand why Sweden has not yet transposed the Directive and why its Parliament thought it necessary to invoke Chapter 2, Article 20 of the Instrument of Government. In other words, Sweden cannot claim *both* to have achieved the fundamental aim of the Directive *and* at the same time accept that it has not transposed it.

Without transposition into Swedish law of the core element of the Directive, the Commission disagrees with Sweden's view that the Directive has only brought marginal harmonisation and maintains its claim as expressed in paragraph 34 of its writ of summons, that is, that the Directive contains very important rules for providers of telecommunications services. The Commission also confirms its position as expressed in paragraph 35 of its writ of summons, that is, that the failure to transpose the Directive has caused the terms of competition within the internal market for telecommunications operators to be **potentially** distorted.

Amount of the financial penalties as fixed by the Commission

The main reason for demanding both a lump sum and a penalty payment is that, by failing to transpose the Directive, Sweden has not implemented the core harmonising element of the Directive. In the Commission's view, this in itself is significant enough to demand both a lump sum as well as a penalty payment.

These are also grounds for determining the daily amounts proposed by the Commission. For this reason, and since Sweden has not presented any arguments convincing the Commission to the contrary, the Commission takes the view that the amounts proposed are proportionate to the nature of the infringement.

Both penalties are calculated on the basis of the seriousness of the infringement ranging from 1 to a maximum of 20, multiplied by the duration factor. The seriousness of this case is comparable to other cases of non-communication where in the past the Commission decided to apply a seriousness factor of 10.