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EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 10th November 2010
sj.f(2010)879182

NOTE FOR THE ATTENTION OF
MR STEFANO MANSERVISI, DIRECTOR GENERAL, DG HOME

Subject: **Revision of the Data Retention Directive – Question of Optional Application**

Reference: Your note of 25 October 2010

With your note, you have requested the advice of the Legal Service as to whether it would be possible to render the application of the Data Retention Directive (Directive 2006/24/EC)[1] optional for Member States. You explain that suggestions for an "opt-out" from the Directive have notably been received from Germany, which faces a delicate situation following the decision of its Constitutional Court on the national law transposing the Data Retention Directive.

In response to your question, the Legal Service would like to recall that Union law applies to the territory of all EU Member States, Article 52 TEU. The principle of uniform application of EU law throughout the Union applies not only to the Treaties themselves, but also to secondary law based on the Treaties.

Opt-outs for individual Member States are therefore in principle possible only where they are foreseen in primary law itself. An example are the opt-outs in favour or the United Kingdom, Ireland, and Denmark in the area of Justice and Home Affairs (Protocols 21 and 22 to the EU Treaty), or the opt-outs of the UK and Denmark in the field of EMU (Protocols No. 15 and 16). The provisions of the Treaties on enhanced cooperation (Art. 20 TEU, Art. 326 ff. TFEU) may equally give rise to legislative acts not applying to all Member States.

In the absence of such exemptions flowing directly from primary law, exemptions or derogations in favour of Member States in EU legislative acts can only be accepted if they are justified by objectively different circumstances.[2] However, your note does not refer to any such different circumstances. The fact that in one Member State, namely Germany, the Constitutional Court has taken a critical stance concerning certain aspects of the national implementing law of the data retention directive does not constitute an objective circumstance which could justify an opt-out of Germany from that Directive. In this context, it must be recalled that Union law prevails over national law, including national constitutional law.

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1 OJ L 105, 13.4.2006, p. 54.

2 In certain cases, derogations may also only be granted for a limited period of time.

Therefore, the concerns expressed by the German Constitutional Court on the basis of German constitutional law cannot be a reason for an opt-out from an EU measure. However, as the Legal Service has already had the occasion to point out, the analysis of the German Court may well contain elements to be taken into account when assessing the compatibility of any proposal on data retention which the Commission might prepare with EU fundamental rights.[3]

An optional application would appear even more problematic in the present case given that the issue of data retention is highly sensitive for the right to the protection of personal data enshrined in Articles 16 (1) TFEU and Article 8 of the Charter. The level of protection of the right to data protection should not depend on in which Member States the person concerned is resident (except where Protocols N° 21 and 22 impose such a situation with the force of primary law). This would however be the case if the measure were made optional.

For these reasons, the Legal Service concludes that absent any discernible objective justification for a different treatment of certain Member States, it is not possible to transform the directive into an optional instrument. In this respect, the Legal Service sees no difference between the two versions proposed in your note, i.e. to exhaustively list the Member States that are not participating, or to include a provision allowing Member States not to participate in the amended measure.

The above comments apply independently of whether a future instrument on data retention is based on Article 114 TFEU (internal market harmonisation) or Article 87 (2) (a) TFEU (police cooperation). Of course, to the extent that Article 87 (2) (a) TFEU were retained, the derogations in favour of the United Kingdom, Ireland, and Denmark under Protocols 21 and 22 would become applicable.

The Legal Service would however add in this respect that the current directive, which is based on Article 114 TFEU (ex-article 95 EC), specifically justifies this legal basis with the need to remove obstacles to the internal market resulting from different data retention requirements.[4] If the current regulation of the retention obligation in Directive 2006/24/EC were rendered optional, this would also have the effect of reintroducing obstacles to the internal market.

My services remain at your disposal for any additional question you might have.

Luís ROMERO REQUENA

Cc: M Smulders, van Rijn, de March, Ladenburger, Coudert, Ms O'Reilly, Ms Vrignon, LS

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3 On this, cf. LS note of 20 October 2010, Ref. Ares (2010)759377.

4 Recital 6 of the Directive.