

2011/2091	Infraction constatée	ALLEMAGNE	Service responsable : HOME/A/03	Etat du dossier au 22/09/2011	Jr.Rs.:	Eq.J. ■■■ Ref. Arr. ■■■	SG(2011)D/9667	22/09/2011
Services associés : SGEN/X/00; SJUR/X/00				I. FACTS				
Non-transposition of the Data Retention Directive 2006/24/EC				The deadline for transposition of the Data Retention Directive (2006/24/EC) was 15 September 2007. Because Germany had not communicated any national transposing measures to the Commission by the said deadline, the Commission on 27 November 2007 sent DE a letter of formal notice (reference SG(2007) D207204). On 18 January 2008, DE replied notifying the COM of Telecommunications Surveillance Law of 31 December 2007 (SG(2008) A/00731), which it declared to be the complete transposition of the Directive. On 2 March 2010, the German Constitutional Court in its judgment (ref. 1 BvR 256/08, 1BvR 263/08, 1 BvR 586/08) annulled the Telecommunications Surveillance Law in its entirety.				
Bases juridiques : Directive:32006L0024				II. CORRESPONDENCE WITH THE MEMBER STATE				
Stade :				On 16 June 2010, the Commission sent a letter to Germany through EU Pilot (file number 1174/10/JLSE) requesting clarifications with regard to the transposition of the Directive.				
Financement communautaire :				On 23 June 2010, Germany confirmed that its Constitutional Court had declared the national law transposing the Directive to be unconstitutional in its entirety and that it had included very detailed requirements in its judgment of what such a law should include.				
Procédures en relation : dossier père -> ; dossiers fils ->				On 27 October 2010, COM invited DE officials to meet officials from DG Home Affairs to discuss the status and timescales of preparations of the new legislation.				
Fait Incriminé :				The meeting took place on 21 January. During the meeting, the German delegation undertook to keep the Commission informed about developments. Over four months later, however, no further notifications have been forthcoming from Germany.				
Infringement case 2011/2091 - A letter of formal notice was adopted by the Commission 16 June 2011 concerning failure of Germany to communicate measures in compliance with obligation of Article 15 of Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks.				On 17 June, The Commission sent an Article 258 letter of formal notice to Germany (ref. SG-Greffe(2011)D/9667). It appears from Germany's reply to this letter on 15 August 2011 that the authorities in Germany are currently preparing new measures for complying with Directive 2006/24/EC. However, no draft text of these measures and no timetable for the adoption of these measures have been communicated to the Commission. Furthermore, it appears from Germany's reply that the authorities in Germany are preparing measures based on a proposal by the German Minister for Justice for a system of 'quick freeze plus'. The Commission has made clear on several occasions that, in the Commission's 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.				
III. CONCLUSION AND PROPOSAL				Since the judgment of their Constitutional Court in March 2010, DE has not indicated to COM how and when it proposes to produce new legislation to transpose the Data Retention Directive. It is therefore proposed to issue to DE an Article 258 reasoned opinion.				
Mise en demeure 258 (ex226) :				In its Communication on Implementation of Article 260(3) TFEU (OJ C 12, 15.01.2011, p.1), COM in exercising its discretionary power considers that the Article 260(3) instrument should be used as a matter of principle in all cases of failure to fulfil an obligation, which concern the transposition of directives adopted under a legislative procedure. COM nevertheless recognised that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3). In the present case, COM considers that it is appropriate to depart from these general criteria and not to use the Article 260(3) instrument due to several reasons linked to the specificity of the present case:				
Décision : 16/06/2011:E/2011/4081 ;C(2011)4112				1) Germany had notified the national transposition measures, which subsequently have been annulled by the German Constitutional Court.				
Envoi : 17/06/2011:SG(2011)D/9667;C(2011)4112				2) It is not certain that the Court of Justice will follow the interpretation by the Commission of the application of Article 260(3) in an exceptional situation of annulment a posteriori of the transposition measures.				
Réponse : 16/08/2011:INF(2011)103426				3) The transposition of the Data Retention Directive is particularly complex due to the fact that the general obligation to retain data requires adoption of national measures whose implementation may raise sensitive questions linked to fundamental rights, in particular the right to data protection.				
Mise en demeure complémentaire 258 (ex226) :				III. CONCLUSION AND PROPOSAL				
Décision :				Since the judgment of their Constitutional Court in March 2010, DE has not indicated to COM how and when it proposes to produce new legislation to transpose the Data Retention Directive. It is therefore proposed to issue to DE an Article 258 reasoned opinion.				
Envoi :				In its Communication on Implementation of Article 260(3) TFEU (OJ C 12, 15.01.2011, p.1), COM in exercising its discretionary power considers that the Article 260(3) instrument should be used as a matter of principle in all cases of failure to fulfil an obligation, which concern the transposition of directives adopted under a legislative procedure. COM nevertheless recognised that there might be special cases in which it would not deem it appropriate to seek penalties under Article 260(3). In the present case, COM considers that it is appropriate to depart from these general criteria and not to use the Article 260(3) instrument due to several reasons linked to the specificity of the present case:				
Réponse :				1) Germany had notified the national transposition measures, which subsequently have been annulled by the German Constitutional Court.				
Avis motivé 258 (ex226) :				2) It is not certain that the Court of Justice will follow the interpretation by the Commission of the application of Article 260(3) in an exceptional situation of annulment a posteriori of the transposition measures.				
Décision :				3) The transposition of the Data Retention Directive is particularly complex due to the fact that the general obligation to retain data requires adoption of national measures whose implementation may raise sensitive questions linked to fundamental rights, in particular the right to data protection.				
Envoi :								
Réponse :								
Avis motivé complémentaire 258 (ex226) :								
Décision :								
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Réponse :								
Saisine 258 (ex226) :								
Décision :								
Dépot décision :								
Réf.Aff. :								
D.Arrêt :								
Origine CDO :				Correspondance avec l'état membre (2 dern. évén.):				
16/06/2010:				09/11/2010:EM - Envoi lettre:SG-EUPILOT-DOC-2010-5661				
				03/11/2010:EM - Envoi lettre:SG-EUPILOT-DOC-2010-554				
Historique des décisions (6 dernières décisions) :								
16/06/2011:E/2011/4081 ;C(2011)4112:Mise en demeure 258(ex226):								

DOCUMENT INTÉRIEUR

Etat des consultations :							Prop. du service responsable :	22/09/2011:Avis motivé 258(ex226)::
	MD258(ex226)	MDC258(ex226)	AM258(ex226)	AMC258(ex226)	MD260(ex228)	MDC260(ex228)	Prop. des chefs de cabinet :	
DG -> SJ							Prop. décision de la Commission :	
SJ -> DG							Position du service juridique :	
DG -> SG								

