



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL HOME AFFAIRS  
Director General

Brussels, **25 OCT. 2010**

**NOTE FOR THE ATTENTION OF MR LUIS ROMERO REQUENA,  
DIRECTOR-GENERAL OF THE LEGAL SERVICE**

The European Commission is required to evaluate the application of the Data Retention Directive (Directive 2006/24/EC) no later than 15 September 2010 with a view to determining whether it is necessary to amend its provisions.

The Commission is about to launch an impact assessment feeding into the potential review of this instrument. In this context, my services have started reflecting on the need to amend several key aspects of this Directive, including the following: the purpose of data retention; the scope of data categories covered by this instrument; the period of data retention; the definition of serious crime; the list of competent authorities with access to retained data; the modalities of data access and transfer; the list of economic operators under retention obligations; cost reimbursement; and data security.

The review of this Directive will have considerable influence on the eventual choice of a legal basis for a new proposal. Directive 2006/24/EC is based on Article 95, TEC, and uses an 'internal market' logic to require that Member States harmonise their data retention practices. Following the review, the Commission may need to present a proposal on the basis of Article 87(2)(a), TFEU, for establishing a 'police cooperation' measure concerning data retention for law enforcement purposes.

Anticipating such a review, several stakeholders, including Member State authorities, have expressed their views on potential amendments

Subject to a favourable opinion from your services, such non-participation by Member States could take different forms. In particular:

- i) The proposal could exhaustively list those Member States that are not participating in the amended data retention measure;

- ii) The proposal could include a provision allowing Member States not to participate in the amended data retention measure;

In each scenario, the proposal could require Member States that are not participating/opt not to participate in the amended data retention measure not to maintain any domestic measures providing for compulsory data retention.

The above issues pose the following questions:

Would it be lawful for the Commission to propose a measure including a non-participation clause of type (i) or (ii) mentioned above:

- 1) based on Article 114(1), TFEU [internal market]; or
- 2) based on Article 87(2)(a), TFEU [police cooperation]?

  
Stefano Manservigi