



Press and Information

Court of Justice of the European Union

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Judgment in Case C-270/11
Commission v Sweden

Sweden is ordered to make a lump sum payment of €3 000 000 for its delay in transposing the Data Retention Directive into national law

Given that the directive is intended to ensure that electronic communications data are available for the purpose of the investigation, detection and prosecution of serious crime, any delay in its transposition is liable to have consequences for public and private interests

The Data Retention Directive¹ aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order 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. That directive should have been transposed into national law by the Member States by no later than 15 September 2007.

In 2009, the Commission brought an initial action against Sweden before the Court of Justice for failure to fulfil obligations concerning Sweden's failure to transpose the directive into national law within the prescribed period. By an initial judgment delivered in 2010,² the Court held that Sweden had exceeded the time-limit for adopting the laws, regulations and administrative provisions necessary to comply with the directive and had thus failed to fulfil its obligations under that directive.

In 2011, having decided that Sweden had still not complied with the judgment of 2010, the Commission brought this further action for failure to fulfil obligations. It asked the Court to order Sweden to pay a daily penalty of €40 947.20 for each day that Sweden delays in complying with that judgment, from the day on which the judgment is delivered in the present case until the day on which the initial judgment of 2010 is complied with, and to pay a fixed daily amount of €9 597 for each day that Sweden delays in complying with that judgment, for the period from the day of the initial judgment to the day on which judgment is delivered in the present case (or to the day on which the necessary measures are taken to comply with the initial judgment, if that is earlier) inclusive.

On 21 March 2012, the Swedish Parliament adopted measures transposing the directive into Swedish legislation in order to ensure total compliance with the judgment of 2010. Those measures were scheduled to come into force on 1 May 2012. As a result, the Commission waived the setting of a daily penalty. However, it maintained its claim regarding the payment of a lump sum.

In its judgment delivered today, the Court holds, first, that Sweden had not adopted all the necessary measures to ensure compliance with the initial judgment of 2010 at the end of the two-month period following receipt of the letter of formal notice sent to it by the Commission (that is, on 28 August 2010). Therefore, Sweden has failed to fulfil its obligations under EU law. Accordingly, the Court holds that it is necessary to order Sweden to make a lump sum payment.

¹ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

² Case [C-185/09](#) *Commission v Sweden*.

Next, regarding the principle of imposing a lump sum, the Court states that that principle is essentially based on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period after the judgment initially establishing it was delivered.

In view of the aim of the directive – which is intended to ensure that electronic communications data are available for the purpose of the investigation, detection and prosecution of serious crime – any failure to comply with the judgment of 2010 is liable to undermine the private and public interests involved. Moreover, since Sweden's failure to fulfil its obligations in that respect has lasted for over two years from the date on which that judgment was delivered, the Court finds that the breach persisted for a considerable period after that date.

Lastly, when calculating the amount of the lump sum payment, the Court takes into account factors such as the seriousness of the infringement and the length of time for which that infringement has persisted.

Regarding the seriousness of the infringement, the Court holds that any failure to fulfil the obligation to transpose the directive could impede the proper functioning of the internal market. Nevertheless, it is apparent from a report by the Commission of 2011³ that the directive has not fully achieved its aim of establishing a level playing field for operators in the EU. Accordingly, the Commission should have established the supposed threat to the conditions of competition in the telecommunications services internal market, which it has failed to do.

The Court also takes into account, as a mitigating circumstance, the fact that Sweden has never failed to comply with any judgment previously given by the Court finding that there has been a failure to fulfil obligations.

By contrast, the Court rejects the justifications put forward by Sweden pursuant to which the delay in complying with the judgment of 2010 was attributable to extraordinary internal difficulties connected with specific aspects of the legislative procedure, to the extensive political debate on the transposition of the directive, and to the issues raised in terms of difficult choices involving weighing the protection of privacy against the need to combat crime effectively. A Member State cannot plead internal difficulties (provisions, practices or situations prevailing in its domestic legal order) to justify failure to observe obligations arising under EU law. The Court also rejects the argument that the infringement concerns only a partial failure to implement the directive: the wording of the directive allowed the Member States to postpone the application of the obligation to retain communications data until 15 March 2009, but did not allow them to postpone the transposition of the directive itself, which should have been carried out before 15 September 2007.

Concerning the duration of the continuation of the infringement, the Court emphasises that this lasted for almost 27 months from the date on which the initial judgment of 2010 was delivered, namely, until 1 May 2012: a significant period of time.

In the light of the foregoing, the Court orders Sweden to make a lump sum payment of €3 000 000.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay.

Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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³ COM (2011) 225 final.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355