Dear [Name],

Commissioner Malmström asked me to reply to your letter of 15 November 2010 in which you address two issues in relation to the Data Retention Directive.

We have taken due note of your suggestion to envisage a differentiated application of the Directive. We have also taken due note of your request for involvement of civil society in the expert group that advises the Commission on issues surrounding the Directive. I understand your request as meaning to be involved on issues regarding the revision of the Directive.

A differentiated or optional application of the Directive raises important issues of EU law, not in the least it would be problematic with regard to the uniform application of fundamental rights throughout the European Union.

According to Article 52 of the Treaty on European Union, Union law applies to the territory of all EU Member States. 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 such as the Directive. Opt-outs for individual Member States are therefore in principle possible only where they are foreseen in the Treaty itself. In the absence of such exemptions flowing directly from the Treaty, exemptions or derogations in favour of Member States in EU legislative acts can only be accepted if they are justified by objectively different circumstances, and in certain cases may also only be granted for a limited period of time.

The concerns expressed by the German Constitutional Court on the basis of German constitutional law do not constitute an objective circumstance justifying an opt-out of Germany from the Directive. In this context it must be recalled that Union law prevails...
over national law, including constitutional national law. However, this does not exclude
the Commission from analysing the Court's ruling, since it may well contain elements to
be taken into account when assessing the compatibility with EU fundamental rights of a
proposal for a review of the Directive which the Commission intends to prepare.

The protection of fundamental rights such as the right to data protection should not
depend on the place where the person concerned resides in the European Union. This
would be the case if the Directive would become optional.

As to the participation of civil society in the expert group, the latter is composed of
representatives of all relevant stakeholders as listed in the Directive, amongst which
representatives from the European Parliament who represent the views and interests of
our citizens. The Commission may invite experts on an ad-hoc basis depending on the
issues under discussion.

With regard to the revision of the Directive, the Commission intends to organise
dedicated meetings with the various stakeholders in order to discuss this matter in-depth
and gather their views and ideas ahead of tabling a proposal. Such meetings are likely to
take place in the first half of 2011. Such meetings will allow civil society to voice its
views and enter into a fruitful dialogue with the Commission on data retention.

Yours sincerely,

Søren SCHØNBERG