Dear Ms Malmström,

Thank you for your reply of 7 October to my letter proposing to remove the obligation in Directive 2006/24/EC to indiscriminately retain information on the daily communications and movements of all 500 mio. citizens in the EU.

1) Differentiated application of the Directive

You wrote that you “do not at this stage see any reason to envisage a differentiated application of the Directive if the evaluation comes to the conclusion that the retention of data is necessary and proportionate”.

We hope very much that the new Commission will come to the conclusion that a bulk or blanket retention of communications data is not necessary and proportionate. The EU Court of Justice only this week ruled invalid regulations that required the indiscriminate publication of personal data of all beneficiaries of EAGF and EAFRD aid, arguing that “it is possible to envisage measures which affect less adversely that fundamental right of natural persons and which still contribute effectively to the objectives of the European Union rules in question”.¹ I am confident that the Commission will find that data preservation, affecting citizens far less adversely than blanket retention, still contributes effectively to the prosecution of serious crime. The number of convictions etc. that were a result of using retained data does not demonstrate that these convictions etc., or this number of convictions etc., were only made possible through indiscriminate retention of information on the communications of the entire population. In order to comply with the test established by the EU Court of Justice, it is indispensable to examine whether the crime rate or the crime clearance rate differs in a statistically significant manner in countries that use targeted data preservation as compared with countries that have blanket retention schemes in place, and whether the coming into effect of retention legislation in a country has had any statistically significant effect on crime, crime clearance rates, the number of convictions etc. in that country or not. Certainly the Court of Justice will also examine these issues closely when asked to rule on the validity of the data retention directive next year.

¹ Judgement of 9 November 2010, C-92/09 and C-93/09, § 86.
Even if the new Commission chose to maintain the position that blanket retention of communications data was “necessary” and “proportionate” in legal terms, it is important to acknowledge that there are still good political reasons for national parliaments to opt for a targeted preservation of suspect data instead, as successfully practised in Europe and beyond. In my last letter I have set out in detail why blanket data retention has proven to be superfluous, harmful or even unconstitutional in many states across Europe and beyond. So if the Commission decides to uphold the principle of blanket retention at all, the EU must in the future leave it to national parliaments and constitutional courts to decide whether they make use of that radical instrument or not. The German Minister of Justice has assured me that she is of the same opinion.

I understand that the Commission initially proposed a harmonised regime to prevent providers under a retention obligation from being disadvantaged in comparison to other providers. Yet these economical differences can be eliminated by fully compensating providers for the cost involved in blanket retention, or even by imposing duties on providers under no such obligation. If a Member State can demonstrate that it does not need blanket data retention to prosecute crime effectively, and that no obstacle to the functioning of the internal market is created, there is no reason for the European Union to still impose the unacceptable blanket retention regime on that Member State and its citizens.

That being said, I hope to have demonstrated that there are good reasons for a differentiated application of the Directive, if the principle of blanket retention is to be upheld at all.

2) Involvement of civil society in the expert group

All along the process of evaluation and revising the Directive, the Commission is involving the expert group “the platform on electronic data retention”, set up by Commission Decision 2008/324/EC, whose mandate is inter alia to assist the Commission with the evaluation of the Directive, and to provide feedback from stakeholders. Although the Commission has decided that the group should initially be composed of law enforcement, industry, European Parliament and data protection representatives, it has expressly reserved to “invite official representatives of [...] non-governmental organisations to participate in its meetings”.2

As an official representative of the Working Group on Data Retention (AK Vorrat), I respectfully ask the Commission to invite me to future meetings of the platform on electronic data retention. I can provide feedback from the coalition of over 100 civil liberties, data protection and human rights associations, crisis line and emergency call operators, professional associations of journalists, jurists and doctors, trade unions and consumer organisations that represent those whose communications are being registered under the Directive. I can also feed in the position of European Digital Rights, being an observer to this group. Since a proper and careful balancing of the fundamental rights of citizens is required by the EU Court of Justice,3 the involvement of civil society in every step of the process of revising the Directive is crucial. Being a jurist and having been closely involved with the developments surrounding data retention for years, my expertise can be valuable to the work of the platform and the Commission.

2 Article 5 of Decision 2008/324/EC.
3 Judgement of 9 November 2010, C-92/09 and C-93/09, § 86.
By inviting a civil society representative, the Commission would demonstrate that it is serious about fully taking into account the views of all stakeholders, rather than rushing the revision of the Directive as much as the original proposal was. We would therefore welcome the invitation of a civil society representative to meetings of the expert group as an important sign of good-will.

Yours sincerely,

[...]

Arbeitskreis Vorratsdatenspeicherung (Working Group on Data Retention)

cc. Ms Viviane Reding, Vice President
    Ms Neelie Kroes, Vice President
    Mr John Dalli, Commissioner