

National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies

November 2022 Update

Country: Austria

FRANET contractor: European Training and Research Centre
for Human Rights and Democracy

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1. Summary

FRANET contractors are requested to highlight in 1 page **maximum** the key developments in the area of surveillance by intelligence services in their Member State. This introductory summary should enable the reader to have a snapshot of the evolution during the reporting period (mid-2016 until third quarter of 2022). It should mention:

*the most significant legislative reform/s that took place or are taking place and highlight the key aspect/s of the reform, focusing on oversight and remedies.
relevant oversight bodies' (expert bodies (including non-judicial bodies, where relevant), data protection authorities, parliamentary commissions) reports/statements about the national legal framework in the area of surveillance by intelligence services.*

List of the different relevant reports produced in the context of FRA's surveillance project to be taken into account

FRA 2017 Report:

[Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU - Volume II: field perspectives and legal update](#)

FRANET data collection for the FRA 2017 Report:

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies - Legal update](#)

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies - Monthly data collection on the current reform of intelligence legislation \(BE, FI, FR, DE, NL and SE\)](#)

FRA 2015 Report:

[Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU – mapping Member States' legal framework](#)

FRANET data collection for the FRA 2015 Report:

[Country studies for the project on National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies](#)

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*the most significant legislative reform/s that took place or are taking place and highlight the key aspect/s of the reform, focusing on oversight and remedies.
relevant oversight bodies' (expert bodies (including non-judicial bodies, where relevant), data protection authorities, parliamentary commissions) reports/statements about the national legal framework in the area of surveillance by intelligence services.*

In Austria, the civil branch of the security and intelligence service underwent a comprehensive reform in 2021. The Federal Agency for State Protection and Counter Terrorism (*Bundesamt für Verfassungsschutz und Terrorismusbekämpfung*) was replaced by the newly established Directorate State Protection and Intelligence Service (*Direktion Staatsschutz und Nachrichtendienst*)¹ on 1

¹ Austria, Website of the Directorate State Protection and Intelligence Service ([Direktion Staatsschutz und Nachrichtendienst](#)).

December 2021.² Before that, the Federal Agency for State Protection and Counter Terrorism had left a devastating impression on the public and on international partners according to the media.³ A parliamentary enquiry committee⁴ established in the wake of a raid on the Federal Agency for State Protection and Counter Terrorism in 2018 unveiled massive quality deficiencies in this Agency. The starting point of the – subsequently declared illegal – raid were numerous accusations against officials of the Federal Office for the Protection of the Constitution and Counter Terrorism for abuse of office, bribery, embezzlement of tax money, passing on information and sexual abuse.⁵ Employees had been disconcerted by this and mistrust had grown massively due to the seized intelligence documents, which were later published in the media.⁶ Moreover, it is said that in the run-up to the terrorist attack in Vienna on 2 November 2020, the flow of information allegedly failed despite multiple indications of the danger of the later offender.⁷ In addition, former high-ranking employees of the Federal Agency for State Protection and Counter Terrorism were involved in the so-called Wirecard affair as reported by the media.⁸ Former employees of the Federal Agency for State Protection and Counter Terrorism allegedly helped former Wirecard director Jan Marsalek to flee to Belarus in January 2020. In addition, there were suspicions in media that a secret document with the formula of the nerve agent Novichok could have reached Mr. Marsalek from the Federal Agency for State Protection and Counter Terrorism.⁹

The new Directorate State Protection and Intelligence Service is structurally different from the Federal Agency for State Protection and Counter Terrorism, as it consists of two separate areas: on the one hand, the state protection area, which is responsible both for danger prevention by means of interrogations and arrests and criminal investigations and on the other hand, the intelligence service area, which is responsible for extended threat research and information gathering for the purpose of threat investigation. The exchange between the two areas takes place in a Joint Information and Situation Centre. The Directorate State Protection and Intelligence Service may resort to surveillance techniques. The most important legal basis for the Directorate for State Protection and Intelligence Service are the State Protection and Intelligence Service Act (e.g. § 11)¹⁰ and the Security Police Act¹¹ in this respect.

² Austria, Federal Act amending the Act concerning Police Protection of the State, the Security Police Act, the Criminal Code, the Code of Criminal Procedure 1975 and the Redemption Act 1972 ([Bundesgesetz, mit dem das Polizeiliche Staatsschutzgesetz, das Sicherheitspolizeigesetz, das Strafgesetzbuch, die Strafprozeßordnung 1975 und das Tilgungsgesetz 1972 geändert werden](#)), Federal Law Gazette I No. 148/2021.

³ DerStandard, [‘Das BVT ist Geschichte, der neue Verfassungsschutz DSN startet’](#), 30 November 2021.

⁴ Austrian Parliament, Website on the parliamentary enquiry committee concerning the Federal Agency for State Protection and Counter Terrorism ([BVT-Untersuchungsausschuss](#)).

⁵ The reason for the house search was a preliminary investigation on the grounds of suspected abuse of office. The basis for the investigation was the testimony of several witnesses who reported abuse of office, misappropriation of taxpayers' money and sexual assault.

⁶ Kurier, [‘Verfassungsschutz neu: DSN beerbt ab morgen BVT’](#), 30 November 2021.

⁷ Austria, Untersuchungskommission zum Terroranschlag vom 02.11.2020, [Abschlussbericht](#), 10 February 2021. See also Austria, Austrian Ombudsman Board, [Special report of the Ombudsman Board on the terrorist attack of 2 November 2020](#), December 2022, and the related press release, [Volksanwalt Walter Rosenkranz zum Sonderbericht „Terroranschlag“ - Artikel - Volksanwaltschaft](#), 9 January 2023.

⁸ DerStandard, [‘Das BVT ist Geschichte, der neue Verfassungsschutz DSN startet’](#), 30 November 2021.

⁹ DerStandard, [‘Wirecard, BVT und Nervengift: Das mysteriöse Netzwerk des Jan Marsalek in Österreich’](#), 29 October 2021.

¹⁰ Austria, State Protection and Intelligence Service Act ([Bundesgesetz über die Organisation, Aufgaben und Befugnisse des Verfassungsschutzes - Staatsschutz- und Nachrichtendienst-Gesetz](#)), Federal Law Gazette I No. 5/2016.

¹¹ Austria, Security Police Act ([Sicherheitspolizeigesetz](#)), Federal Law Gazette [No. 566/1991](#).

The organisational unit of the Directorate State Protection and Intelligence Service responsible for the intelligence service is now responsible for the comprehensive and early reconnaissance, evaluation and analysis as well as the continuous assessment of all domestic threat situations relevant to the protection of the constitution. This includes, for example, protection against terrorist, ideologically or religiously motivated crime as well as defence against threats from espionage, intelligence activities and proliferation. This also includes extended threat investigation, which is the surveillance of a group if it is to be expected that criminal activity involving a serious threat to public security will occur.

In the course of the comprehensive reforms the control of the Directorate State Protection and Intelligence Service was expanded through the establishment of an Independent Control Commission on the Protection for the Constitution at the Federal Minister of the Interior (*Unabhängige Kontrollkommission Verfassungsschutz*, established according to § 17a et seqq. State Protection and Intelligence Service Act). The Control Commission consists of currently three (this will soon be changed to five) independent members not bound by instructions in the performance of their duties. The members of the Control Commission are appointed by the National Council with a two-thirds majority, whereby half of the members of the National Council must be present (§ 17a (5) State Protection and Intelligence Service Act). Re-election is not permitted. One member must have pursued a profession requiring a university degree in law for at least five years and possess special knowledge and experience in the fields of fundamental rights and freedoms. The other members must have completed a university degree and must have pursued a profession for at least five years in a position requiring relevant knowledge for their function in the Control Commission, in particular in the field of law, political science or economics. Judges and public prosecutors of the civil service, lawyers and members of the federal or of a provincial government, and further persons mentioned in § 17b State Protection and Intelligence Service Act may not be appointed. Before commencing work, each member of the Control Commission must undergo a reliability examination (§ 2a State Protection and Intelligence Act). As a further means to ensure its independence, the Control Commission shall be provided with office premises outside the premises of the Directorate General for Public Security or any subordinate security authority. The Control Commission does not cover matters in the area of competence of the Legal Protection Commissioner at the Federal Ministry of Interior or any other legal protection authority. There are thus no interactions foreseen between them. The Control Commission's task is to identify systemic deficiencies and the need for improvement in the Directorate State Protection and Intelligence Service. It can act either on its own initiative or at the specific request of the Federal Minister of the Interior or the Standing Subcommittee in Parliament. In addition, the Control Commission also serves as a contact point for whistle-blowers.¹² The members of the Control Commission are not obliged to disclose the identity of a person providing information or to report judicially punishable conduct or breaches of official duty committed in their function as Control Commission. The Control Commission shall submit an annual report on the performance of its functions and recommendations to the Federal Minister of the Interior and the Standing Subcommittee in Parliament by 31 March of the following year. In addition, the Control Commission shall draw up an annual report informing the public about its activities, in compliance with legal obligations of confidentiality (§ 17d (1) and (5) State Protection and Intelligence Service Act).

¹² Austria, Explanatory notes to the Federal Act amending the Act concerning Police Protection of the State, the Security Police Act, the Criminal Code, the Code of Criminal Procedure 1975 and the Redemption Act 1972 ([Erläuterungen zum Bundesgesetz, mit dem das Polizeiliche Staatsschutzgesetz, das Sicherheitspolizeigesetz, das Strafgesetzbuch, die Strafprozeßordnung 1975 und das Tilgungsgesetz 1972 geändert werden](#)).

The staff of the new Directorate State Protection and Intelligence Service was also increased. Moreover, the recruitment and training of staff has also been redesigned. § 2 (7) State Protection and Intelligence Act stipulates that staff members of the Directorate State Protection and Intelligence Service now have to undergo special training for state protection and counterterrorism, which is to be conducted by the Security Academy. The special training is oriented in particular to the focal points of the job descriptions and takes human rights aspects into account. Furthermore, staff members must undergo a reliability examination check prior to commencing employment at the Directorate State Protection and Intelligence Service (§ 2a State Protection and Intelligence Service Act).

In the course of the comprehensive reforms the parliamentary control of the Directorate State Protection and Intelligence Service was also expanded. Previously, the Standing Subcommittee of the Committee on Internal Affairs only discussed challenges in the area of the Protection of the Constitution on an ad hoc basis. Now, the members of the Standing Subcommittee receive an annual report on the Directorate State Protection and Intelligence Service via the Federal Minister of the Interior (§ 17 (1a) State Protection and Intelligence Service Act). Moreover, the Control Commission may also act at the request of the Standing Subcommittee. If a request of the Standing Subcommittee is addressed to the Chairman of the Control Commission, the Control Commission shall submit a written report on the matter to the Standing Subcommittee within three months (§ 17a (2) State Protection and Intelligence Service Act).

2. Annexes - Tables and Figures

2.1. Overview of security and intelligence services in the EU-27

FRANET contractors are requested to check the accuracy of the table below (see Annex pp. 93 - 95 of the FRA 2015 report) and correct or add in track changes any missing information concerning security and intelligence services in their Member State (incl. translation and abbreviation in the original language). Please provide the full reference in a footnote to the relevant national law substantiating all the corrections and/or additions made in the table.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military
AT	Directorate State Protection and Intelligence Service (Direktion für Staatsschutz und Nachrichtendienst, DSN) ¹³			Military Intelligence Service/Heeresnachrichtendienst (HNnA) Military Defence Agency/Abwehramt (AbwA)

¹³ Austria, Federal Act amending the Act concerning Police Protection of the Stat, the Security Police Act, the Criminal Code, the Code of Criminal Procedure 1975 and the Redemption Act 1972 ([Bundesgesetz, mit dem das Polizeiliche Staatsschutzgesetz, das Sicherheitspolizeigesetz, das Strafgesetzbuch, die Strafprozeßordnung 1975 und das Tilgungsgesetz 1972 geändert werden](#)), Federal Law Gazette I No. 148/2021.

Amendments in respect to Austria included in the table.

2.2. EU Member States' legal framework on surveillance reformed since 2017

In order to update the map below (Figure 1 (p. 20) of the FRA 2017 report), FRANET contractors are requested to state:

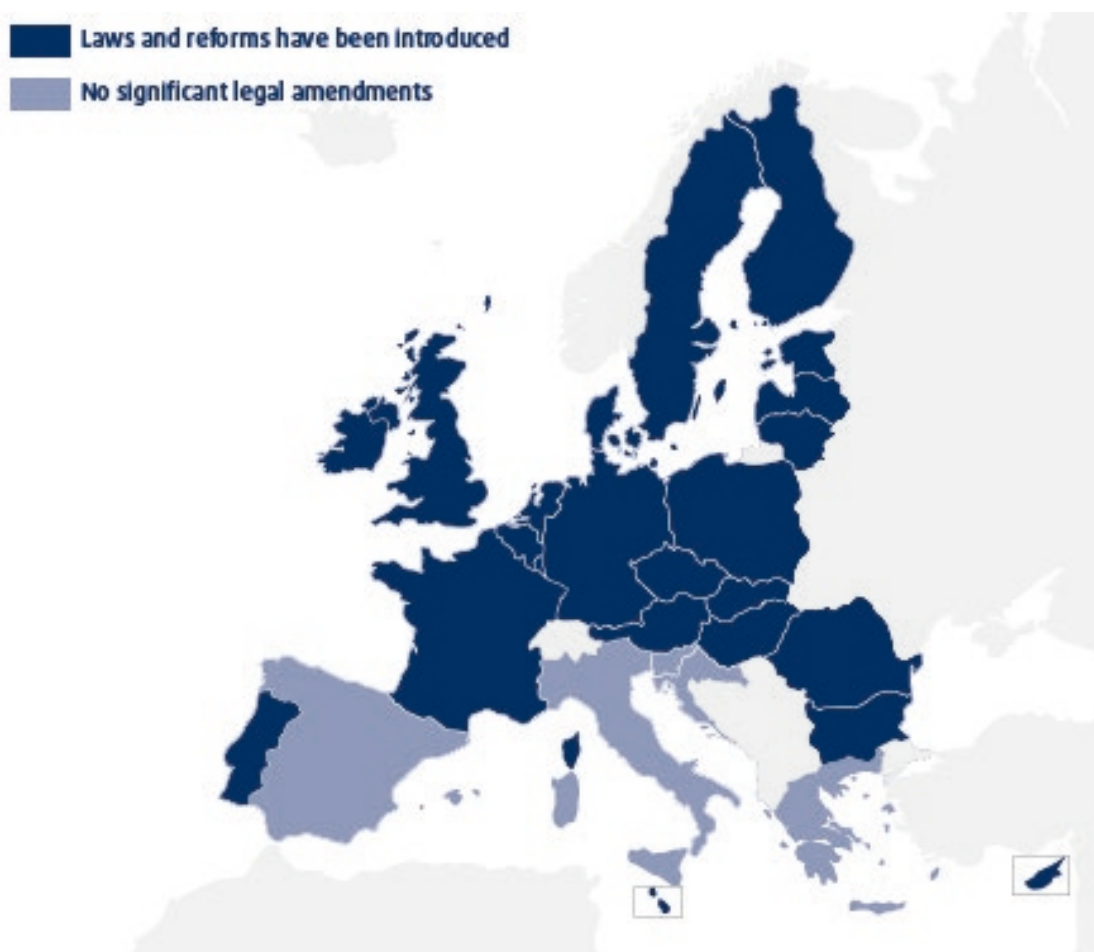
1. *Whether their legal framework on surveillance has been reformed or is in the process of being reformed since **mid-2017** – see the Index of the FRA 2017 report, pp. 148 - 151. Please do not to describe this new legislation but only provide a full reference.*

Yes, by the Federal Act amending the Act concerning Police Protection of the State, the Security Police Act, the Criminal Code, the Code of Criminal Procedure 1975 and the Redemption Act 1972.¹⁴

2. *whether the reform was initiated in the context of the PEGASUS revelations.*

No.

Figure 1: EU Member States' legal frameworks on surveillance reformed since October 2015

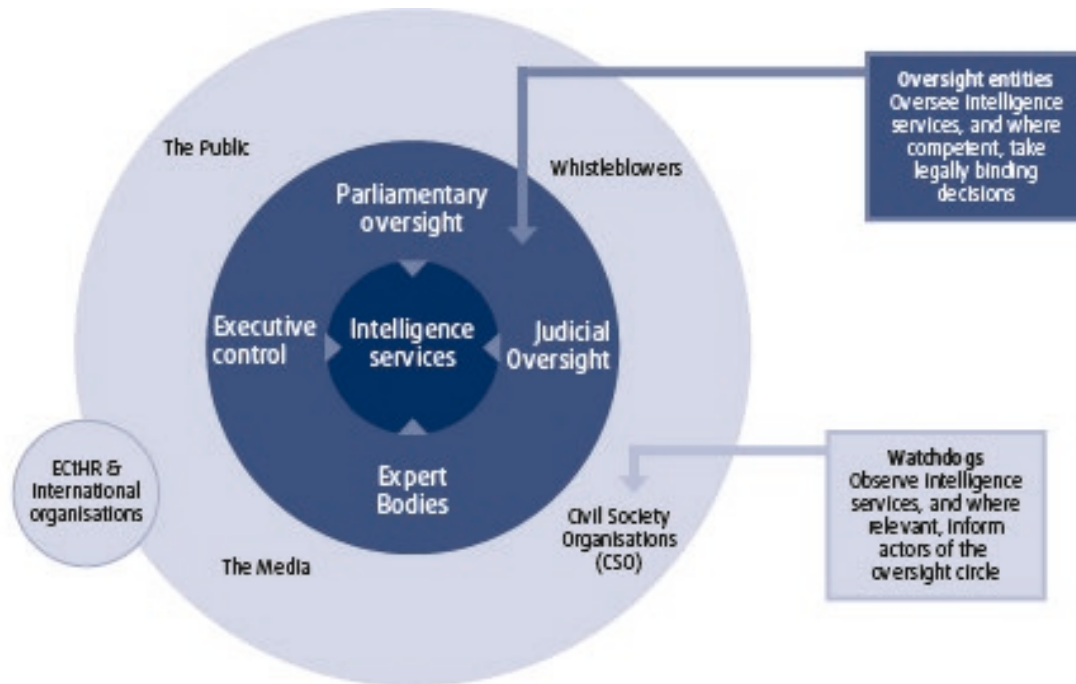


¹⁴ Austria, Federal Act amending the Act concerning Police Protection of the State, the Security Police Act, the Criminal Code, the Code of Criminal Procedure 1975 and the Redemption Act 1972 ([Bundesgesetz, mit dem das Polizeiliche Staatsschutzgesetz, das Sicherheitspolizeigesetz, das Strafgesetzbuch, die Strafprozeßordnung 1975 und das Tilgungsgesetz 1972 geändert werden](#)), Federal Law Gazette I No. 148/2021.

2.3. Intelligence services' accountability scheme

FRANET contractors are requested to confirm whether the diagram below (Figure 5 (p. 65) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Figure 5: Intelligence services' accountability scheme



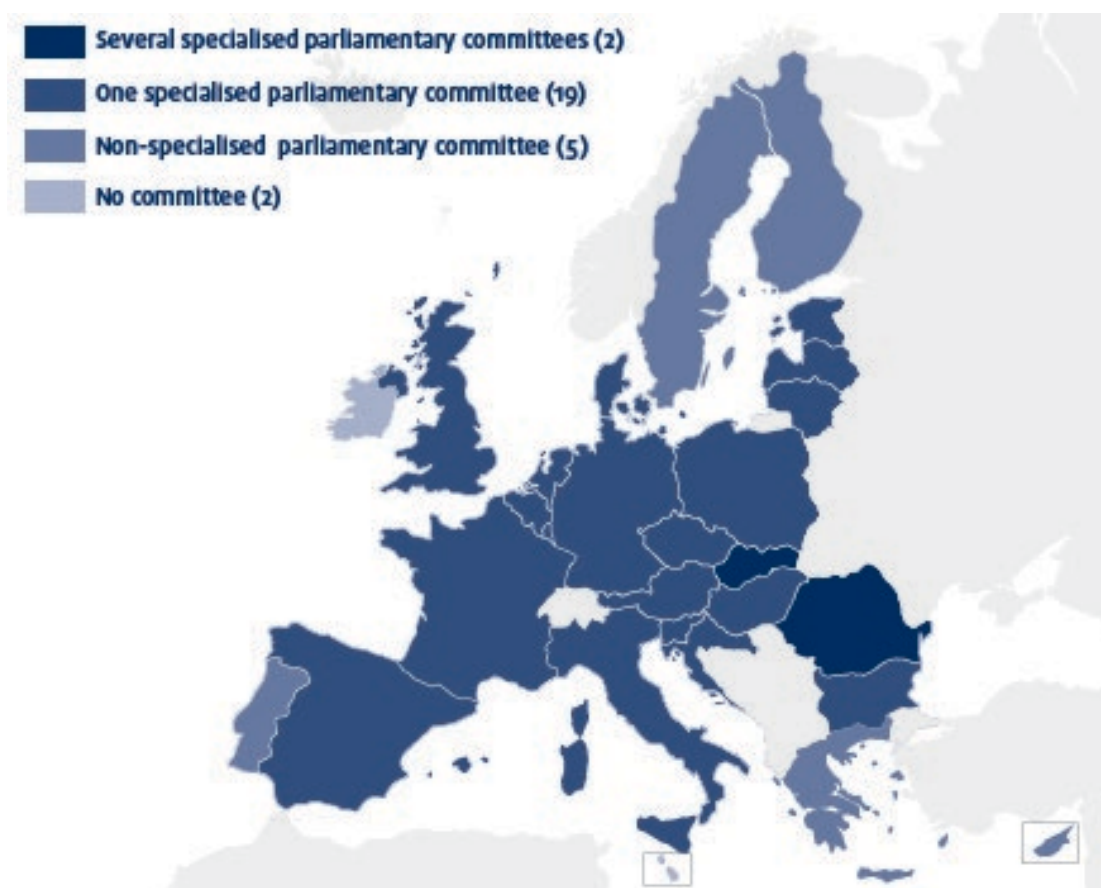
Confirmed for Austria.

2.4. Parliamentary oversight of intelligence services in EU Member States

FRANET contractors are requested to confirm that the map below (Figure 6 (p. 66) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Confirmed for Austria.

Figure 6: Parliamentary oversight of intelligence services in EU Member States



2.5. Expert bodies (excluding DPAs) overseeing intelligence services in the EU

FRANET contractors are requested to check the accuracy of the table below (Table 2 (p. 68) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Confirmed for Austria.

Table 2: Expert bodies (excluding DPAs) overseeing intelligence services in the EU

EU Member State	Expert Bodies
AT	Legal Protection Commissioner at the Ministry of Interior (<i>Rechtsschutzbeauftragter beim Bundesminister für Inneres</i>) and Independent Control Commission for Protection of the Constitution (<i>Unabhängige Kontrollkommission Verfassungsschutz</i>)

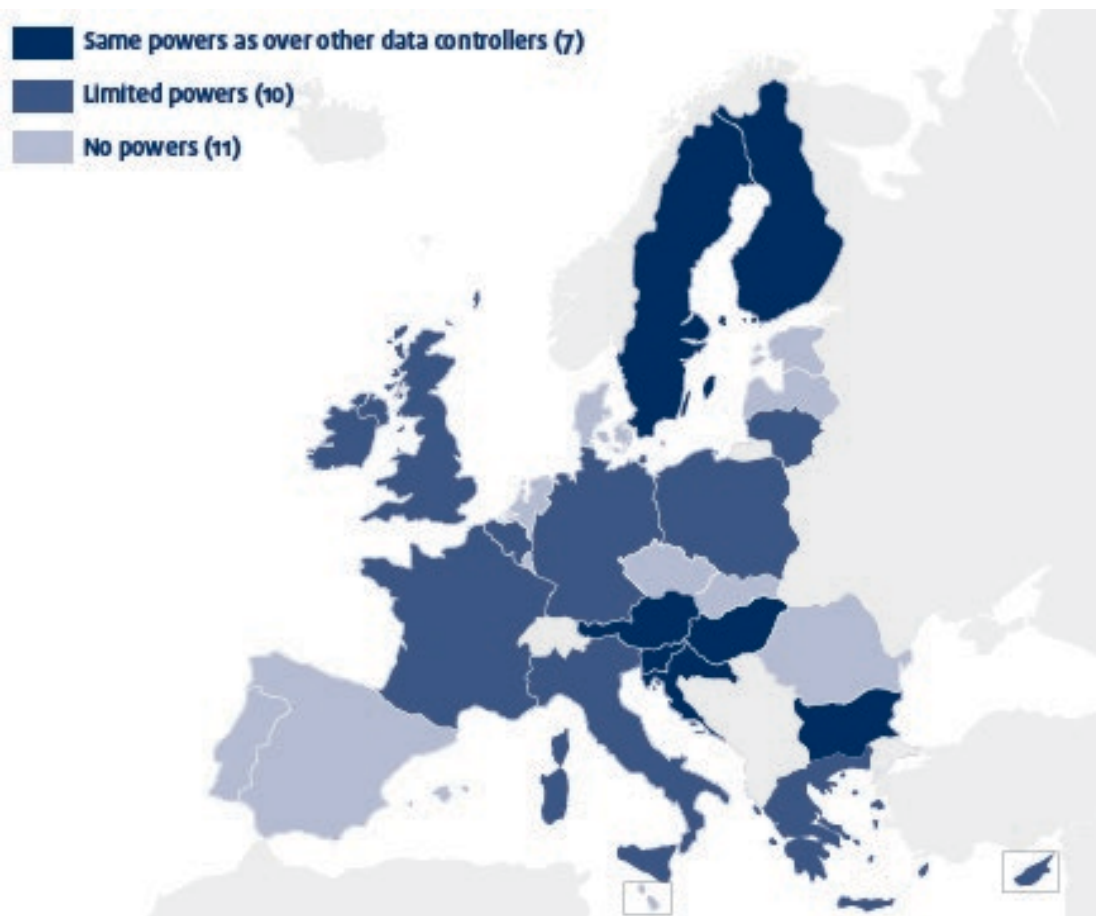
Amendments for Austria now included in the table.

2.6. DPAs' powers over national intelligence services, by member states

FRANET contractors are requested to confirm that the map below (Figure 7 (p. 81) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Confirmed for Austria.

Figure 7: DPAs' powers over national intelligence services, by member states

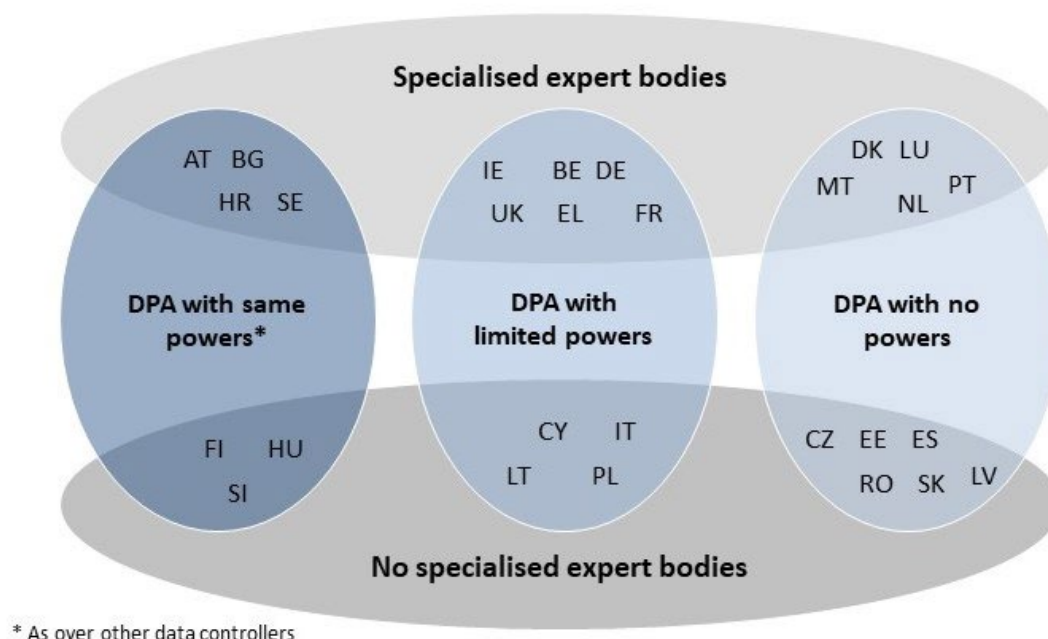


2.7. DPAs' and expert bodies' powers over intelligence techniques, by EU Member State

FRANET contractors are required to check the accuracy of the figure below (Figure 8 (p. 82) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Confirmed for Austria.

Figure 8: DPAs' and expert bodies' powers over intelligence techniques, by EU Member State



Confirmed for Austria.

2.8. Binding authorisation/approval of targeted surveillance measures in the EU

FRANET contractors are required to check the accuracy of table below (Table 4 (p. 95) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Table 4: Binding authorisation/approval of targeted surveillance measures in the EU-27

	Judicial	Executive	Expert bodies	Services
AT			✓	

Confirmed for Austria.

2.9. Approval/authorisation of general surveillance of communication

All FRANET contractors are requested to check the accuracy of the table below (Table 5 (p. 97) of the FRA 2017 report), and to update/include information as it applies to their Member State (if not previously referred to). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework, in particular where - since 2017 - your Member State regulates these type of surveillance methods (for a definition of general surveillance, see FRA 2017 Report, p. 19).

Not relevant for Austria.

Table 5: Approval/authorisation of general surveillance of communication in France, Germany, the Netherlands and Sweden

	Judicial	Parliamentary	Executive	Expert
DE		✓		✓
FR			✓	
NL	✓		✓	✓
SE				✓

2.10. Non-judicial bodies with remedial powers

FRANET contractors are requested to check the accuracy of table below (Table 6 (p. 112) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Table 6: Non-judicial bodies with remedial powers in the context of surveillance, by EU Member State

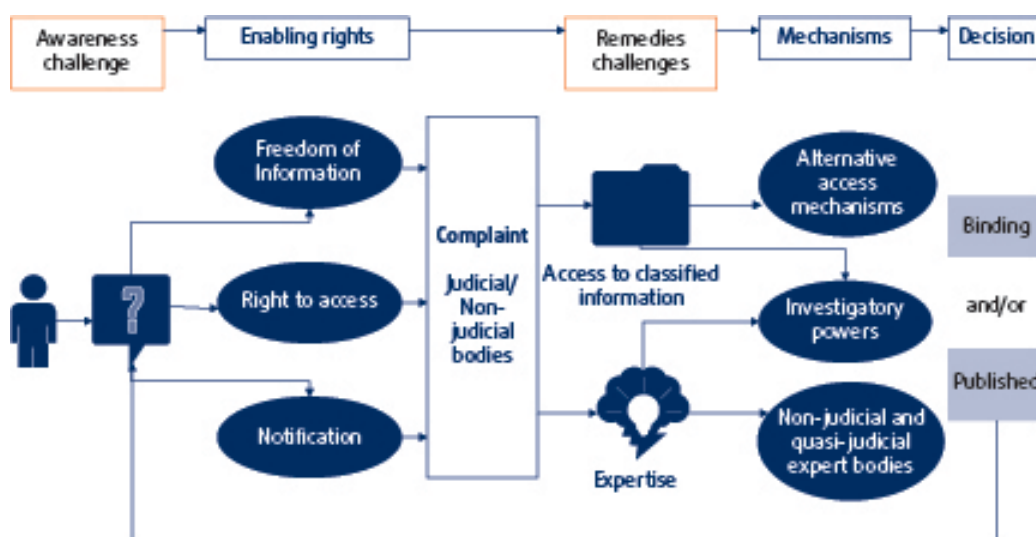
	Executive (ministry)	Expert body(ies)	DPA	Parliamentary committee(s)	Ombuds institution
AT		✓	✓		✓

Confirmed for Austria.

2.11. Implementing effective remedies

FRANET contractors are requested to confirm that the diagram below (Figure 9 (p. 114) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Figure 9: Implementing effective remedies: challenges and solutions



Comment Austria: This figure is generally somehow difficult to understand. It seems very optimistic to connect challenges faced by individuals and remedial bodies, rights, mechanisms and decisions in a single figure. Not all bubbles are self-explanatory (e.g., "Expertise": whose expertise on what?). The boxes in the row at the top are connected with arrows indicating a logical connection from the awareness challenge to a decision. However, these arrows are not reproduced in the below bubbles, boxes and icons. The logical connection indicated in the top row is thus not visible below (or might not be

existent?). We can confirm however, that at least the challenges and the connections in the top row as well as some of the connections below are correct for Austria.

2.12. Non-judicial bodies' remedial powers

FRANET contractors are required to check the accuracy of table below (Table 7 (pp. 115 - 116) of the FRA 2017 report). In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Table 7: Non-judicial bodies' remedial powers in case of surveillance, by EU Member State

	Bodies with remedial competence	Decisions are binding	May fully access collected data	Control is communicated to complainant	Decision may be reviewed
AT	Legal Protection Commissioner	Decisions in the ex ante authorization of measures by the Legal Protection Commissioner are binding. In the context of remedies, only the decision by the legal Protection Commissioner to file a complaint with the DPA can be regarded as binding. Thus, this box should possibly rather remain blank.			This box should rather remain blank, as the decisions taken by the Legal Protection Commissioner in the context of remedies are not reviewed.
	Austrian Ombudsman Board				
	Austrian Data Protection Authority			Informing the person concerned that a control was performed is the task of the Legal Protection Commissioner in the given context. Therefore, this box should remain blank.	Since the Federal Administrative Court decides on appeals against decisions of the Data Protection Authority, this box should be filled with yellow.

Note:

- = Expert body
- = Ombuds institution
- = Data protection authority
- = Parliamentary Committee
- = Executive

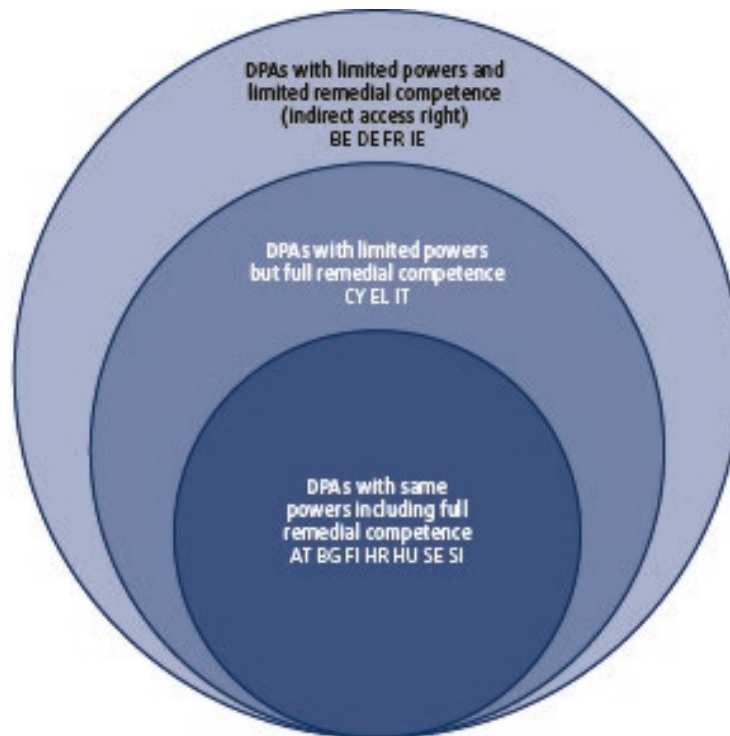
Source: FRA, 2017

Amendments included in the table for Austria.

2.13 DPAs' remedial competences

FRANET contractors are required to check the accuracy of the figure below (Figure 10 (p. 117) of the FRA 2017 report) with respect to the situation in your Member State. In case of inaccuracy, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the legal framework.

Figure 10: DPAs' remedial competences over intelligence services



Confirmed for Austria.