

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

November 2022 Update

Country: Poland

FRANET contractor: Helsinki Foundation for Human Rights

Author(s) name(s): Barbara Grabowska-Moroz

DISCLAIMER: This document was commissioned under contract as background material for comparative analysis by the European Union Agency for Fundamental Rights (FRA) for the project '*National intelligence authorities and surveillance in the EU*'. The information and views contained in the document do not necessarily reflect the views or the official position of the FRA. The document is made publicly available for transparency and information purposes only and does not constitute legal advice or legal opinion.

Table of Contents

1. Summary	3
2. Annexes- Table and Figures	5
2.1. Overview of security and intelligence services in the EU-27	5
2.2. EU Member States' legal framework on surveillance reformed since 2017	5
Figure 1: EU Member States' legal frameworks on surveillance reformed since October 2015.....	6
2.3. Intelligence services' accountability scheme	6
Figure 5: Intelligence services' accountability scheme	7
2.4. Parliamentary oversight of intelligence services in EU Member States	7
Figure 6: Parliamentary oversight of intelligence services in EU Member States	8
2.5. Expert bodies (excluding DPAs) overseeing intelligence services in the EU.....	8
Table 2: Expert bodies (excluding DPAs) overseeing intelligence services in the EU	8
2.6 DPAs' powers over national intelligence services, by member states	8
Figure 7: DPAs' powers over national intelligence services, by member states	9
2.7. DPAs' and expert bodies' powers over intelligence techniques, by EU Member State	9
Figure 8: DPAs' and expert bodies' powers over intelligence techniques, by EU Member State	10
2.8. Binding authorisation/approval of targeted surveillance measures in the EU.....	10
Table 4: Binding authorisation/approval of targeted surveillance measures in the EU-27.....	10
2.9. Approval/authorisation of general surveillance of communication.....	10
Table 5: Approval/authorisation of general surveillance of communication in France, Germany, the Netherlands and Sweden.....	11
2.10. Non-judicial bodies with remedial powers	11
Table 6: Non-judicial bodies with remedial powers in the context of surveillance, by EU Member State	11
2.11. Implementing effective remedies.....	11
Figure 9: Implementing effective remedies: challenges and solutions.....	12
2.12. Non-judicial bodies' remedial powers	12
Table 7: Non-judicial bodies' remedial powers in case of surveillance, by EU Member State.....	12
2.13. DPAs' remedial competences	14
Figure 10: DPAs' remedial competences over intelligence services.....	15

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](#)

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.*

In June 2016 the Venice Commission issued an opinion assessing legislative changes introduced in **Poland** regarding covert methods surveillance (mostly access to content of the communication and to metadata).¹ It recommended, among other things, to complement the system of judicial pre-authorisation of the “classical” surveillance under Article 19 with additional procedural safeguards (a “privacy advocate”, a complaints mechanism, a system of ex-post automatic oversight of such

¹ Opinion on the Act of 15 January 2016 amending the Police Act and certain other Acts, adopted by the Venice Commission at its 107th Plenary Session (Venice, 10-11 June 2016), CDL-AD(2016)012-e.

In January 2022 the Senate Pegasus Inquiry Committee was established.¹¹ It was tasked with investigating the case of illegal surveillance conducted with use of, inter alia, Pegasus spyware. One of its tasks is also to prepare a draft law that will reform the actions of special services on the basis of the “How to saddle the Pegasus” report prepared by the Human Rights Commissioner in 2019. However, the Senate in Poland does not have control powers over the executive, which is why the Committee cannot enforce its decisions, e.g. summon the members of the executive branch to explain their involvement in the Pegasus scandal. According to the Constitution it is Sejm (and not Senate) that shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.¹²

2. Annexes- Table 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.

Correct. However, Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*, CBA) is neither a security nor an intelligence service. It was labeled by the legislator as a ‘special service’ (*szłużba specjalna*) just as the intelligence and counter-intelligence services. But it is mostly tasked with combating corruption crimes.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military
PL	Internal Security Agency/ <i>Agencja Bezpieczeństwa Wewnętrznego</i> (ABW)	Foreign Intelligence Agency/ <i>Agencja Wywiadu</i> (AW)		Military Counter-intelligence Service/ <i>Służba Kontrwywiadu Wojskowego</i> (SKW) Military Intelligence Service/ <i>Służba Wywiadu Wojskowego</i> (SWW)

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

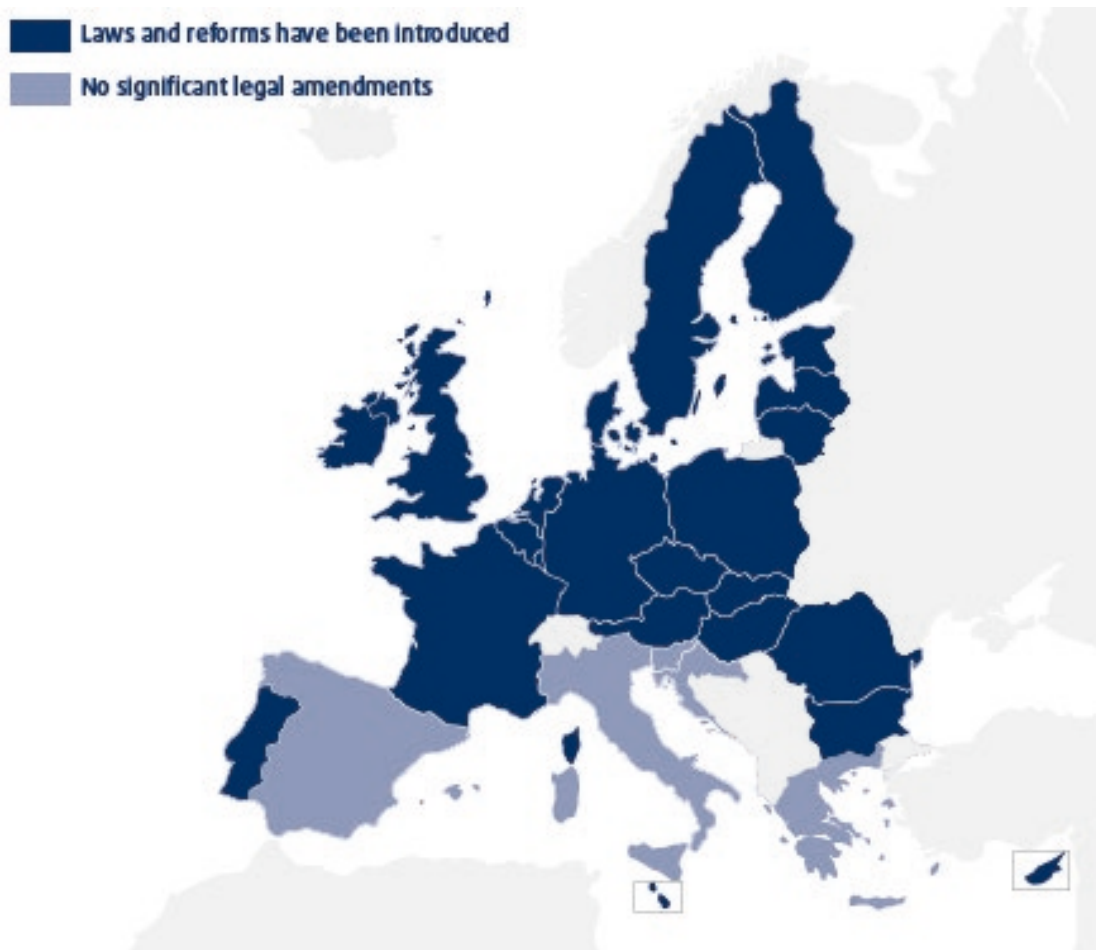
In order to update the map below (Figure 1 (p. 20) of the FRA 2017 report), FRANET contractors are requested to state:

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

¹¹ Resolution of the Senate of the Republic of Poland of 12 January 2022 on the appointment of the Extraordinary Committee to clarify cases of illegal surveillance, their impact on the electoral process in the Republic of Poland and the reform of secret services.

¹² Article 95 of the Constitution of Poland of 2 April 1997. Official Journal No. 78, position 483.

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



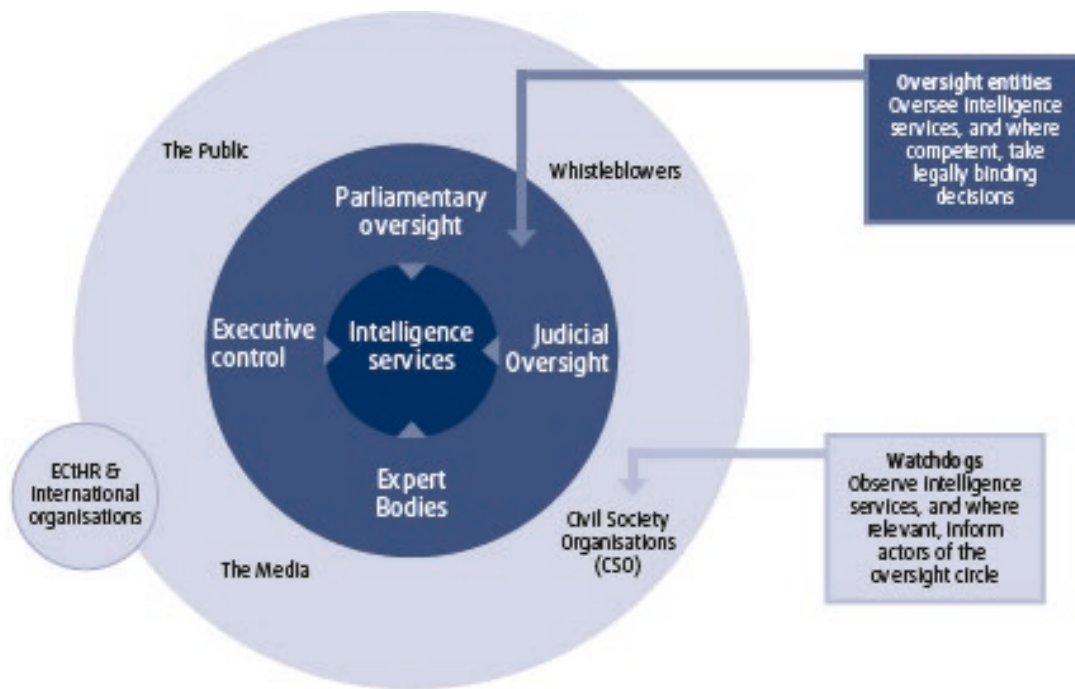
In Poland the legal framework was amended since 2017 in a scope provided above. The major element was an implementation of the Police Directive with Act of 14 December 2018 on the protection of personal data processed in connection with the prevention and combating of crime. The Act does not apply, however, to special services. That is why it should be concluded that **in Poland** legal framework on surveillance was not reformed since 2017. Poland should be placed among states where 'No significant legal amendments' were introduced since 2017, so its category on a map should be changed.

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.

Correct in general. **In Poland** there are no expert bodies with powers to oversee intelligence services and to provide remedies.

Figure 5: Intelligence services' accountability scheme



2.4. Parliamentary oversight of intelligence services in EU Member States

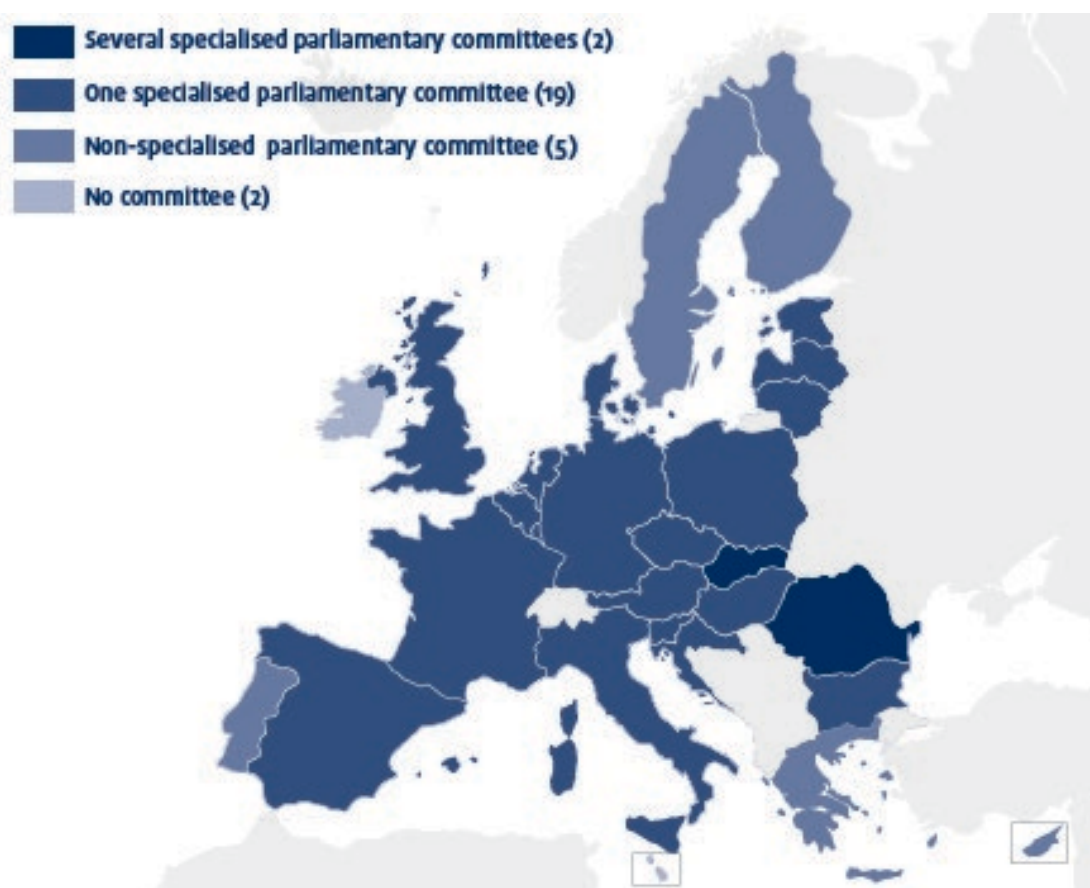
FRANET contractors are requested to confirm that the map below (Figure 6 (p. 66) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to the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

Correct. A new committee was established in Senate to explain the Pegasus scandal,¹³ however, without binding powers towards the services and the executive. In Sejm, the chamber of Parliament that is tasked with the oversight of the executive, there is still one committee tasked with oversight of special services.¹⁴

¹³ Special Committee for Clarification of Cases of Illegal Surveillance, Their Impact on the Electoral Process in the Republic of Poland and on the Reform of the Secret Services.

¹⁴ Special Services Committee.

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.

Correct.

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

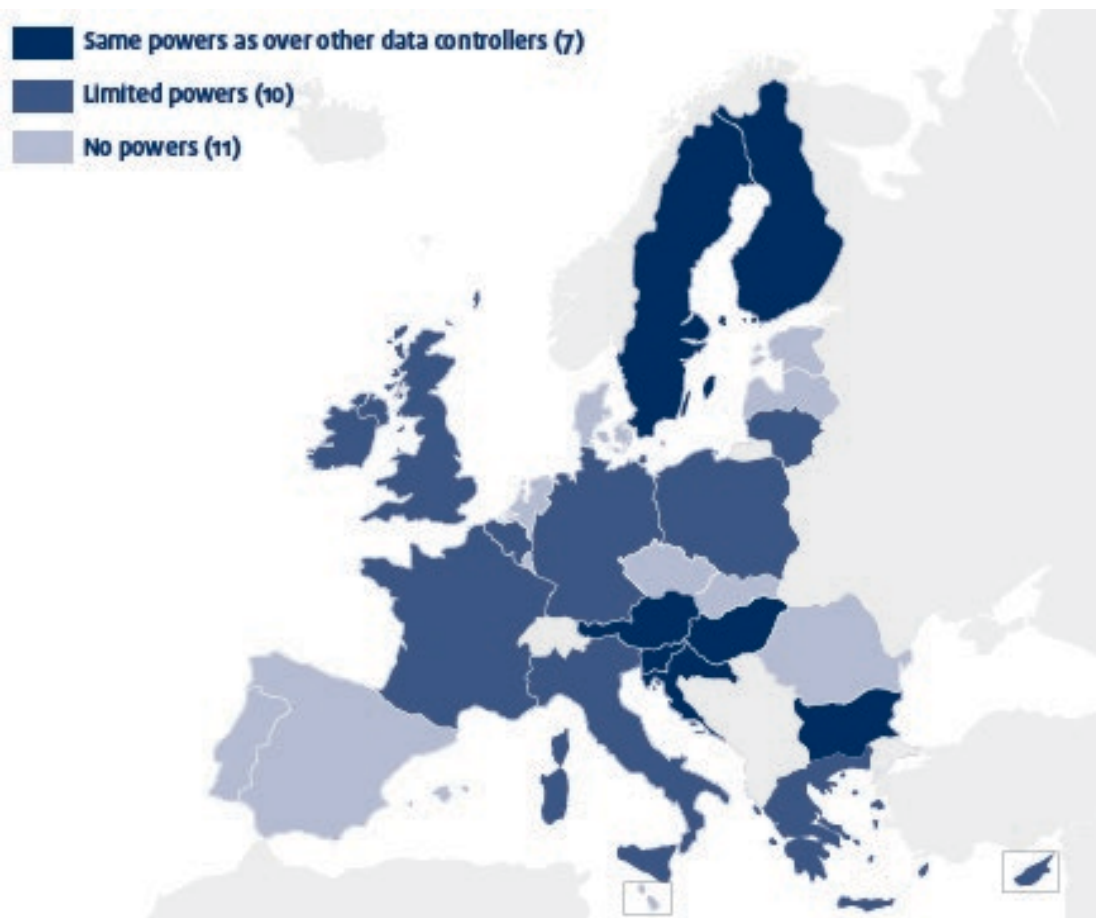
EU Member State	Expert Bodies
PL	N.A.

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.

DPA in Poland has **no powers** over national intelligence services. The category should be changed to 'No powers'.

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

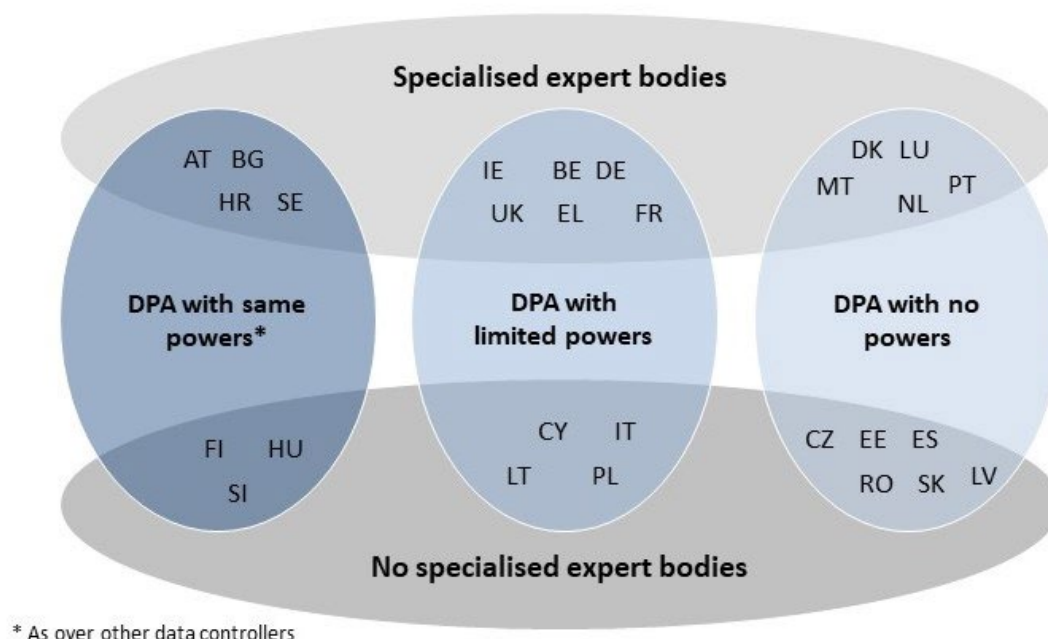


2.7. DPAs' and expert bodies' powers over intelligence techniques, by EU Member State

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.

DPA in Poland has **no powers** over intelligence techniques. Poland should be placed in group 'DPA with no powers' and 'No specialised expert body'.

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



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.

In Poland, access to content of the communication (called ‘operational control’) requires judicial authorisation. Such authorisation is not required, however, in the case of targeted access to telecommunication, Internet and postal data.

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

	Judicial	Executive	Expert bodies	Services
PL		✓		✓

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).

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

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

N/A.

In Poland the binding law regulates access to metadata (telecommunication, internet and postal data). Such an access by police or special services does not involve judicial authorization or parliamentary oversight. It remains a sole decision of the agency/service.

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.

Correct.

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
PL					

2.11. Implementing effective remedies

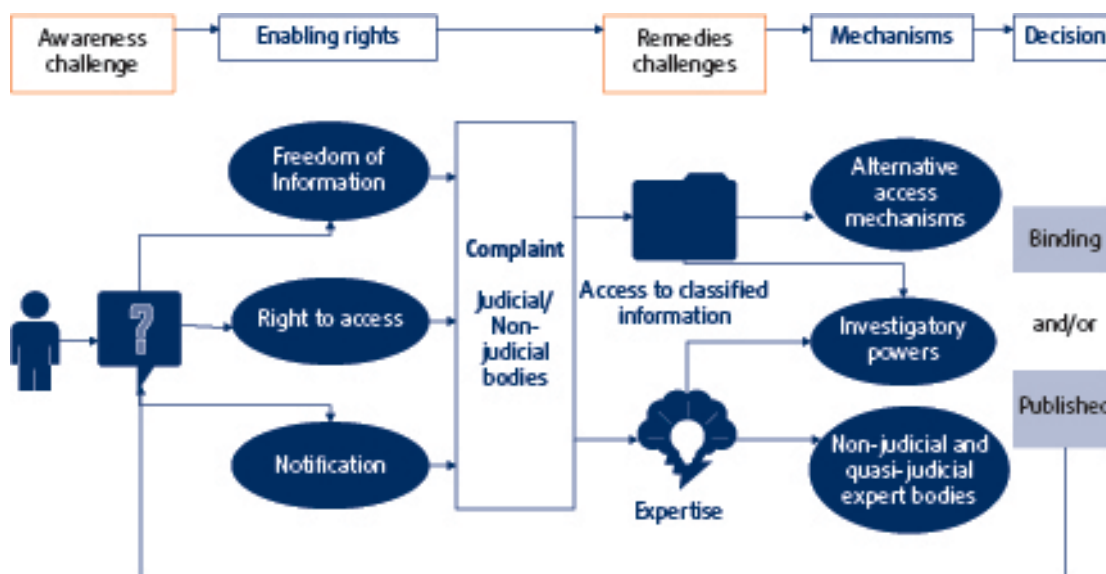
FRANET contractors are requested to confirm that the diagram below (Figure 9 (p. 114) of the FRA 2017 report) illustrates the situation in your Member State in an accurate manner. If it is not the case, please suggest any amendment(s) as appropriate and substantiate it/them with specific reference to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

The major awareness challenge in Poland is the fact that there is no remedy available at all. In *Pietrzak v Poland*¹⁵ and *Bychawska-Siniarska and others v Poland*¹⁶ (cases pending before the ECHR), the government suggested that request for an access to public information is an effective remedy against alleged surveillance. Meanwhile, there is no obligation of notification that a person was under surveillance. As a result, there is no complaint mechanism available under Polish law. Consequently, **in Poland**, no expert body is involved in any complaint procedure, that would be empowered to conduct their own investigation.

¹⁵ Application no. 72038/17.

¹⁶ Application no. 25237/18.

Figure 9: Implementing effective remedies: challenges and solutions



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.

In Poland, there is no non-judicial body with remedial powers in case of surveillance.

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				
	Austrian Ombudsman Board				
	Austrian Data Protection Authority				
BE	Standing Committee I				
	The federal Ombudsman				
	Privacy Commission				
BG	Commission for Personal Data Protection				
	Committee for Oversight of the Security Services				
CY	Commissioner for Personal Data Protection				
DE	G10 Commission				
	Federal Data Protection Commissioner				
	Parliamentary Control Panel				

DK	Danish Intelligence Oversight Board				
EE	Chancellor of Justice				
EL	Hellenic Data Protection Authority				
ES	Spanish Ombudsman				
FR	National Commission for Control of Intelligence Techniques				
	Defender of Rights				
	National Commission on Informatics and Liberty				
FI	Parliamentary Ombudsman				
	Office of the Data Protection Ombudsman				
HR	Council for Civic Oversight of Security and Intelligence Agencies				
	Ombudsman of the Republic of Croatia				
	Personal Data Protection Agency				
	Committee for Internal Affairs and National Security				
HU	Commissioner for Fundamental Rights				
	Data Protection Commissioner				
	Parliamentary Committee for National Security				
	Relevant ministries				
IE	Complaints Referee				
	Data Protection Commissioner				
IT	Garante per la protezione dei dati personali				
LU	Control Authority «Article 17»				
	National Commission for Data Protection				
LT	Ombudsperson				
	State Data Protection				
	Parliamentary Committee on National Security and Defence				
MT	Commissioner of the Security Service				
NL	Review Committee for the Intelligence and Security Services				
PT	Council for the Oversight of the Intelligence				
	Portugese Ombudsman				
RO	Parliamentary Committees				
	Swedish Foreign Intelligence Inspectorate (SIUN)				

SE				
	Commission on Security and Integrity Protection (SIN)			
	Swedish Data Protection Authority (Datainspektionen)			
SI	Human Rights Ombudsman			
	Information Commissioner			
	Parlm. Supervision of the Intelligence and Security Services Act			
SK	Commission to Supervise the Use of IT Tools			

Note:

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

Source: FRA, 2017

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.

DPA in Poland has **no powers** and **no remedial competences** over national intelligence services.

Figure 10: DPAs' remedial competences over intelligence services

