

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

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Country: Germany

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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](#)

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.*

The Act for the Adjustment of Data Protection Law with Regulation (EU) 2016/679 and for the Implementation of Directive (EU) 2016/680 (*Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*), also referred to as Data Protection Adjustment and Implementation Act EU (*Datenschutz-Anpassungs- und Umsetzungsgesetz EU*), adopted in 2017 not only aimed at translating the EU data protection reform package – Regulation (EU) 2016/679 and Directive (EU) 2016/680 – to German data protection law. Moreover, the Data Protection Adjustment and Implementation Act EU also revised the national data protection regime for

areas not covered by EU law, namely for data processing in the field of national security.<sup>1</sup> Thus, not only the Federal Data Protection Act (*Bundesdatenschutzgesetz*) was amended by the law but also the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*), the Federal Intelligence Service Act (*Bundesnachrichtendienstgesetz*), the Military Counter-Intelligence Service Act (*Gesetz über den Militärischen Abschirmdienst*), the Security Clearance Act (*Sicherheitsüberprüfungsgesetz*) and the Article 10 Act (*Artikel 10-Gesetz*). Apart from harmonising the wording of national intelligence legislation with the terminology of the EU data protection reform, the regulation of data protection oversight in the area of intelligence services was removed from the Federal Data Protection Act. Instead, new provisions on the role and oversight powers of the Federal Data Protection Commissioner were included in the laws of the three federal intelligence services, thus, more or less transferring the oversight powers from the old Federal Data Protection Act to intelligence legislation.<sup>2</sup> However, with regard to the Federal Intelligence Service (*Bundesnachrichtendienst*, BND) the Federal Data Protection Commissioner's power to issue ad hoc opinions and advise the parliament and the general public on critical issues was limited by the Data Protection Adjustment and Implementation Act EU as, according to section 64 no. 1b of the Federal Intelligence Service Act, he or she now can only give advice to intelligence oversight bodies, namely the Parliamentary Control Panel, the G 10 Commission and the Independent Supervisory Council. The amendments came into force on 25 May 2018.

In a landmark judgment the Federal Constitutional Court decided on 19 May 2020 that the reform of the Federal Intelligence Service Act, that was only adopted in December 2016 in the wake of the Snowden revelations to regulate the BND's mass surveillance of extraterritorial communication and international SIGINT cooperations, violated the constitution. Among others, this reform had established the so-called Independent Body (*Unabhängiges Gremium*), consisting of two judges and one public prosecutor, to oversee such SIGINT operations, whereas the legislator denied that the fundamental right to confidential communication as warranted by article 10 of the German constitution is affected by the BND's extraterritorial surveillance. Against this view the Federal Constitutional Court held that article 10 of the German constitution does also protect the right to confidential communication of foreign citizens in other countries from arbitrary interference by German authorities. The Court found that the contested legislation allows for disproportionate surveillance, does neither warrant adequate protection of the communication of journalists and similar professions nor an effective oversight, in particular when the application of the "third party rule" might hinder oversight, i.e. when it comes to questions regarding international intelligence cooperation.<sup>3</sup>

As required by the Court, intelligence legislation was revised in spring 2021. The Act to Change the Federal Intelligence Service Act to Implement the Guidelines of the Federal Constitutional Court and the Federal Administrative Court (*Gesetz zur Änderung des BND-Gesetzes zur Umsetzung der Vorgaben des Bundesverfassungsgerichts sowie des Bundesverwaltungsgerichts*) was adopted by the German Bundestag on 25 March 2021 and issued on 19 April 2021. The Act amended eight laws *inter alia* the Federal Intelligence Service Act, the Article 10 Act (*Artikel 10-Gesetz*) and the Parliamentary

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<sup>1</sup> Germany, Act for the Adjustment of Data Protection Law to Regulation (EU) 2016/679 and for the Implementation of Directive (EU) 2016/680 (*Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*), 30 June 2017, available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl117s2097.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl117s2097.pdf).

<sup>2</sup> After further legal changes, these provisions are laid down in sections 27 and 28 of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*), sections 63 and 64 of the Federal Intelligence Agency Act (*Bundesnachrichtendienstgesetz*) and sections 13 and 13a of the Military Counter-Intelligence Act (*Gesetz über den Militärischen Abschirmdienst*).

<sup>3</sup> Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2020), 1 BvR 2835/17, 19 May 2020, available at: [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519\\_1bvr283517.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1bvr283517.html). See also the English press release at: [www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-037.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-037.html).

Control Panel Act (*Gesetz über das Parlamentarische Kontrollgremium*).<sup>4</sup> The amendment of the Federal Intelligence Service Act specifies the thresholds for the surveillance of telecommunication of foreigners in other countries, and reorganises both the transfer of personal data collected in the context of such surveillance and the cooperation with foreign intelligence services. In addition, the amendment explicitly authorises the Federal Intelligence Service (*Bundesnachrichtendienst*) to hack and infiltrate IT systems in foreign countries, and it regulates the cooperation with the German military intelligence. To reform intelligence oversight, the law established an Independent Supervisory Council (*Unabhängiger Kontrollrat*) as a supreme federal authority (*Oberste Bundesbehörde*) with means that is belongs to the top level in the administrative hierarchy and has an institutional autonomy like the administration of the German Bundestag, the federal ministries, the Federal Court of Justice or the Federal Data Protection Commissioner. The Council consist of a quasi-judicial oversight body, tasked mostly with ex ante authorisation of surveillance measures and an administrative oversight body for ex post control. Members of the quasi-judicial oversight body of the Council are six judges of the Federal Supreme Court (*Bundesgerichtshof*) and/or the Federal Administrative Court (*Bundesverwaltungsgericht*) who are elected by the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) of the German Bundestag for twelve years.<sup>5</sup> In addition, an amendment of the Parliamentary Control Panel Act provides for improved cooperation among intelligence oversight bodies by authorising the Control Panel to request information from the G10 Commission, the Federal Data Protection Commissioner and the Independent Supervisory Council, if deemed necessary for investigations of the Control Panel. Also, section 58 of the revised BND Act provides for cooperation of all these bodies through regular exchange of information on general matters relating to their oversight activities. However, any cooperation is subject to the applicable secrecy provisions. Whereas key provisions on the Independent Supervisory Council already came into force on 22 April 2021, the rest of the new legislation applied from 1 January 2022, at which time the Independent Supervisory Council became fully operational.

Another piece of intelligence legislation, the Act on the Adjustment of the Law on the Protection of the Constitution (*Gesetz zur Anpassung des Verfassungsschutzrechts*), was adopted by the German Bundestag on 10 June 2021 and came into force on 9 July 2021. Among others, the law amended the Article 10 Act, so that each of the German intelligence agencies was authorised to hack IT systems in Germany in order to intercept encrypted communication (*Quellen-Telekommunikationsüberwachung*) by order of the Federal Ministry of the Interior and Community and with the approval of the competent G10 commission at the federal or state level. In addition, the membership of the federal G10 Commission was increased from four to five members, three of whom must now be fully qualified jurists. However, the fact that the members of the G10 Commission act on an honorary basis was not changed. But the Commission was authorised to directly access databases when inspecting the intelligence agencies.<sup>6</sup>

On 26 April 2022, the Federal Constitutional Court issued another landmark decision on intelligence legislation, namely on the Bavarian Act on the Protection of the Constitution (*Bayerisches Verfassungsschutzgesetz*) which governs the powers of the internal intelligence agency of the state of Bavaria.<sup>7</sup> The court ruled that many of the agency's surveillance powers violate the fundamental rights

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<sup>4</sup> Germany, Act to Change the Federal Intelligence Service Act to Implement the Guidelines of the Federal Constitutional Court and the Federal Administrative Court (*Gesetz zur Änderung des BND-Gesetzes zur Umsetzung der Vorgaben des Bundesverfassungsgerichts sowie des Bundesverwaltungsgerichts*), 19 April 2021, available at [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=//%5b@attr\\_id=%27bgbl121s0771.pdf%27%5d](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//%5b@attr_id=%27bgbl121s0771.pdf%27%5d)

<sup>5</sup> Gärditz, K. F. (2021), 'Bundesnachrichtendienst semper reformanda', *Deutsches Verwaltungsblatt*, No. 14/2021, pp. 905-914.

<sup>6</sup> Germany, Act on the Adjustment of the Law on the Protection of the Constitution (*Gesetz zur Anpassung des Verfassungsschutzrechts*), 5 July 2021, available at [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&start=//%5b@attr\\_id=%27bgbl121s2274.pdf%27%5d](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//%5b@attr_id=%27bgbl121s2274.pdf%27%5d)

<sup>7</sup> Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2020), 1 BvR 1619/17, 26 April 2022, available at: [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/04/](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/04/)

to privacy of information, private homes or communication due to excessive and vague regulations, missing safeguards and the lack of independent oversight. These powers include, among others, remote hacking of computers, the use of informers or long-term observations, the bugging of private homes, and the use of so-called IMSI catchers to locate mobile phones. The Bavarian legislator must now revise the state intelligence legislation until 31 July 2023. Moreover, the decision has wider implications as it indicates the need to revise similar powers of the other German internal intelligence agencies. Therefore, a working group of the Conference of the German Interior Ministers (*Innenministerkonferenz*) and the Federal Ministry of the Interior has drafted a report with tentative considerations on how to revise German legislation on internal intelligence that was published in summer 2022. The focus of these considerations is how to revise thresholds for surveillance and limit its scope. With regard to oversight the report discusses options which bodies to task with ex ante approval of surveillance measures both at the national and the state level (e.g. data protection commissioners, courts, G10 commissions, or independent control councils to be established at state level) without any final conclusions.<sup>8</sup> According to media reports, the federal government considers tasking the new Independent Control Council also with the approval of surveillance operations by the Federal Office for the Protection of the Constitution.<sup>9</sup>

Regardless of the discussions at the level of the Conference of German Interior Ministers a revision of federal intelligence law is required until the end of 2023 by another decision of the Federal Constitutional Court. On 28 September 2022, the Court held that provisions of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*) on the mandatory transfer of data collected by the intelligence agencies to law enforcement agencies are too vague and disproportionate and, thus, violate the fundamental right to informational self-determination.<sup>10</sup>

## 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.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military

[rs20220426\\_1bvr161917.htm](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-033.html). See also the English press release at:

[www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-033.html](https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-033.html).

<sup>8</sup> Germany, Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat*) (2022), Bund-Länder-AG zur Auswertung des Urteils des Bundesverfassungsgerichts v. 26.4.2022 - 1 BvR 1619/17 – (BayVSG). Abschlussbericht, available at:

[www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/2022/abschlussbericht-bund-laender-ag.pdf](https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/2022/abschlussbericht-bund-laender-ag.pdf).

<sup>9</sup> Krempl, S. (2022), ‘Karlsruher Urteil: Regierung will Verfassungsschutz-Befugnisse einschränken’, *heise online*, 20 June 2022, available at: <https://www.heise.de/news/Karlsruher-Urteil-Regierung-will-Verfassungsschutz-Befugnisse-einschraenken-7146236.html>.

<sup>10</sup> Germany, Federal Constitutional Court (Bundesverfassungsgericht) (2022), 1 BvR 2354/13, 28 September 2022, available at: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/09/rs20220928\\_1bvr235413.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2022/09/rs20220928_1bvr235413.html). See also the English press release at:

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/en/2022/bvg22-085.html>.



<p><b>D</b> <b>E</b></p>	<p>Federal Office for the Protection of the Constitution/ <i>Bundesamt für Verfassungsschutz</i> (BfV)</p> <p>Additional note: The German internal secret service also known as <i>Verfassungsschutz</i>, is in fact a network of the above mentioned federal office (<i>Bundesamt für Verfassungsschutz</i>) and <b>authorities of the 16 federal states, most of which are called <i>Landesamt für Verfassungsschutz</i></b>. See: <a href="https://www.verfassungsschutz.de/EN/about-us/german-services/german-intelligence-services_node.html">https://www.verfassungsschutz.de/EN/about-us/german-services/german-intelligence-services_node.html</a></p>		<p>Federal Intelligence Service/<i>Bundesnachrichtendienst</i> (BND)</p> <p>Remark: According to Section 1 (2) of the Federal Intelligence Service Act, the <b>task of the BND is the collection and analysis of information required to gain knowledge about foreign countries</b> that is of importance in terms of foreign and security policy. For this purpose, the intelligence agency is also <b>authorised to collect data in Germany</b>, e.g. in the context of “strategic surveillance” at German communication hubs, to protect its premises or for security vetting of staff. Despite its power to collect data in Germany, the agency is Germany’s foreign intelligence service. <b>The agency even describes itself as “civil and military foreign intelligence service”</b> as it also serves military purposes in close cooperation with the Federal Armed Forces. See: <a href="https://www.bnd.bund.de/DE/Die_Arbeit/arbeit_node.html">https://www.bnd.bund.de/DE/Die_Arbeit/arbeit_node.html</a></p>	<p>Federal Office for Military Counter-Intelligence Service/ <i>Bundesamt für den Militärischen Abschirmdienst</i> (BAMAD)</p> <p>Explanation and remark: On 1 August 2017, the Military Counter-Intelligence Service (<i>Militärischer Abschirmdienst</i>, MAD), was separated from the Federal Armed Forces, reorganised as civil higher federal authority (<i>Bundesoberbehörde</i>) under the direct supervision of the Federal Ministry of Defence and, thus, officially renamed to BAMAD. See: <a href="https://www.bmvg.de/de/aktuelle/tagesbefehl-der-ministerin-zur-streitkraeftebasis-11322">https://www.bmvg.de/de/aktuelle/tagesbefehl-der-ministerin-zur-streitkraeftebasis-11322</a></p> <p>However, it is still usually referred to as MAD. See: <a href="https://www.bundeswehr.de/de/organisation/weitere-bmvg-dienststellen/mad-bundesamt-fuer-den-militaerischen-abschirmdienst">https://www.bundeswehr.de/de/organisation/weitere-bmvg-dienststellen/mad-bundesamt-fuer-den-militaerischen-abschirmdienst</a></p> <p>Although the MAD is supervised by the Federal Ministry of Defence it is not a military intelligence agency in the usual sense. Rather, the MAD is an internal intelligence agency tasked with the protection of the armed forces against inside extremism and espionage. It is not tasked with military reconnaissance which is left to the BND and the armed forces themselves.</p>
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## 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:

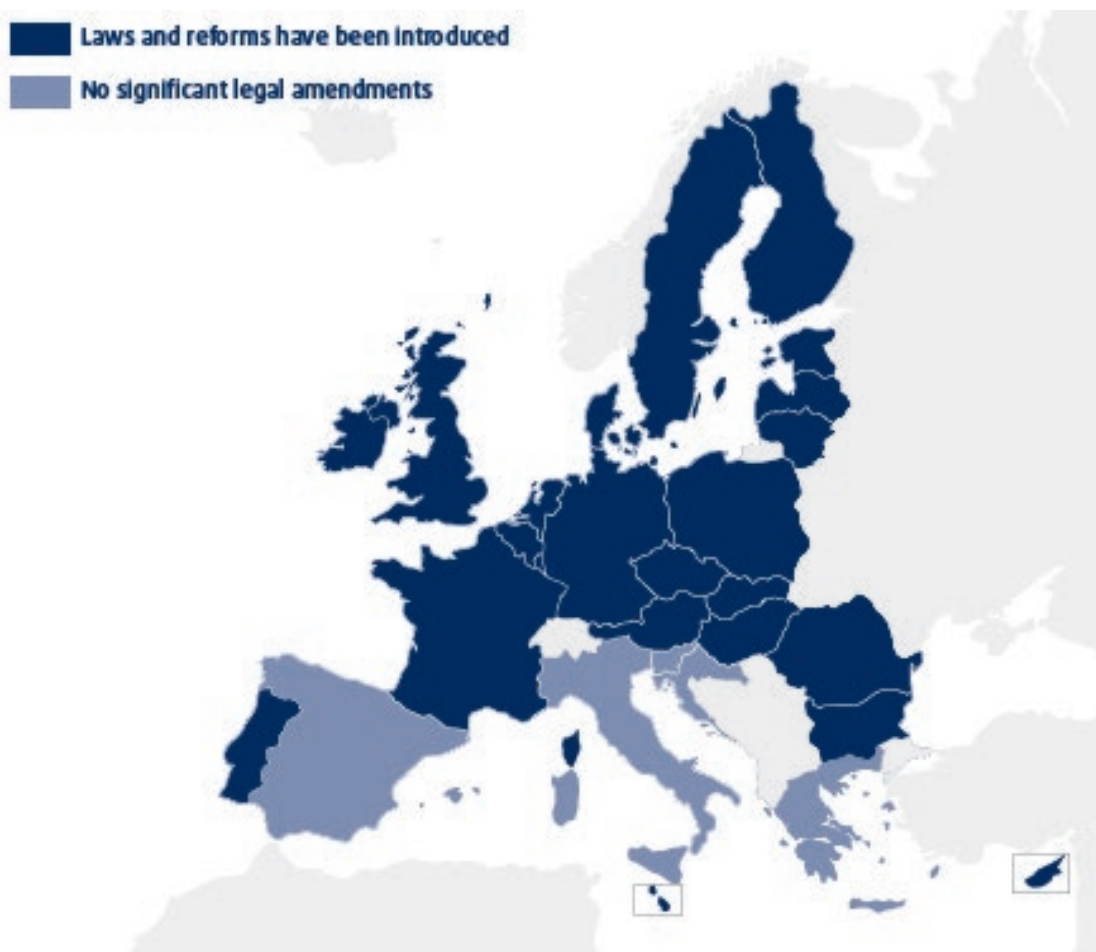
1. Whether their legal framework on surveillance has been reformed or is in the process of being reformed since **mid-2017** – see the Index of the FRA 2017 report, pp. 148 - 151. Please do not to describe this new legislation but only provide a full reference.

Yes, German has reformed the legal framework on surveillance since 2017. The following list provides an overview of legal changes in German intelligence law that are relevant to surveillance by the three federal intelligence authorities and their oversight. Most significant reforms are printed in bold:

- Germany, Data Protection Amendment and Implementation Act EU (*Datenschutz-Anpassungs- und -Umsetzungsgesetz EU*), 30 June 2017, available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl117s2097.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s2097.pdf)

- Germany, Act to adapt the regulations on inventory data disclosure to the requirements resulting from the decision of the Federal Constitutional Court of 27 May 2020 (*Gesetz zur Anpassung der Regelungen über die Bestandsdatenauskunft an die Vorgaben aus der Entscheidung des Bundesverfassungsgerichts vom 27. Mai 2020*), 30 March 2021, available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl121s0448.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s0448.pdf)
  - Germany, Act amending the BND Act to implement the requirements of the Federal Constitutional Court and the Federal Administrative Court (*Gesetz zur Änderung des BND-Gesetzes zur Umsetzung der Vorgaben des Bundesverfassungsgerichts sowie des Bundesverwaltungsgerichts*), 19 April 2021, available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl121s0771.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s0771.pdf).
  - Germany, Law on the Adaptation of the Law on the Protection of the Constitution (*Gesetz zur Anpassung des Verfassungsschutzrechts*), 5 July 2021, available at: [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBI&jumpTo=bgbl121s2274.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl121s2274.pdf)
2. whether the reform was initiated in the context of the PEGASUS revelations.
- None of the above listed legal amendments was initiated in the context of the PEGASUS revelations.

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

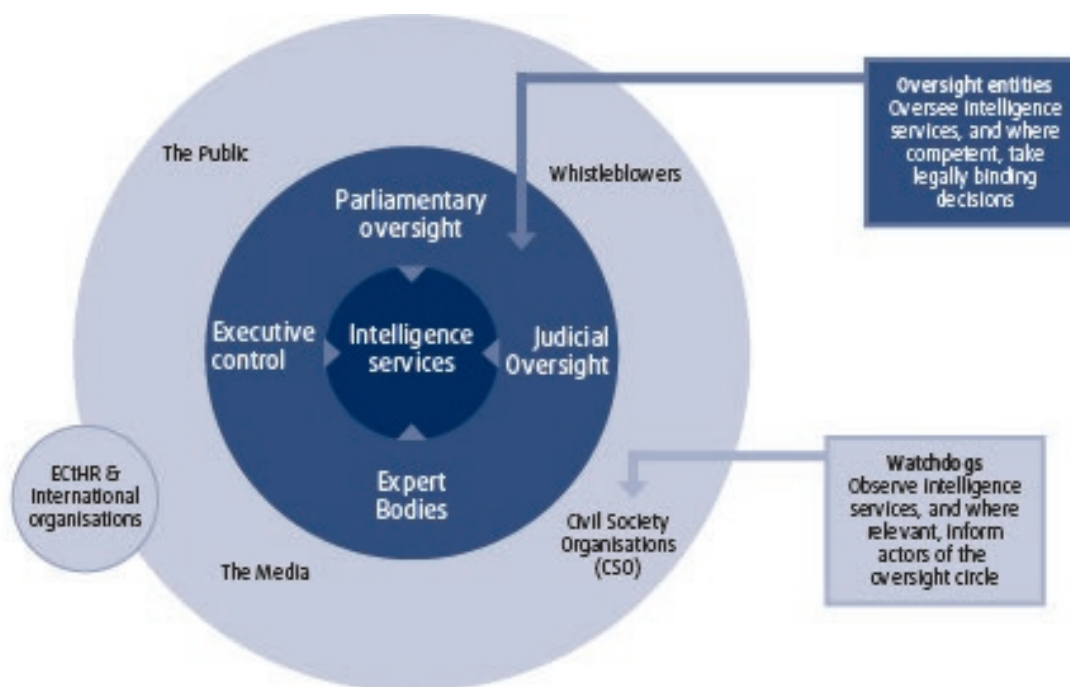




### 2.3. Intelligence services' accountability scheme

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

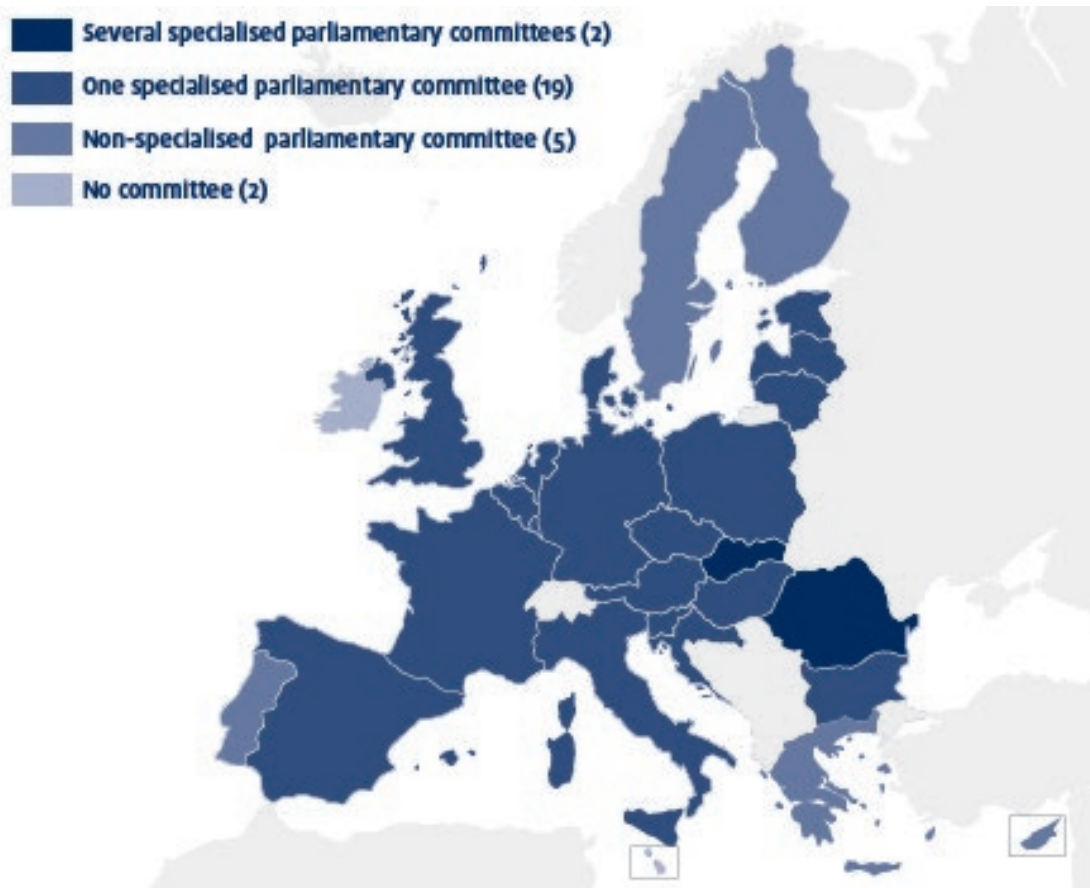


Data protection authorities (DPAs) seem to be missing at first glance but as the 2017 report states on p. 65 that DPAs are “treated as a type of expert body for purposes of the report” the figure does not need any amendment.

### 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.

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



Although the 2017 report mentions both the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) and the Trust Panel (*Vertrauensgremium*) on p. 66-67, the figure shows Germany with only one specialised parliamentary intelligence oversight committee. Indeed, the Parliamentary Control Panel is the key body for parliamentary intelligence oversight at the federal level. However, the Trust Panel is tasked with budgetary oversight of the federal intelligence authorities according to Section 10a (2) of the Federal Budget Ordinance (*Bundeshaushaltsordnung*). See also: [https://www.bundestag.de/ausschuesse/a08\\_haushalt/vertrauensgremium](https://www.bundestag.de/ausschuesse/a08_haushalt/vertrauensgremium). Thus, I commend to put Germany in the category “several specialised parliamentary committees”.

## 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.

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

EU Member State	Expert Bodies
DE	G 10 Commission ( <i>G 10-Kommission</i> ) Independent Supervisory Council ( <i>Unabhängiger Kontrollrat</i> )

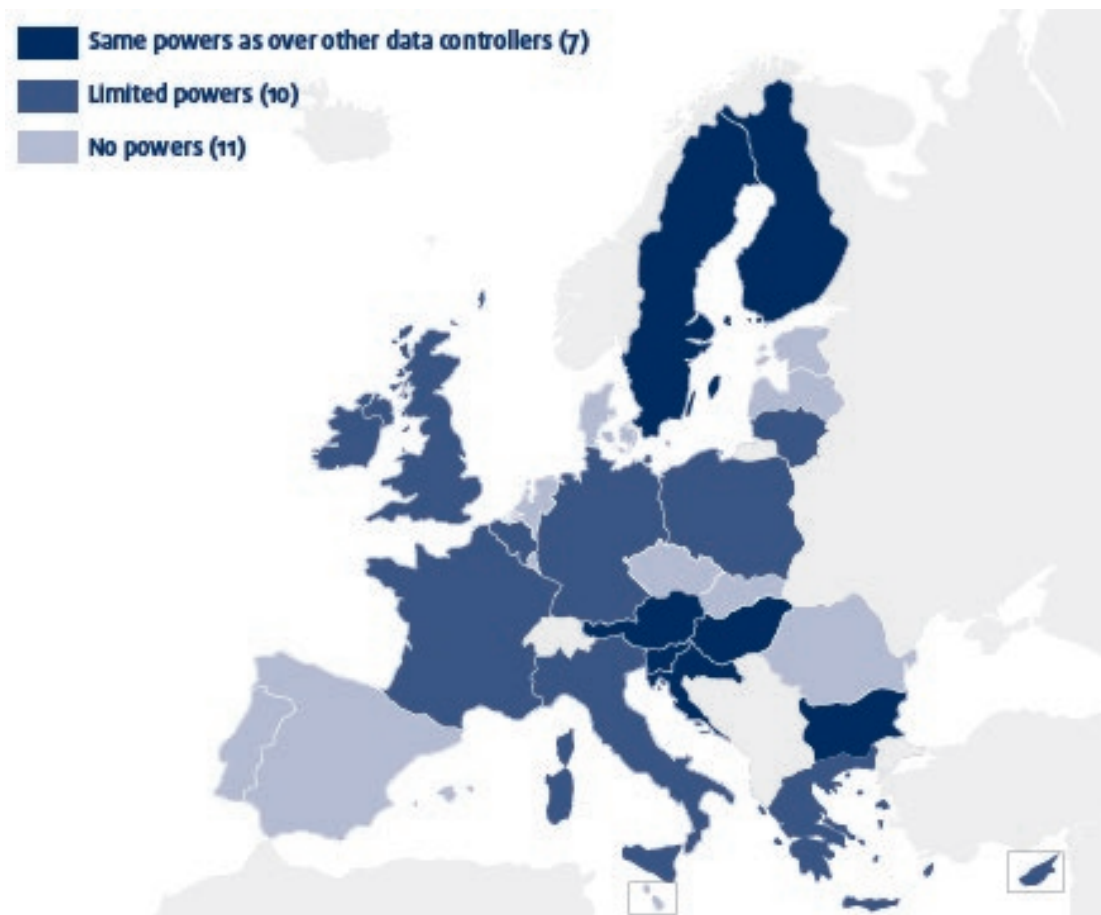
The Act amending the BND Act to implement the requirements of the Federal Constitutional Court and the Federal Administrative Court (*Gesetz zur Änderung des BND-Gesetzes zur Umsetzung der Vorgaben des Bundesverfassungsgerichts sowie des Bundesverwaltungsgerichts*) of 19 April 2021 replaced the Independent Committee by the Independent Supervisory Council (*Unabhängiger*

*Konrollrat*). Sections 40-58 of the amended BND Act regulate the organisation and functioning of the Independent Supervisory Council which is composed of two oversight components, namely the Quasi-judicial Control Body (*gerichtsähnliches Kontrollorgan*), tasked with ex ante oversight of the BND's SIGINT activities, and the Administrative Control Body (*administratives Kontrollorgan*), tasked with ex post oversight, whose head is supervised by the judge of the quasi-judicial body who presides the overall Independent Supervisory Council. The Independent Supervisory Council was established as supreme federal authority (*oberste Bundesbehörde*) in Berlin on 1 January 2022. See the website of the Independent Supervisory Council: <https://ukrat.de>.

## 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.*

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



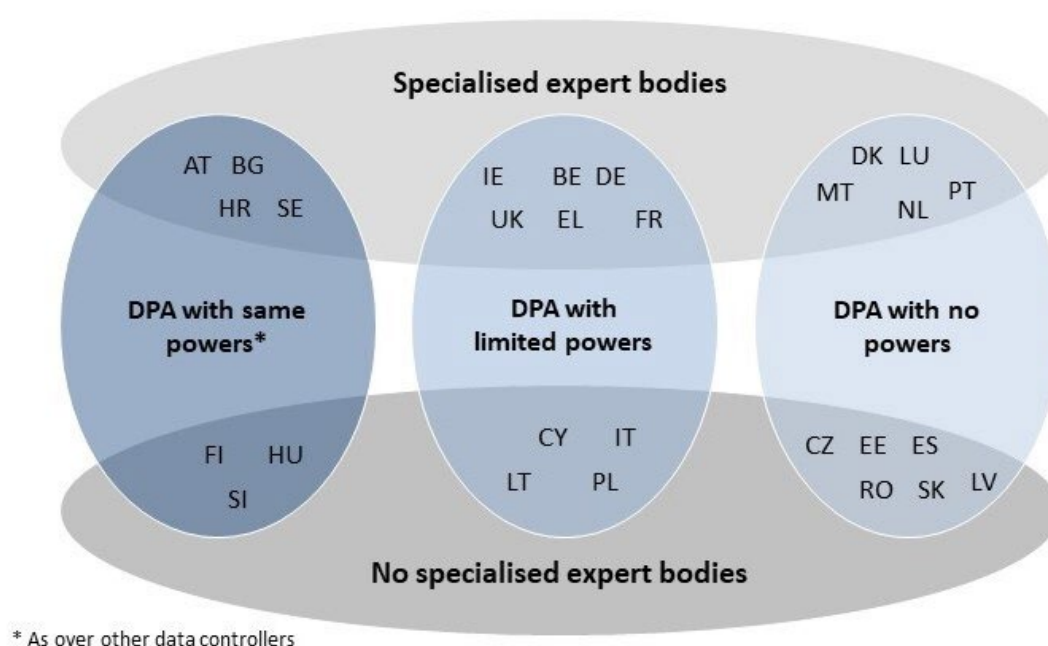
The figure displays the German situation accurate but it worth mentioning that the legal basis for this has changed since mid-2016. The Act on the Adjustment of Data Protection Law to Regulation (EU) 2016/679 and the Implementation of Directive (EU) 2016/680 (*Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*), also called Data Protection Adjustment and Implementation Act EU (*Datenschutz-Anpassungs- und -Umsetzungsgesetz EU*) of 30 June 2017, which came into force on 25 May 2018, provided for the individual regulation of data protection oversight in the three acts on the federal intelligence agencies. After several amendments, the relevant sections are now: Section 28 of the Federal Act on the Protection of the Constitution, Section 63 of the Federal Intelligence Service Act,

and Section 13a of the Military Counter-Intelligence Service Act. Each of these provisions is limiting data protection oversight if the release of information requested by the Federal Commissioner for Data Protection and Freedom of Information would jeopardise national security or the security of a federal state.

## 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.

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



The figure displays the German situation accurately.

## 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
DE		✓	✓	

The table is still valid, at least when it comes to the authorisation of **target surveillance of telecommunication (including legal hacking to intercept encrypted communication) and correspondence in Germany** under the Article 10 Act (G10) which provides for an authorisation

process by which an intelligence agency’s application for targeted surveillance has, firstly, to be ordered by the supervising ministry (Section 10 G10), and, secondly, approved by the G10 Commission (Section 15 G10) if the Commission finds the order admissible and necessary.

**Targeted surveillance of communication of EU institutions or organisations, authorities of EU Member States, or EU citizens** by the Federal Intelligence Service (BND) is ordered by the president of the BND and approved by the Independent Supervisory Council (Section 23 (5) and (7) BND Act) – unless an order is directed at communication between these targets and Germany and was already approved by the G10 Commission. Thus, **for surveillance directed at EU targets only the box “expert bodies” is to be checked.**

**Targeted hacking of foreign computer systems** provided for by Section 34 the Federal Intelligence Service Act (BND Act) since 2021, is only ordered by the BND’s president (Section 37 BND Act) and authorised by the Independent Supervisory Council (Section 42 (3) BND Act). The BND reports to the Federal Chancellery about such orders on a regular basis, and the Federal Chancellery is reporting to the Parliamentary Control Panel (Section 37 (5) BND Act). Thus, **for targeted hacking of foreign computer systems by the BND only the box “expert bodies” is to be checked.**

The regime governing the authorisation of other surveillance methods such as the operation of informants, of IMSI catchers to locate mobile phones, or long-term observations is currently under review due to the implications of the decision of the Federal Constitutional Court on the powers of the Bavarian internal intelligence agency.

## 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		✓		✓

If using the scheme of table 4, then **table 5 should also check the box “executive”** as the same approval/authorisation procedure as for targeted surveillance applies to **general surveillance of communication between Germany and other countries under the regime of the Article 10 Act (G10)**: Applications of the Federal Intelligence Service for “strategic surveillance” and the selectors (“search terms”) to be used are, firstly, ordered by the Federal Ministry of the Interior and Community (*Bundesministerium des Innern und für Heimat*) (Section 10 G10) and, secondly, authorised by the G10 Commission (Section 15 G10). In addition, the Parliamentary Control Panel approves the “telecommunication relations” which are proposed by the Federal Ministry of the Interior and Community (Section 5 G10) as relevant targets for SIGINT operations.

In case of **general surveillance of foreign communication under the regime of the Federal Intelligence Service Act (BND Act)**, the Independent Supervisory Council as expert body is tasked with overseeing the legality and approving SIGINT operations ordered by the BND’s president or a delegate (Section 23 and 42 BND Act). Unlike with “strategic surveillance” of communication to and from Germany, neither the Federal Ministry of the Interior and Community nor the Parliamentary Control Panel are involved in the authorisation of individual SIGINT operations. Rather, the Federal Chancellery only determines the overall issues and topics of interest (Section 19 (3) and (4) BND Act) and is informed by the BND about SIGINT orders on a regular basis (Section 23 (8) BND Act), whereas the Independent Supervisory Council reports to the Parliamentary Control Panel on a regular basis on



its control activities (Section 55 BND Act). Thus, **for general surveillance of foreign communication only the “expert” box should be checked in the table.**

## 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**

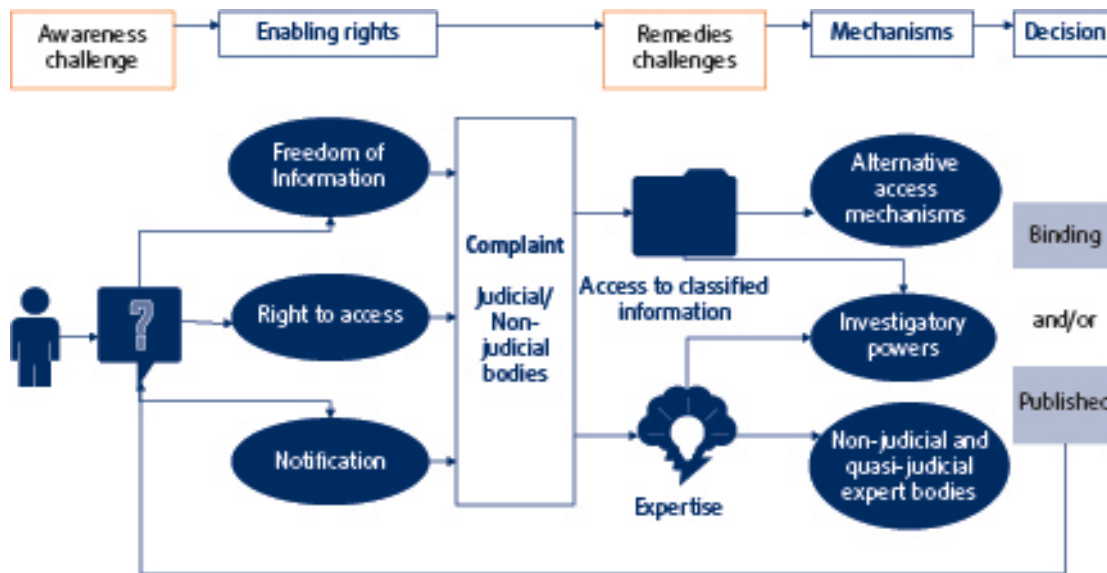
	Executive (ministry)	Expert body(ies)	DPA	Parliamentary committee(s)	Ombuds institution
DE		✓	✓	✓	(Petition Committee of the German Bundestag acts as a filter: only reasonable complaints are sent to the PKGr)

For reasons of clarity, it should be considered to explicitly name the Petitions Committee of the German Bundestag as Germany, unlike other EU Member States, has no national ombudsperson.

## 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**



The figure is not really self-explaining. However, given the intent to illustrate different challenges in a very general manner, it seems OK for Germany.








## 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
DE	G10 Commission				
	Federal Data Protection Commissioner				
	Parliamentary Control Panel				

Note:

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

Source: FRA, 2017

The **Parliamentary Control Panel is only authorised to access information and objects that are under exclusive control of the German federal intelligence services** (Section 6 (1) of the Parliamentary Control Panel Act). Thus, information and, for instance, software or technical devices, falling under the “third party rule” may be excluded from oversight of the Parliamentary Control Panel. However, the Federal Government is obliged to request approval from foreign partners to grant access on demand of the Parliamentary Control Panel.

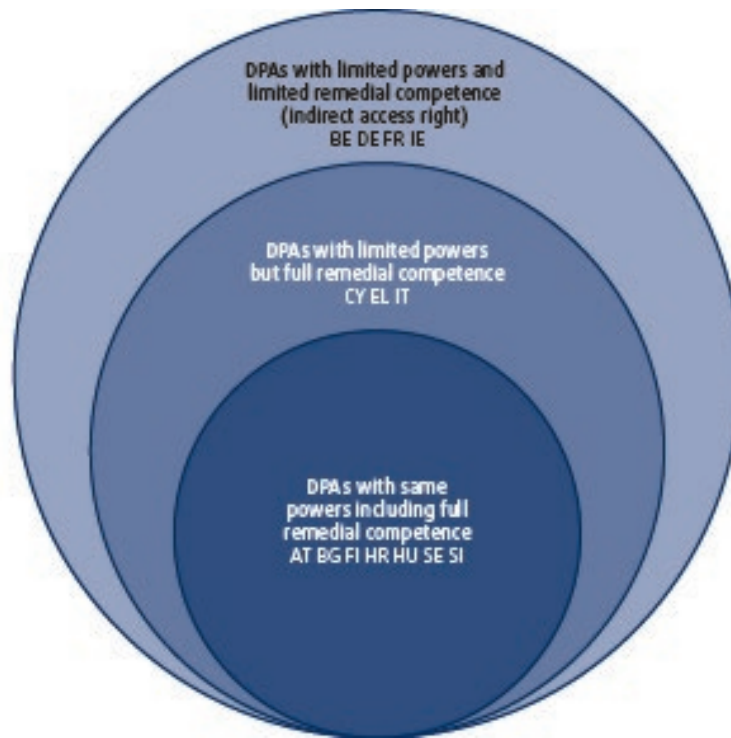
The **powers of the Federal Data Protection Commissioner to access collected data may be limited for two reasons**. Firstly, communication data collected by G10 orders are excluded from the DPA's oversight, unless the DPA is requested by the G10 Commission to do so (Section 28 (2) of the Federal Act on the Protection of the Constitution, and with reference to this provision also Section 63 of the Federal Intelligence Service Act, and Section 13a of the Military Counter-Intelligence Service Act). Secondly, access to collected data can be limited if the responsible federal ministry decides that the release of the requested information would jeopardise national security or the security of a federal state. See also 2.6.

Though there are no legal provisions on informing complainants, the **reports of the G10 Commission and Parliamentary Control Panel suggest that complainants are informed about the outcome of investigations**. Usually, complaints are found being unjustified.

## 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**



German situation is displayed accurately.