

MEMO / 23 October 2017

## Quotes on surveillance by intelligence services: fundamental rights safeguards and remedies in the EU

This second volume, '[Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU](#)', explores legal changes since the first volume in 2015 and how these laws are applied in practice. It is based on data from all EU Member States on the legal framework governing surveillance and complemented by field research in seven Member States: Belgium, France, Germany, Italy, the Netherlands, Sweden and the UK. This involved more than 70 interviews with a range of stakeholders related to surveillance. These included overseers and controllers from the executive, independent expert bodies, parliamentary committees, the judiciary and actors from the civil society. These quotes are contained in the report. Below are a selection of some of them:

*"The culture in the secret services is one of secrecy, and the present culture in society is to be as open as possible. The key element for the existence of the secret services today is what is called trust. Trust in society that they act between the borders of the law. For that you need to become more transparent than you were before."* (**Expert body**)

### **Surveillance 'in accordance with the law'**

*"The law governing the intelligence services is difficult to understand, inconsistent and has no regulatory concept."* (**Academia**)

*"An ordinary well-educated non-lawyer looking at the legislation would not be able to understand from this that there is such a broad signal intelligence capability and they certainly wouldn't without the benefit of detailed legal advice be able to understand the ramifications of what is proposed."* (**Lawyer**)

*"[The law] has failed numerous tests in terms of clarity and foreseeability."* (**Expert body**)

*"The main aspects that characterise the law's lack of clarity are the imprecision with which the law on the intelligence services deals with a certain number of issues and the excessively vast scale of the surveillance."* (**Lawyer**)

*"You read the text and you do not really understand what it means. You read it again, you get a bit of a glimpse, but the cascades of cross-references to other laws hinder your understanding. The terms are vague."* (**Civil society organisation**)

*"That legal framework is clear for those who work for the [ombuds institution]. The framework is perhaps less clear to members of the public. There is frequent consultation between institutions to determine which institution is competent to deal with a particular matter."* (**Ombuds institution**)

*"The [new] legislation is positive to the extent that it makes explicit things which were previously implicit."* (**Lawyer**)

### **Legality in case of international intelligence cooperation**

*"There is an accountability gap. You know that all oversight bodies are looking at their national services, no one is looking at how the cooperation of secret services as a whole works out. When our services send the information we look at the ways they apply the rules, we do not know what the other intelligence service will do with it, we always follow one end of the string and the other end is not known."* (**Expert body**)

*"It is not at all normal that international cooperation on intelligence is not included in the law. This cooperation not only exists but is desired by the executive. The law should therefore include this in*

*order to enable political control and proportionality, including for reasons of national sovereignty, as this cooperation could lead to a transfer of sovereignty.”* (**Academia**)

### **Surveillance for a legitimate aim: need for ‘national security’ definition(s)**

*“The services do not have a monopoly on national security. Other services such as police, customs, etc., also have an essential role to play.”* (**Expert body**)

*“It is not only military and political security, it is also increasingly infrastructure and economic and financial security. Threats can have a plurality of aspects. [...] It includes security of technological infrastructures, cybercrime.”* (**Parliamentary committee**)

### **An imperative: control from within**

*“We also say how important it is for services to have a strong legal department within the services. It is not only for the outsider to be critical, but for inside.”* (**Expert body**)

*“Also, ‘behind the scene’ we are doing a lot for fundamental rights, and ‘behind the scene’ we are helping the agencies to improve their practices, pointing to the issues that we consider disproportionate, unnecessary etc.”* (**Expert body**)

*“The strength of the [national] system is having an independent person who says what is doable and what is not, and the government which decides in fine.”* (**Expert body**)

### **Oversight framework of intelligence services**

*“Oversight is not lack of trust, but willingness to clarify.”* (**Parliamentary committee**)

*“Well, we have no whistleblower protection. In general, there is no such protection and this is a real problem.”* (**Data protection authority**)

### **Features of oversight bodies**

*“The oversight body must be able to work independently, full-time, it must be able to specialise and choose its own staff.”* (**Expert body**)

*“The primary concern of the oversight is to have access to all the material available to the services. [...] The oversight body needs to have access to the algorithms and to the strategies behind those algorithms.”* (**Expert body**)

*“While the surveillance community, the secret service and the police are now immersed in big data and the advanced information society, the oversight bodies should not use coaches drawn by horses. But this is the situation today because intelligence organisations, services and police are hesitant to accept the use of [certain] software by control bodies, oversight bodies.”* (**Data protection authority**)

*“[It is important] to make sure each body with powers in this area has an understanding about what one could do... But I think the concern is really around the fragmentation, complexity, lack of transparency.”* (**Data protection authority**)

*“[Some] DPAs feel uncomfortable because they have no expertise in the field in question, and therefore stop themselves from even thinking about it.”* (**Data protection authority**)

*“One area where we need to get some more expertise is in the technical field, maybe someone who knows more about data analysis, algorithms, that need is increasing.”* (**Expert body**)

*"Even though we have not always been fully staffed, public confidence in our body has significantly increased due to the greater transparency of our procedures and the decisions we have made."* (**Expert body**)

*"At minimum, there must be very close cooperation governed by law, and not just dependent on the will and the intention of the acting persons."* (**Data protection authority**)

*"It is rather difficult to talk about transparency in relation to services whose effectiveness depends upon secrecy."* (**Parliamentary committee**)

*"I think people need to realise how much of what we do is secret and it is such a small amount, and it really is only when there are real national security issues."* (**Expert body**)

*"But when it comes to the substantive issues, let's say: what have we learned from the [expert body]? How many interceptions have there been? Not just how many times did we meet, but what was the substance of that discussion. Were there any novel decisions? Were there any novel technologies that came to our attention? I want to know about this."* (**Civil society organisation**)

*"What's actually going on? We always had a feeling or hints that what was revealed in the Snowden revelations was in one form or another happening. But no one really knew substantially. The reform just now, even many members of parliamentary oversight committees I have talked to, say they only learn about these things from the media - and not from the official channels they are supposed to learn them from..."* (**Media**)

### **Stages of intelligence service oversight**

*"The ideal situation would be to never have to say 'no'. This is what I would like to aim for in the future; an understanding of the intrinsic and legal limits [by the services]."* (**Judiciary**)

### **The remedial route**

*"The average citizen does not even know where to address a complaint."* (**Data protection authority**)

*"A limited number of remedies is available for persons. For national surveillance measures, the procedure requires the person to file a complaint with the [expert body] before being granted recourse to the [judge], without any information required to be disclosed to the person on the existence of surveillance measures."* (**Civil society organisation**)

*"What will be the point of an individual lodging a complaint if he can base his arguments only on rumours? 'The direct and personal interest' of the law is difficult to demonstrate."* (**National human rights institution**)

*"Very few citizens' complaints relate to intelligence work, and this is for two reasons: the real 'bad guys' don't attach any importance to it, or if the work is done well, they don't know about it."* (**Expert body**)

*"A significant part of the people who file complaints tend to have psychological problems."* (**Judiciary**)

*"In general, we will not confirm or deny that someone has been wiretapped. We will focus on whether there has been a wrongdoing, an illegal practice, and this we aim to communicate, even though often in an abstract way."* (**Expert body**)

*"The only thing that we can do now is to have individual persons going to court. That is a problem, you need to have standing as an individual, you need to be individually targeted e.g. by secret services, then of course comes a question, how can you prove that you have been the target of the secret services because usually you never know, they will never notify you, maybe after 50 years. It is really difficult and has become more difficult for us to have these court cases."* (**Civil society organisation**)

#### **Raising individuals' awareness**

*"Experience shows, however, that in the majority of notifications the persons concerned do not bring legal action."* (**Expert body**)

*"The [expert body] drafts a report on the basis of the complaint, which is sent to the individual. [...] [W]hichever of these options is chosen, it comes down to the same thing: there is no access to classified documents."* (**Expert body**)

**For further information**, please contact the FRA Media Team:

Email: [media@fra.europa.eu](mailto:media@fra.europa.eu) / Tel.: +43 1 58030-642

FRA's work on Information society, privacy and data protection issues and related publications can be found at [online](#).