

SURVEILLANCE PROJECT PEER REVIEW MEETING: SUMMARY

Vienna, 7 November 2014

Background

On the basis of a request from the European Parliament, FRA launched a project to assess the protection of privacy and data protection in the context of large-scale surveillance. On completion of the first phase of the project, during which the Agency was provided with a mapping of national legal frameworks by [FRANET](#), its multidisciplinary research-network, FRA held a peer-review meeting with a small group of experts.

The aim of the meeting was to discuss the preliminary findings and seek guidance on the possible future steps the project might take, as well as to allow for complementarity with other initiatives. The 17 experts included representatives from EU institutions and the Council of Europe, data protection authorities, academia and civil society organisations. The participants brought their various perspectives and expertise to the discussions.

1) Introduction to FRA's project on surveillance and preliminary findings of its first phase.

After a brief introduction to FRA's working methods and a presentation of the preliminary findings of the surveillance project, the discussion focused on topics such as: the distinction between law enforcement and intelligence agencies; the problems that arise from the reluctance of certain EU Member States to discuss surveillance ; the use of national security as a ground for exemption from data protection rules; data retention and the difference between mass surveillance and bulk collection in this regard; the outsourcing of surveillance activities to the private sector; the importance, or lack thereof, of defining concepts such as national security and targeted/non-targeted surveillance, among others.

Participants advised that FRA focus on questions such as: what the impact of surveillance on fundamental rights is; what is happening on the ground and how the law is applied in practice; the loopholes that can be found in the law with regards to how intelligence services can carry out their work; and the information exchange from national intelligence services to law enforcement agencies.

A series of pending cases before the ECtHR were mentioned as relevant for defining the criteria for the principle of necessity to be met, the gravity of interference in the case of content data and metadata, the need for a prior judicial authorisation and the definition of national security.

The possibility of further liaison with the Council of Europe in the context of the project's work was also referred to at the meeting. Various participants also shared the view that the CJEU data retention ruling should be applied by analogy to areas other than data retention. Furthermore, the idea that encryption should be used as a means of affording more protection to communications, but one that is currently underdeveloped, was brought up by various participants. However, other participants stated that encryption would only make it slightly more difficult for intelligence services and that there should therefore be more investment in short term policies beyond encryption at the EU level. All of the participants agreed that all of the above will be difficult to put into practice if there is no political will to do so.

2) Fieldwork methodology, discussion and recommendations for the fieldwork phase.

After a brief presentation of the way FRA has carried out the fieldwork phase in past projects, participants were encouraged to give more practical input regarding how the fieldwork phase, which will be carried out in 2015, should be implemented. The scope and focus of this phase will be defined once the desk phase is completed.

With regard to the content of further FRA research, the participants emphasised the importance of gaining an understanding of the way intelligence services implement the legal framework. Some participants recommended that FRA have a clear approach regarding the project to focus on the law, processes and oversight, rather than looking at the scale of surveillance and related issues. Due to the fact that diverse practices and issues are addressed differently throughout the EU, certain Member States were grouped according to the interest in approaching them on the basis of their oversight system, the role of their data protection authorities and their gathering of signals intelligence.

While considering possible sources of information, different actors and material were mentioned. According to the participants, during the fieldwork phase the following could be addressed: access to information commissions where they exist in EU Member States; analysing training materials used by the intelligence services; information from the EU Intelligence Analysis Centre (EU INTCEN); data protection authorities and other relevant institutions; national intelligence services. Other possible sources of information included defence lawyers of clients who have been targeted through mass surveillance, judges, former intelligence officials, specialist NGOs, investigative journalists, and the Surveillance Industry Index (a collection of documents that details the companies and states involved in the trade of technology that facilitates international surveillance).

Project timeline

Based on participants' valuable contributions, FRA will carry out the fieldwork phase in 2015 and will be publishing a legal report in the spring of 2015. In parallel, FRA will continue to engage with experts when developing the project. A comparative analysis of desk and fieldwork research will follow in 2016, followed by the publication of the final report.
