European Parliament LIBE Committee Inquiry on Electronic Mass Surveillance of EU Citizens

European Parliament, Brussels, 14 October 2013

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THE EU, COE & GENERAL INTERNATIONAL LEGAL FRAMEWORK

SHORT VERSION

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Overview

Five main topics covered in the full version (see handout with full slides):

(A)The ECHR requirements that must be met by European States undertaking surveillance of electronic communications, both in terms of substantive law and in terms of oversight and remedies; and the application of the ECHR requirements to surveillance by European States of electronic communications outside their territory. (slides (A)(i) – (A)(iii) in the full handout)

(B)Reflection of the ECHR requirements in EU law (to the extent that EU applies: see below, at E). (slides (B)(i) and (B)(ii) in the full handout)

(C)European data protection requirements. (slides (C)(i) – (C)(iv) in the full handout)

(D)The international-legal requirements that must be met by non-European States undertaking surveillance of electronic communications, both in terms of substantive law and in terms of oversight and remedies; and general international law on extra-territorial activities. (slides (D)(i) and (D)(ii) in the full handout).

(E)And a crucial preliminary issue for the EU: the extent to which such activities by EU Member States are covered by the "national security" exemption in the Treaties and in the data protection directives. (slides (E)(i) – (vii) in the full handout; slides E.1 – E.5 in this short presentation)

In my short oral presentation, I will merely note the issues at (A) – (D) and focus on (E)

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A. ECHR requirements

- Indiscriminate mass surveillance of everyone's e-communications, without any individualised suspicion of criminal or subversive activities, and effectively without time-limit, is fundamentally contrary to the substantive legal principles adduced by the ECtHR in relation to national security surveillance.

- Surveillance must be subject to strict procedural safeguards and effective supervision and control.

- EU Member States must apply these ECHR principles to surveillance by them of both their own citizens and of foreigners, even if the latter are outside the State in question, certainly when this is within the EU or the Council of Europe area.

- **UK law governing the activities of GCHQ appears to be seriously deficient in all these terms.**

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B. Reflection of the ECHR requirements in EU law

- The EU Charter of Fundamental Rights reflects ECHR guarantees, and indeed updates them and expands on them in certain ways, in particular in relation to "communications" and data protection (Arts. 7 and 8 CFR). The Charter is now binding law for the EU.

- **However, the CJEU cannot use the Charter to rule on the compatibility of any UK (or Polish) law or practice with the Charter: see Protocol No. 30 to the revised Treaties.**

- In a different context (copyright infringement), the CJEU has stressed the **prohibition on "general monitoring"** and the overall need to strike a **"fair balance"** between competing interests.
- The judgment suggests that the CJEU [if it has jurisdiction: see slides (E)] would apply to such monitoring tests similar to those applied by the Strasbourg Court, and perhaps even stricter ones, given the special emphasis on data protection in EU law and the Charter.

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(C) European data protection law

- **Continuous interception and "buffering" of all traffic going through the fibre-optic cables carrying large portions of European (and global) Internet traffi**c (as is apparently done by NSA and GCHQ), for ill-defined purposes, without any individualised suspision or targetting, is **impossible to square with the basic data protection principle**s set out in EC- and EU law, in the CJEU's SABAM judgment, and in the judgments of several MSs' constitutional courts (including Germany).

- **Put simply, any such activity that falls within EU competence (as to which, see slides (E)) is in violation of general principles of EU law and the Charter of Fundamental Rights.**

- In effect, "targets" of PRISM and TEMPORA are selected on the basis of a mathematical "profile". **Such automated profiles are extremely dangerous**.

- **The use of data mining/"profiling" technologies in the reported PRISM and TEMPORA programmes pose an especially grave risk to the fundamental rights and freedoms of European (and non-European) citizens.**

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D. ICCPR & other UN principles:

- The UN standards are fully in accordance with the ECHR standards set out in the earlier slides, both as regards the substantive requirements and the procedural ones.

- **The USA, as a party to the ICCPR, is bound to comply with essentially the same international human rights principles as apply in Europe, also in respect to surveillance over "NON-USPERSONS".**

- **The non-application of U.S. Constitutional and statutory guarantees to non-US citizens would appear to be in clear breach of modern international human rights standards generally and the ICCPR in particular.***

*The fifth U.S. "Understanding" submitted to the UN when it ratified the ICCPR does not affect this, as far as matters are concerned over which the U.S. Federal authorities "exercise jurisdiction" - as they undoubtedly do over PRISM, etc.)

- **The surveillance of global communications by the USA, and of vast amounts of non-UK communications data by the UK (and similar actions by other States), is an infringement of the sovereignty of the other States affected and strongly arguably illegal under general public international law.**

- The proposal for an *Additional Protocol* to the COE Cybercrime Convention that would legalise such extraterritorial data gathering is dangerous and would undermine national sovereignty.

- **As the EDPS said to this Committee last week: We should do our utmost to ensure that this additional protocol will not be adopted.**

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E. The "national security" exemption in the Treaties (1)

"[N]ational security remains the sole responsibility of each Member State" (Art. 4(2) TEU)

- On the face of these texts, it would appear:

- **that the EU has no competence at all on matters relating to national security**; that those matters remain the sole responsibility of the States; and that the MSs are also free to organise any cooperation between themselves - and with third countries - as they deem fit.

- **that the Charter FR (which is EU law) does not apply** to anything the MSs do (either by themselves or in some form of cooperation, be that within the EU or with third countries) in relation to national security; and

- **that the ECJ also has no jurisdiction** over such matters at all.

HOWEVER, that is an over-statement of the legal position: see the next slides

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E. The "national security" exemption in the Treaties (2)

The Treaties say that:

- **MSs** may have sole competence in relation to their own **national security**, **BUT**

- **the Union** has shared competence with the MSs when it comes to **the Union's own internal security**, and in relation to **crime** and **terrorism**, and

- under the CFSP **the Union** also has competences in relation to **international security**.

There are clearly considerable overlaps between these matters - and that has implications for the scope of the "national security" exemption.

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E. The "national security" exemption in the Treaties (3)

The implications of the overlapping issues and competences:

- "National security", each MS's "internal security", the Union's "internal security", and "international security" cannot be separated from each other, nor from JHA action, in particular in relation to "terrorism and related activities" (or international crime, or extremism or xenophobia). The duties and responsibilities that MSs have in relation to the latter matters impact on the autonomy of MSs in relation to the first:
- **It follows from general law on treaties (VCLT) that MSs may not invoke Art. 4(2) TEU in such a way as to negate or undermine the shared competences of the EU in relation to internal security, crime and terrorism. MSs' "autonomous" actions to protect their own national security must respect, and tie in with, their joint or cooperative or coordinated actions with other MSs in relation to the EU's own internal security, the joint security of all the MSs, and the joint fight against international crime and terrorism.**

The "national security" exemption and the Union's *acquis*:

- Just as MSs may also not invoke Art. 4(2) to negate or undermine the shared competences of the EU in relation to internal security, crime and terrorism, they may also not use their powers in the exempt area to negate or undermine the Union's general *aquis*:
- **"National measures which seek to maintain national security may not interfere with the fundamental freedoms and, insofar as they fall within the scope of EU law, must respect fundamental rights as understood in the EU legal order.**"

(Diamond Ashiagbor, Nicola Countouris, Ioannis Lianos (Eds.), The European Union After the Treaty of Lisbon, CUP, 2012, p. 57)

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E. The "national security" exemption in the Treaties (4)

Johannesburg Principles:

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is **to protect a country's existence or its territorial integrity against the use or threat of force**, or its **capacity to respond to the use or threat of force**, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is **not legitimate** if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, ***to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.***

- (or, one could add, to gain an ***advantage in diplomatic negotiations, or an economic advantage for itself or the country's industries*** – DK)

- **This contrasts with the excessively wide definitions given to "national security" and "foreign intelligence" in UK and US law.**

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E. The "national security" exemption in the Treaties (5)

General conclusion *re* EU competence concerning the UK's GCHQ's surveillance:

- **The EU institutions (including the EP and the Court) are legally allowed to assess, within their own competences:**

(i) **whether the UK's surveillance programmes, and its data exchanges/cooperation with the USA, are limited to the protection of "national security" in the sense in which that term must be understood in international and EU law;**

(ii) **even if they are so limited: whether they do not unduly affect actions lawfully taken by the Union (or by its MSs acting jointly under Union law) in relation to internal or international security, and/or in relation to the fight against terrorism; and/or whether they do not unduly affect the Union's fundamental freedoms;**

(iii) **to the extent that they are not limited to the protection of "national security" as understood in international and EU law: quite broadly, whether those programmes are compatible with Union law (since the Art. 4(2) TEU exemption does not apply);**

(iv) **specifically, the latter would include competence to assess whether the programmes meet the Union's privacy and data protection requirements; and**

(v) **In relation to the U.S.'s surveillance programmes, whether the USA is acting in contravention of the EU's data protection rules in any activity carried out in the EU; and whether the "Safe Harbor" and other EU-USA arrangements relating to personal data are actually safe and appropriate.**

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Final remark:

To end this presentation, let me wholeheartedly endorse the view of the European Data Protection Supervisor, Peter Hustinx, expressed to the LIBE Committee at the last hearing, on 7 October 2013:

"We are facing an existential challenge to our fundamental rights and liberties. We must therefore be prepared to 'draw a line in the sand'".

The LIBE enquiry is a major opportunity to draw this line. I hope that my presentation will help it do that.