



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 21 October 2013**

**15106/13**

**PE 478  
JAI 920  
CSC 129  
DATAPROTECT 149**

**NOTE**

---

from: General Secretariat of the Council  
to: Delegations

---

Subject: Summary of the **7th hearing of the LIBE inquiry on electronic mass surveillance of EU citizens**, held in Brussels on 14 October 2013

---

The meeting was chaired by Mr López Aguilar (S&D, ES).

**SESSION I**

**Electronic mass surveillance of EU Citizens and international, Council of Europe and EU law**

The first invited speaker, Mr Scheinin, former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Professor at the European University Institute and leader of the FP7 project "SURVEILLE", discussed the international legal framework on privacy and the possible breach of international law incurred by the NSA mass surveillance. He stressed that breaches of the International Covenant on Civil and Political Rights (ICCPR) could be established and that both the US and UK were contracting parties to this instrument. He said that later this week the US would be subject to a periodic review of its compliance with the ICCPR. He outlined the scope of and practice regarding Article 17 of the ICCPR on the right to privacy, based

on case law and Human Rights Committee commentary. He concluded that the NSA's electronic surveillance went beyond what could be considered justified under permissible limitations tests on multiple grounds. He recommended that the EP should study carefully the report on the US undergoing periodic review, and recommended the activation of the interstate complaints procedure under ICCPR. He called for further support to be given to programmes under Horizon 2020 in relation to privacy and studies on the implications of surveillance.

During the discussion the MEPs raised the following issues: further clarifications on the ICCPR procedures and content, and specifically if the EU could initiate an interstate complaints procedure, the possible follow-up to various breaches of privacy established, expectations for the upcoming US periodic review, surveillance and limitations to free movement and development of automated databases regarding interstate movements.

Professor Scheinin clarified that apart from the political rights and the rights of citizens not to be expelled from their own country, ICCPR did not distinguish between nationals and non-nationals. He explained the extraterritorial effect of the ICCPR, i.e. State responsibility vis-à-vis foreign citizens outside the territory of the State concerned. He said it was possible that some Latin American countries were considering an action under interstate procedure. The results of the US periodic review were expected by 1 November 2013. The interstate complaint procedure under the ICCPR could only be initiated by the States and the EU was not a party to the ICCPR and could not become one. He also stressed that criteria prescribed by law regarding the unlawfulness of the NSA surveillance had been already been met according to the information available to date. Countering terrorism was a pressing need and justified privacy intrusion, but the question of where exactly the limit was needed to be addressed. He concluded that if there were no longer any expectations on privacy this would have an effect on other human rights. Excessive surveillance primarily affected the right to privacy but had further indirect effects, such as a chilling effect on freedom of association and freedom of movement. He referred to biometric passports and the fact that data not necessary for the purpose of crossing borders was gathered in national databases.

The second invited speaker, Professor Zupancic, Judge at the European Court of Human Rights, briefly discussed the legal implications of NSA surveillance. He stressed that in his view this was primarily an issue for the US courts and that it would take years before this issue and the legislation behind it was clarified. He stressed he was speaking in a personal capacity and was not representing the views of the European Court of Human Rights. He said that a procedure would come to Strasbourg only after national remedies had been exhausted and would take years. There was no relevant existing case law, as the existing case law mainly related to criminal procedures. He also discussed various differences in the US and EU legal systems on privacy. If the case was lodged by an aggrieved citizen suing a State party to the convention, it would have to be first examined nationally. He stressed that the US courts could use the doctrine of political question, meaning they would not necessarily wish to get involved in the case on merits. He also discussed various differences in the US and EU legal systems on privacy. Mr Zupancic stressed that the US could not be sued before the ECtHR as it was not a party to the ECHR and even actions against any other contracting party would take years.

During the discussion the MEPs raised the following issues: security services circumventing national legal frameworks in today's globalised world, protection of UK journalists under ECHR, slowness of legal proceedings and no effective legal protection of citizens' rights as there were legal difficulties in initiating any case in view of the lack of evidence, rules of secrecy and general lack of transparency ultimately resulting in loss of the right to judicial oversight and loss of rule of law.

The third invited speaker, Mr Korff, Professor of Law, London Metropolitan University, spoke about ECHR requirements and the case law. He stressed that States should comply with international human rights law when acting in the territories of third States. He said that if surveillance had been carried out by the UK or any other Member State it was clearly in breach of existing laws on human rights requirements as the data mining effectively instituted profiling, which was extremely dangerous when searching for rare phenomena such as who constituted potential terrorists. He outlined what he considered to be a very successful law regulating the purpose of surveillance in Schleswig Holstein regional legislation setting out the requirements needed for the procedure to be sufficiently targeted. He agreed with the previous speaker, Mr Scheninin, that an interstate case under ICCPR would be essential and added that such activities

also violated a general principle of international law, namely the sovereignty of States. He firmly rejected an additional protocol to the COE Cyber convention. He commented on Article 4 TEU and dismissed the idea that there was no EU competence in national security matters. In his view this was an overstatement because of existing EU competence in the area of CFSP regarding international peace and security, JHA competence in fight against terrorism and serious crime. Such activities in his view could not be separated from the activities of Member State security services. National security services had an obligation to act in accordance with the EU Treaties. It was important to establish whether the UK was acting in accordance with its own obligations under the Treaty. A further question to be examined was the issue of defining national security itself, did it also include political and economic spying. The existing UK definition was clearly deficient. He referred to the Johannesburg principles, endorsed by the COE and UN, which were much more restrictive in the definition. He stressed that the ECJ did have the right to interpret this legal term so that it was compatible with the Treaties and the Charter of Fundamental Rights. There was clearly EU competence to discuss issues beyond those which could be considered national security issues in the narrow sense. He stressed that secret services had never actually been brought within the rule of law in our democracies. Nowadays they were permeating various parts of everyday life as well as cooperating beyond national borders on the basis of bilateral, multilateral arrangements as well as through international organisations such as NATO.

## **SESSION II**

### **Court cases on surveillance programmes**

The fourth invited speaker, Mr Guibert, Vice-Chairman of the "Ligue des Droits de l'Homme" (LDH), presented a case lodged by FIDEH in France against X for violation of privacy laws and Criminal Code in France.

The fifth invited speaker, Mr Pickles, Director of Big Brother Watch, presented the case lodged before the European Court of Human Rights (Big Brother Watch, English PEN, Open Rights Group, and Dr Constanze Kurz v. UK) alleging violations of Article 8 ECHR. The applicants claim this was due to inadequacies of the protection afforded by the legal system in the UK in the context of surveillance and intelligence service activities by UK authorities and lack of clear, transparent and precise legal basis.

The sixth invited speaker, Dr Kurz, Computer Scientist, Project Leader at Forschungszentrum für Kultur und Informatik, one of the plaintiffs in the case lodged before the European Court of Human Rights; criticised widespread mass surveillance practices in disregard of EU citizens' rights, accumulating data not just for storage but also for treatment and analysis.

**Date of next meeting**

- 4 November 2013, 15.30 – 18.30 (Brussels)

---