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Independent oversight has an important role to play in the context of national security. Together with parliamentary oversight and the involvement of the courts, it contributes to the lawfulness of the activities of intelligence and security services, while at the same time protecting fundamental rights. Independent oversight can provide transparency where secrecy is inherent in the domain of national security.

National security and therefore the activities of intelligence and security services have become increasingly dynamic. Developments that take place in society require flexibility and quick adaptation to deal with rapidly changing behaviour and technological changes in, for example, the cyber domain. Static regulatory frameworks are no longer an adequate response to these developments. Predictability is more complex and it is not realistic merely to split up the dynamic activities into static concepts such as ‘ex ante’, ‘ex durante’ or ‘ex post’. All this is not unique to the domain of national security. There are clear similarities to, for example, the privacy, Internet and Communications Technology (ICT) sector.

However, there is no European framework for independent oversight of national security. Regulation is national and there are substantial differences between the member states. This was confirmed by the recent update given to your Committee by the EU Fundamental Rights Agency (FRA).² About 15 EU member states have independent bodies responsible for oversight of intelligence and security services. They exchange views in the context of the ‘European Oversight Conference’, eight of them (including the UK independent oversight body) participate in the Intelligence Oversight Working Group (IOWG) and work on concrete projects to improve independent oversight.³

For a long time the only European guidance was offered by the European Court of Human Rights, which has a long tradition of decisions on national security. It has underlined the importance of independent oversight and the need for it to take binding decisions; it has

¹ <https://english.ctivd.nl/>

² European Union Agency for Fundamental Rights, Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU, Update 2023, Submission to the PEGA Committee, February 2023, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/PEGA/DV/2023/02-28/FRASubmissiontothePEGACommittee_EN.pdf

³ <https://english.ctivd.nl/about-ctivd/international-cooperation>

decided on the lawfulness of practices in the context of national security, such as bulk interception. These decisions of the European Court of Human Rights based on the European Convention on Human Rights are part of the EU acquis. This is made explicit in the EU Charter of Fundamental Rights. The Luxembourg court has also started to look into national security-related topics.

All EU member states are members of the Council of Europe Convention on Data Protection, the so-called Convention 108. This convention has been updated. A very important part of this update, generally called Convention 108+, is the inclusion of the national security domain.⁴ Convention 108+ is now therefore the only existing European binding framework dealing with the processing of data by intelligence and security services. It also includes the criteria that need to be met regarding the powers and independence of oversight. Basically all EU member states have signed Convention 108+, several have already finalized the ratification process and many are in the process of ratifying it.⁵ This makes Convention 108+ part of the EU acquis.

In a public memo the two independent oversight bodies of the Netherlands have described why Convention 108+ is so important for overseeing the national security domain.⁶ Let me give you an illustration of its relevance:

Convention 108+ is fully applicable to the national security domain. This means that national security regulations must comply with it. The applicability concerns the area of oversight but also the requirements (principles and rules) in the Convention on the collection and processing of personal data.

To the extent that the Convention allows a few specific exceptions and restrictions in the context of national security, each specific exception and restriction must be provided for by law, must respect the essence of the fundamental rights and freedoms and must demonstrate that it 'constitutes a necessary and proportionate measure in a democratic society' on one of the legitimate grounds listed in the Convention. Exceptions and restrictions must not interfere with the 'independent and effective review and supervision under the domestic legislation of the respective Party'.

⁴ <https://www.coe.int/en/web/data-protection/convention108-and-protocol>

⁵ <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=223>

⁶ <https://english.ctivd.nl/latest/news/2021/02/17/index>

Convention 108+ states that the oversight 'shall have powers of investigation and intervention'. Effective review and supervision implies binding powers where the impact on the fundamental rights is the greatest, particularly in the accessing, analysis and storage phases of processing personal data. Binding powers must deal with the restriction/termination of data processing, including data minimization/deletion. It should be noted that these kinds of oversight powers are also required under the current EU standards laid down in the GDPR and the Police Directive. When it comes to protecting the rule of law as effectively as possible, the lack of binding powers within the domain of national security is incompatible with the criterion that this 'constitutes a necessary and proportionate measure in a democratic society'.

Convention 108+ imposes on the States Parties an obligation to require that data controllers (including intelligence and security services in the case of national security) provide the oversight body with all relevant information concerning the transfer of personal data. The reasons for the transborder exchange of data must also be substantiated. This includes an obligation to grant the oversight body the power to prohibit or suspend the exchange of data, or subject it to conditions.

The Convention is specific on the cooperation of oversight bodies. They must cooperate with one another 'to the extent necessary for the performance of their duties and exercise of their powers'. Particular forms of cooperation are mentioned: mutual assistance, coordinating investigations and interventions, and conducting joint actions. Furthermore, the Convention obliges the parties to establish a network of oversight bodies.

By signing it, the member states of the EU have already committed themselves to Convention 108+. Further commitment by ratification and actual implementation of Convention 108+ will support independent oversight in the national security domain. It contributes to the lawful activity of intelligence and security services, to the protection of national security and to the protection of the fundamental rights involved.