

# Short Thematic Report

## National intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies

Legal update

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# 1 Description of tasks – Phase 3 legal update

## 1.1 Summary

Most of the key developments in the area covered by this report unfolded in the wider context of the **NSA Inquiry Committee of the German Bundestag (1. Untersuchungsausschuss des 18. Deutschen Bundestages – “NSA-Untersuchungsausschuss”)**. The inquiry committee was established by an all-party proposal of the Bundestag on 20 March 2014 and started working on 3 April 2014.<sup>1</sup> The committee is mandated to investigate “Five Eyes” surveillance in Germany and the complicity of German intelligence services but also other issues related to the “secret war” against terrorism such as the interrogation of asylum-seekers by the Federal Intelligence Service (*Bundesnachrichtendienst*, BND) in cooperation with US security services, or the role which the AFRICOM headquarter at the US airbase Ramstein plays in the drone war against alleged terrorists in Afghanistan, Yemen, Somalia and elsewhere. Moreover, the committee is tasked with developing recommendations for legal reform and how to protect IT security.<sup>2</sup> Until May 2016, the committee held more than hundred sessions in which it heard legal and technical experts, US whistleblowers testifying on drone warfare and NSA surveillance programmes, staff from the German intelligence services, their executive oversight, the G10 Commission, the Federal Data Protection Commissioner and others.<sup>3</sup>

In the course of the hearings – and due to research of investigative journalists as well as a few “Wikileaks” – it **became public that the BND closely cooperated with intelligence services of the United States (and to a lesser extent also of the United Kingdom)** to search the flow of data intercepted in the context of several SIGINT programmes that were targeting both German hubs of the global glass fibre cable network and satellite communication. As at least 40,000 of the “selectors” used in this context potentially targeted also German addresses, authorities of partner states and European corporations it became evident that international intelligence cooperation had developed an independent existence beyond effective internal and executive oversight.<sup>4</sup>

Moreover, the BND itself was found to target the communication of partner states’ authorities by exploiting G10 surveillance orders beyond their legal mandate to intercept foreign data flows routed via Germany. Given these new revelations, the **opposition parties pushed to broaden the mandate of the inquiry committee in order to include the investigation of independent BND surveillance.**<sup>5</sup> In early June 2016, MPs in the Rules of Procedure Committee (*Geschäftsordnungsausschuss*) of the German Bundestag agreed that the NSA Inquiry Committee will also cover the procedures related to several thousand problematic SIGINT selectors allegedly developed by the BND on an independent basis. The period to be investigated is limited from June 2013 to 31 October 2015. The proposal was adopted in the plenary of the German Bundestag on 9 June 2016.<sup>6</sup>

Although significant parts of the procedures of the NSA Inquiry Committee are held secretly *in camera*, the investigation of the Committee is in particular limited when it comes to opera-

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<sup>1</sup> heute im bundestag (2014), ‘NSA-Ausschuss nimmt Arbeit auf’, 3 April 2014.

<sup>2</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2014), *Einsetzung eines Untersuchungsausschusses: Antrag der Fraktionen CDU/CSU, SPD, DIE LINKE. und BÜNDNIS 90/DIE GRÜNEN*, Printed Document 18/843, 18 March 2014, available at: <http://dip21.bundestag.de/dip21/btd/18/008/1800843.pdf>.

<sup>3</sup> See [www.bundestag.de/bundestag/ausschuesse18/ua/1untersuchungsausschuss](http://www.bundestag.de/bundestag/ausschuesse18/ua/1untersuchungsausschuss).

<sup>4</sup> heute im bundestag (2016), ‘BND hörte bis Ende 2013 Freunde ab’, 29 January 2016.

<sup>5</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Ergänzung des Untersuchungsauftrages des 1. Untersuchungsausschusses – Hilfsweise: Einsetzung eines Untersuchungsausschusses: Antrag der Oppositionsfraktionen*, Printed Document 18/7565, 17 February 2016, available at: <http://dip21.bundestag.de/dip21/btd/18/075/1807565.pdf>.

<sup>6</sup> heute im bundestag (2016), ‘NSA-Ausschuss soll sich auch mit BND-Selektoren befassen’, 8 June 2016, available at: [www.bundestag.de/presse/hib/201606/-/426804](http://www.bundestag.de/presse/hib/201606/-/426804).

tional issues of international intelligence cooperation falling under the “third party rule”. Most prominent, the federal government refused to hand over the list of “selectors” shared by the NSA with the BND to the committee. The government rather chose to task a **“person of trust” (Vertrauensperson) to assess on behalf of the committee a list of “selectors” and issue an opinion** on whether fundamental rights of German citizens and national interests have been violated by the SIGINT cooperation. The “person of trust”, a retired federal administrative judge, investigated the selectors from July to October 2015 in the new BND building in Berlin, supported by legal and technical staff of the intelligence service and informed by visits to the BND headquarter in Pullach and the SIGINT post Bad Aiblingen. The “person of trust” issued his report and opinion on 23 October 2015 both in a public version and an extended classified version. The report describes the “Joint SIGINT Activity” (JSA) of the BND and the NSA at the satellite communication interception post Bad Aiblingen that took place from 2004 to 2012, and assesses around 40,000 NSA “selectors” that were sorted out by the BND due to legal concerns from the several million selectors that were fed into German SIGINT activities. The report concludes that several thousand of these rejected NSA selectors actually pointed to German or European targets in violation of a Memorandum of Agreement signed in 2002 to regulate the Joint SIGINT Activity. However, the report disagrees with the view that intelligence services’ SIGINT has established a regime of “global mass surveillance”, although the mandate of the “person of trust” was limited to the specific field of satellite communication surveillance and the contested list of 40,000 selectors sorted out by the BND due to legal concerns.<sup>7</sup> Thus, the report did neither cover the surveillance of more extensive glass fibre communication nor had it access to the complete list of selectors shared by the NSA with the BND.

Both the opposition parties in parliament and the G10 Commission were not satisfied that oversight was delegated to the “person of trust” and that they were denied a direct assessment of the NSA selectors. Hence, both the **G10 Commission and the opposition parties in parliament submitted complaints according to Article 93 (1) of the Basic Law (Organklagen) to the Federal Constitutional Court** in autumn 2015, demanding the right to directly investigate the list of selectors.<sup>8</sup>

However, both the four chair persons of the parliamentary parties in the NSA Inquiry Committee and the Parliamentary Control Panel had top secret access to the around 3,000 separate BND selectors that will be investigated more publicly by the inquiry committee after the recent agreement to expand its mandate: Whereas a **“task force” of the secretariat of the Parliamentary Control Panel and three of its members investigated the selectors from October to December at the BND headquarter in Pullach** before issuing a secret interim report and a brief public statement on 16 December 2015, the **parties’ chair persons accessed the selectors in premises of the federal chancellery during November 2015** to decide whether it would be worthwhile expanding the mandate of the inquiry committee. The Control Panel found that many targets have been illegally surveilled by the BND, e.g. governments of allied states, EU institutions, NGOs and also several German citizens who were working abroad, and recommended a legislative reform.<sup>9</sup> The federal government responded

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<sup>7</sup> Graulich, K. (2015), *Nachrichtendienstliche Fernmeldeaufklärung mit Selektoren in einer transnationalen Kooperation: Prüfung und Bewertung von NSA-Selektoren nach Maßgabe des Beweisbeschlusses BND-26, Bericht im Rahmen des 1. Untersuchungsausschuss der 18. Wahlperiode des Deutschen Bundestages*, Berlin, 23 October 2015, available at: [www.bundestag.de/blob/393598/b5d50731152a09ae36b42be50f283898/mat\\_a\\_sv-11-2-data.pdf](http://www.bundestag.de/blob/393598/b5d50731152a09ae36b42be50f283898/mat_a_sv-11-2-data.pdf).

<sup>8</sup> Ewer, W. (2015), *Organklage der Oppositionsfractionen gegen Sperrung der Selektoren-Liste*, Kiel, 16 September 2015, available at: <http://t.co/aIdoMcTskO>; Leyendecker, H., Mascolo, G. (2015), ‘Kontrolleure klagen auf Einsicht in Selektorenliste’, *Süddeutsche Zeitung*, 1 December 2015, available at: [www.sueddeutsche.de/politik/nsa-affaere-kontrolleure-klagen-auf-einsicht-in-selektorenliste-1.2762758](http://www.sueddeutsche.de/politik/nsa-affaere-kontrolleure-klagen-auf-einsicht-in-selektorenliste-1.2762758).

<sup>9</sup> Deutscher Bundestag (2016), ‘Kontrollgremium rügt die Schnüffelpraxis des BND’, 16 December 2016, available at: [www.bundestag.de/dokumente/textarchiv/2015/parlamentarisches-kontrollgremium/399586](http://www.bundestag.de/dokumente/textarchiv/2015/parlamentarisches-kontrollgremium/399586). The three-pages public statement of the Parliamentary Control Panel was not published online but only distributed to journalists. However, the investigation is briefly mentioned in the recent activity report of the Control Panel:

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that it had started a comprehensive revision of the strategic surveillance by the BND. Accordingly, selectors of political importance shall be approved by the BND president, the structure of the SIGINT department is to be reviewed and the executive oversight will be strengthened. The federal government denied, however, that mass surveillance took place in the context of the stand-alone selectors of the BND.<sup>10</sup>

Another **constitutional complaint of the opposition parties demanding that the federal government should allow Edward Snowden to be heard as witness** by the NSA Inquiry Committee in Germany failed. On 4 December 2014, the Federal Constitutional Court declared the complaint inadmissible as two letters to the NSA Inquiry Committee in which the federal government supposedly denied protection for Edward Snowden if he would come to Germany are actually non-binding and preliminary opinions without legal significance. In addition, the Constitutional Court rejected the complaint against the majority denial of the Inquiry Committee to invite Snowden for testimony.<sup>11</sup>

Meanwhile, the **German branch of Reporters Without Borders took legal action against the BND** claiming that the confidentiality of their email communication with foreign partners was violated by strategic surveillance. A decision of the Federal Administrative Court (*Bundesverwaltungsgericht*) on the complaint which was submitted on 30 June 2015 is pending.<sup>12</sup>

Additional dynamic came into the whole debate when the **Federal Constitutional Court decided on 20 April 2016 that legislation on international information exchange by the Federal Criminal Police Office (*Bundeskriminalamt*) is unconstitutional**. The court questioned the broad powers to transfer personal data to foreign authorities outside the EU for all purposes necessary to implement any of its tasks.<sup>13</sup> As similar legal provisions govern international information exchange of the intelligence services several commentators argued that the decision does not only demand a revision of the Federal Criminal Police Office Act but also a critical assessment of legislation on intelligence services (see page 8 in chapter *International Intelligence Services Cooperation* for details).<sup>14</sup>

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Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, Printed Document 18/7962, 21 March 2016, pp. 8-9, available at: <http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf>.

<sup>10</sup> Germany, Federal Government (2015), 'Fernmeldeaufklärung des Bundesnachrichtendienstes', Press release, 16 December 2015, available at: [www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2015/12/2015-12-16-altmaier-bnd-selektoren.html](http://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2015/12/2015-12-16-altmaier-bnd-selektoren.html).

<sup>11</sup> Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2014), 'Antrag im Organstreitverfahren zur Zeugenvernehmung von Edward Snowden in Berlin ist unzulässig: Beschluss vom 04. Dezember 2014 (2 BvE 3/14)', Press release, 12 December 2014.

<sup>12</sup> Reporter ohne Grenzen (2015), 'Klage gegen den BND', available at: [www.reporter-ohne-grenzen.de/mitmachen/klage-gegen-den-bnd/](http://www.reporter-ohne-grenzen.de/mitmachen/klage-gegen-den-bnd/).

<sup>13</sup> Germany, Federal Constitutional Court (*Bundesverfassungsgericht*) (2016), 1 BvR 966/09, 20 April 2016, available at: [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420\\_1bvr096609.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420_1bvr096609.html). For an English press release see: <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-019.html>.

<sup>14</sup> Deutsches Institut für Menschenrechte (2016), 'Urteil des Bundesverfassungsgerichts zum BKA-Gesetz: Institut begrüßt Vorgaben für menschenrechtskonforme internationale Sicherheitskooperation', Press release, 20 April 2016, available at: [www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemitteilung-urteil-des-bundesverfassungsgerichts-zum-bka-gesetz-institut-begruesst-vorgaben-f/](http://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemitteilung-urteil-des-bundesverfassungsgerichts-zum-bka-gesetz-institut-begruesst-vorgaben-f/); Humanistische Union (2016), 'Jetzt sind die Gesetzgeber in Bund und Ländern gefordert, endlich verfassungsgemäße Zustände herzustellen', Press release, 20 April 2016, available at: [www.humanistische-union.de/nc/aktuelles/aktuelles\\_detail/back/aktuelles/article/jetzt-sind-die-gesetzgeber-in-bund-und-laendern-gefordert-endlich-verfassungsgemaesse-zustaende-herz/](http://www.humanistische-union.de/nc/aktuelles/aktuelles_detail/back/aktuelles/article/jetzt-sind-die-gesetzgeber-in-bund-und-laendern-gefordert-endlich-verfassungsgemaesse-zustaende-herz/); Kipker, D.-J. (2016), 'Das aktuelle Urteil des BVerfG zum BKA-Gesetz – eine Nachhilfe in Sachen Verfassungsrecht für Gesetzgeber und Sicherheitsbehörden', 3 May 2016, available at: [www.eaid-berlin.de/?p=1116](http://www.eaid-berlin.de/?p=1116).

On 15 June 2016, the Federal Administrative Court (*Bundesverwaltungsgericht*) decided that the BND is not obliged to inform a MP of the Left Party about the origins and recipients of his personal data which the authority is exchanging with other intelligence services. As such information would unveil methods of intelligence work which are to be kept secret in the public interest, data subjects are only entitled to request access to such information when they can demonstrate that these are needed to avoid grave harm.<sup>15</sup>

Despite the heated political debate and legal challenges, the **German Bundestag expanded the surveillance powers of the BND** on occasion of a comprehensive revision of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*) which regulates the domestic intelligence authorities. As part of the legislation also the G 10 Act was amended, mandating the BND to strategically monitor international communication also for the purpose of detecting and responding to “international criminal, terrorist or state-controlled attacks using malware or similar harmful means of information technology” (see update on Chapter *Member States’ laws on surveillance* in FRA Report on page 15-16 for details).<sup>16</sup> The amendment came into force on 21 November 2015. It was justified by the need to monitor internet traffic for “cyberthreats” and protect critical infrastructures.<sup>17</sup>

In summer 2016, the G10 Act was amended another time: On 24 June 2016, the Act for Improved Information Exchange in Combating Terrorisms (*Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus*) was adopted by the German Bundestag only three weeks after it was tabled by the federal cabinet. According to article 5 of the act, Section 15 (6) of the G10 Act is amended to authorize the provisional launch of telecommunication surveillance by German intelligence agencies without prior authorization by the G10 Commission in very urgent cases. However, the collected data shall only be used and processed after the launch of surveillance is approved. The act also authorizes the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) to operate joint international databases for the automated information exchange with foreign intelligence and security services, in particular with its European partners of the Counter Terrorism Group but also with partners from NATO members and other states (for details see chapter 1.2 on international intelligence services cooperation).<sup>18</sup> On 8 July 2016, also the Federal Council (*Bundesrat*) approved the act although the concerns it had voiced before were not addressed by the final bill. The act will be issued by the Federal President (*Bundespräsident*) in July and come into force the day after.

Moreover, several **proposals for a revision of secret surveillance as well as a reform of intelligence services oversight** are in the pipeline. On 2 July 2015, the opposition Left Party tabled a proposal to suspend the Act on Restricting the Privacy of Correspondence, Posts and

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<sup>15</sup> Germany, Federal Administrative Court (Bundesverwaltungsgericht), ‘Bundesnachrichtendienst muss über Herkunft und Empfänger von Daten nur ausnahmsweise Auskunft erteilen’, Press release, 15 June 2016, available at: <http://bverwg.de/presse/pressemitteilungen/pressemitteilung.php?jahr=2016&nr=53>. The decision (is not published yet).

<sup>16</sup> Germany, Act for the Improvement of the Cooperation in the Domain of the Protection of the Constitution (*Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes*), 17 November 2016.

<sup>17</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2015), *Entwurf eines Gesetzes zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes. Gesetzentwurf der Bundesregierung*. Printed Document 18/4654, 20 April 2015, pp. 66 and following, available at: <http://dip21.bundestag.de/dip21/btd/18/046/1804654.pdf>.

<sup>18</sup> Germany, Federal Council (*Bundesrat*) (2016), *Entwurf eines Gesetzes zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus: Gesetzentwurf der Bundesregierung*, Printed Document 295/16, 2 June 2016, <http://dipbt.bundestag.de/dip21/brd/2016/0295-16.pdf>. See also: Töpfer, E. (2016), *Gemeinsame Dateien für die internationale Geheimdienstkooperation? Hintergrundpapier zum Entwurf eines Gesetzes zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus*, Berlin, Deutsches Institut für Menschenrechte, [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/Ergebnispapiere\\_Zusammenfassungen\\_Hintergrundpapiere/Hintergrundpapier\\_Gemeinsame\\_Dateien\\_fuer\\_die\\_internationale\\_Geheimdienstkooperation\\_2016.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Ergebnispapiere_Zusammenfassungen_Hintergrundpapiere/Hintergrundpapier_Gemeinsame_Dateien_fuer_die_internationale_Geheimdienstkooperation_2016.pdf).

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Telecommunications (*Gesetz zur Beschränkung der des Brief-, Post- und Fernmeldegeheimnisses*, G10), arguing that, unlike in 1968 when the G10 Act was adopted, contemporary criminal and police laws provide sufficient means to respond to national security threats.<sup>19</sup> However, till June 2016 the bill was not even discussed in parliament. Proposals for the reform of parliamentary oversight were tabled by both opposition parties: The Left Party tabled a bill to amend the Parliamentary Control Panel Act (*Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes*) on 10 November 2015 aiming to improve cooperation of the federal control panel with its counterparts in the German states, to strengthen minority rights in the control panel and to expand information rights of other parliamentary bodies such as the committees for home affairs and defence.<sup>20</sup> On 18 April 2016, the Green Party tabled a proposal for a “more effective control of the intelligence services”, calling on the German Bundestag to vote for a better oversight by the Parliamentary Control Panel and the G10 Commission, among others, through the power to sanction intelligence services’ misconduct, an increase of staff and resources, the strengthening of minority rights and regular joint meetings of MPs from all committees who are involved in parliamentary oversight.<sup>21</sup> The decision on both proposals is pending but it is unlikely that they will be adopted by the majority of the parliament.

Meanwhile, the parties of the ruling **grand coalition** have negotiated proposals for the legal regulation of BND “open sky” surveillance and a reform of the oversight regime behind closed doors. Apart from a whitepaper of the Social Democrats that was published in summer 2015 (see update on Chapter *Surveillance Measures* in FRA Report on page 14-15 for details), hardly any details of the plans of the coalition became public before the end of June 2016 but it was reported that the plans met significant resistance from “hardliners” in the conservative parties and the intelligence services bureaucracy.<sup>22</sup> On 28 June 2016, the Federal Cabinet approved the Bill on Foreign-to-Foreign Telecommunication Surveillance of the Federal Intelligence Service (*Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*) but did not table the bill in the Federal Council (*Bundesrat*) before the start of the summer break.<sup>23</sup> However, on 5 July 2016 the parliamentary parties of the grand coalition tabled the same bill<sup>24</sup> as well as a proposal for the reform of the parliamentary oversight of the federal intelligence services<sup>25</sup> in the German Bundestag. The first readings of the two bills were held in the last plenary session of the Bundestag before the summer break on 8 July 2016. Both bills were transferred to the committees for further proceedings..

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<sup>19</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2015), *Entwurf eines Gesetzes zur Aufhebung des Artikel 10-Gesetzes und weiterer Gesetze mit Befugnis für die Nachrichtendienste des Bundes zu Beschränkungen von Artikel 10 des Grundgesetzes (G 10-Aufhebungsgesetz – G 10-AufhG)*. *Gesetzentwurf der Fraktion DIE LINKE*, Printed Document 18/5453, 2 July 2015, available at: <http://dipbt.bundestag.de/dip21/btd/18/054/1805453.pdf>.

<sup>20</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2015), *Entwurf eines Ersten Gesetzes zur Änderung des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes*. *Gesetzentwurf der Fraktion DIE LINKE*, Printed Document 18/6640, available at: <http://dipbt.bundestag.de/doc/btd/18/066/1806640.pdf>.

<sup>21</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Für eine wirksamere Kontrolle der Nachrichtendienste*. *Antrag der Fraktion BÜNDNIS 90/DIE GRÜNEN*, Printed Document 18/8163, available at: <http://dipbt.bundestag.de/dip21/btd/18/081/1808163.pdf>.

<sup>22</sup> Aust, S. et al. (2016), ‘Kanzleramt legt BND-Reform vorerst auf Eis’, *Die Welt*, 18 March 2016, available at: <http://m.welt.de/politik/deutschland/article153455819/Kanzleramt-legt-BND-Reform-vorerst-auf-Eis.html>.

<sup>23</sup> Germany, Federal Government (*Bundesregierung*), ‘Klare Regeln für die Auslandsaufklärung’, Press release, 28 June 2016, available at: [www.bundesregierung.de/Content/DE/Artikel/2016/06/2016-06-28-gesetz-bnd-ausland-ausland-fernmeldeaufklaerung.html](http://www.bundesregierung.de/Content/DE/Artikel/2016/06/2016-06-28-gesetz-bnd-ausland-ausland-fernmeldeaufklaerung.html).

<sup>24</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016): *Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*. *Gesetzentwurf der Fraktionen der CDU/CSU und SPD*. Printed Document 18/9041, 5 June 2016, available at: <http://dipbt.bundestag.de/doc/btd/18/090/1809041.pdf>, zuletzt geprüft am 06.07.2016.

<sup>25</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016): *Entwurf eines Gesetzes zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*. *Gesetzentwurf der Fraktionen der CDU/CSU und SPD*. Printed Document 18/9040, 5 June 2016, available at: <http://dipbt.bundestag.de/doc/btd/18/090/1809040.pdf>, zuletzt geprüft am 06.07.2016.

Briefly summarised, the **Bill on Foreign-to-Foreign Telecommunication Surveillance of the Federal Intelligence Service** aims to regulate the BND domestic surveillance of foreigners' telecommunication extracted at German communication hubs or by satellite interception, whereas data collection in the context of extraterritorial surveillance in foreign countries shall remain unregulated. For this purpose, the BND shall be authorized to collect and process any telecommunication content data – except of EU institutions, public authorities of EU Member States and EU citizens – from telecommunication networks if these data are deemed necessary to detect and preempt “threats against internal or external security”, to protect Germany’s “capacity to act”, or to collect “other intelligence of importance for German foreign and security policies” on events to be specified by a core group of five federal ministries and the Federal Chancellery. The selectors being used to search the flow of telecommunication data must not contradict the interests of German foreign and security policy. However, according to the bill EU institutions, public authorities of Member States and EU citizens may be targeted as well if this aims to detect and preempt risks of military or terrorist attacks, arms proliferation, cyberthreats, serious organized crime and human smuggling, or if this aims to extract only intelligence on events in third countries which is of significant relevance for national security.

The selection of telecommunication networks to be targeted shall be ordered in advance by the Federal Chancellery and approved by a new oversight body, the “Independent Body” (*Unabhängiges Gremium*). The new oversight body shall be located at the Federal Court of Justice (*Bundesgerichtshof*) in Karlsruhe and shall be composed of two federal judges and one prosecutor from the Public Prosecutor General of the Federal Court of Justice (*Generalbundesanwalt am Bundesgerichtshof*). The three members and their three proxies shall be appointed by the Federal Government following the suggestion of the President of the Federal Court of Justice respectively of the Public Prosecutor General. The oversight body shall also approve selectors targeting the communications of EU institutions or public authorities of Member States. Surveillance of EU citizens shall not to be approved by the “Independent Body” prior to surveillance but the body may exercise ex post checks. Surveillance affecting the rest of the world shall be exempt from oversight by the “Independent Body”.

European Union institutions and citizens may only be targeted under specific circumstances, e.g. to detect and preempt international terrorism, arms proliferation, cyber attacks, or to collect information that are only related to third countries and which are of special relevance for national security.

Moreover, the bill aims to regulate and legalise surveillance cooperations of the BND and foreign intelligence services, and the automated sharing of information among the BND and its partners by means of joint international databases.

The **Bill to Advance the Parliamentary Oversight of the Federal Intelligence Services** (*Entwurf eines Gesetzes zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*) aims to establish a “Permanent Representative” (*Ständiger Bevollmächtigter*) and increase staff who shall support the Parliamentary Control Panel and coordinate investigations ordered by the panel. The Permanent Representative shall be authorized to attend all meetings of the Control Panel, the Trust Panel and the G10 Commission, thus, acting as an interface between the different oversight bodies. Although the direct cooperation between the oversight bodies shall be improved as well, the reform proposal does not aim to allow the sharing of classified information among the three bodies. Thus, the fragmentation of oversight is likely to remain, even if mitigated by the new function of the Permanent Representative.

The Home Affairs Committee of the German Bundestag will organise an **expert hearing on the two bills in late September**. It is planned that the parliament adopts the bills before the end of 2016.

## 1.2 International intelligence services cooperation

### Regulation of international cooperation

Key to the regulation of the international cooperation of the German intelligence services are Sections 19 (3) and 19 (2) of the Federal Act on the Protection of the Constitution (BVerfSchG).<sup>26</sup> According to Section 19 (3) of the BVerfSchG read in conjunction with Section 9 (2) of the Federal Intelligence Service Act (BNDG) and Section 11 (1) of the Military Counter-Intelligence Service Act (MADG),<sup>27</sup> the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV), the BND and the Military Counter-Intelligence Service (*Militärischer Abschirmdienst*, MAD) may transfer personal data to „foreign public authorities as well as supra- and international bodies“ if this is deemed necessary for the implementation of their own tasks or to preserve significant security interests of the receiving party. A transfer must not take place if it conflicts with foreign concerns of Germany or if interests of affected persons warrant protection and prevail. Any transfer has to be documented. It has to be pointed out to the receiving party that the data may only be used for the same purpose for which it was transferred and that the German intelligence service from which the data originate reserves the right to ask how data are used.

According to Section 19 (2) of the BVerfSchG read in conjunction with Section 9 (2) of the BNDG and Section 11 (1) of the MADG, the BfV, BND and MAD may transfer personal data to bodies of the allied armed forces stationed in Germany as far as the services are obliged to do so in the context of Article 3 of the Supplementary Agreement to the NATO Status of Forces Agreement (*Zusatzabkommen zu dem Abkommen zwischen den Parteien des Nordatlantikvertrages über die Rechtsstellung ihrer Truppen hinsichtlich der in der Bundesrepublik Deutschland stationierten ausländischen Truppen*) which is ratified by Belgium, Canada, France, Germany, the Netherlands, the United Kingdom and the United States.<sup>28</sup> The Supplementary Agreement provides for the commitment of the German intelligence services – as well as all other German authorities – to closely cooperate with the allied forces in particular to promote and protect the security and assets of the Federal Republic of Germany, the partner states, their forces, their civil staff and families, namely by the collection, exchange and protection of relevant intelligence. Article 3 (3a) of the Supplementary Agreement explicitly provides for the exchange of personal data within the limits of national law and only for purposes of implementing the Supplementary Agreement and the NATO Status of Forces Agreement. Unlike Section 19 (3) of the BVerfSchG, Section 19 (2) of the BVerfSchG does neither provide for additional limitations nor documentation. A recent legal commentary claims that the limitations laid down in Section 19 (3) of the BVerfSchG should apply to data transfers with NATO partners as well in order to be practiced in line with constitutional law.<sup>29</sup> It is unknown if the intelligence services do read the law in the same manner.

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<sup>26</sup> Germany, Act on the Cooperation of the Federation and the States in Matters of the Protection of the Constitution and on the Federal Office for the Protection of the Constitution (*Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz*), 20 December 1990 as amended on 17 November 2015, available at: [www.gesetze-im-internet.de/bverfschg/BJNR029700990.html](http://www.gesetze-im-internet.de/bverfschg/BJNR029700990.html).

<sup>27</sup> Germany, Act on the Federal Intelligence Service (*Gesetz über den Bundesnachrichtendienst*), 20 December 1990 as amended on 17 November 2015, available at: [www.gesetze-im-internet.de/bndg/BJNR029790990.html](http://www.gesetze-im-internet.de/bndg/BJNR029790990.html); Germany, Act on the Military Counter-Intelligence Service (*Gesetz über den militärischen Abschirmdienst*), 20 December 1990 as amended on 17 November 2015, available at: [www.gesetze-im-internet.de/madg/BJNR029770990.html](http://www.gesetze-im-internet.de/madg/BJNR029770990.html).

<sup>28</sup> Germany, Supplementary Agreement to the NATO Status of Forces Agreement (*Zusatzabkommen zu dem Abkommen zwischen den Parteien des Nordatlantikvertrages über die Rechtsstellung ihrer Truppen hinsichtlich der in der Bundesrepublik Deutschland stationierten ausländischen Truppen*), 3 August 1959 as amended on 28 September 1994, available at: [https://beck-online.beck.de/?vpath=bibdata%2fges%2fnato\\_tsuabk%2fcont%2fnato\\_tsuabk.htm](https://beck-online.beck.de/?vpath=bibdata%2fges%2fnato_tsuabk%2fcont%2fnato_tsuabk.htm).

<sup>29</sup> Bock, W. (2014), ‘§ 19 BVerfSchG’, in: Schenke, W. et al. (eds.), *Sicherheitsrecht des Bundes*, München, C.H. Beck, p. 1242.



The transfer of data obtained by the strategic surveillance of international telecommunication to and from Germany by the BND to foreign partners is regulated as a special case by Section 7a of the G10 Act:<sup>30</sup> Under Sections 7a (1) and 7a (2) of the G10 Act, the BND may transfer such data to foreign intelligence services or bodies of the allied forces stationed in Germany if this is deemed necessary for the protection of concerns of importance for German foreign and security policy or significant security interests of the receiving party. No interests of affected persons that warrant protection and prevail must conflict with the data transfer; an adequate data protection level is to be warranted by the receiving party, it is to be assumed that the usage of data follows the basic principle of the rule of law, and the principle of reciprocity should be established. The data transfer to foreign intelligence services has to be approved by the Federal Chancellor. The data transfer is decided by a BND officer who has to be an administrative lawyer. The transfer has to be documented and logged for one year. Receiving parties have to sign up to purpose limitation, to keep the tag on the data that indicates their origin from telecommunication surveillance, and to inform about further usage on request of the BND. Data transfers have to be reported to the G 10 Commission on a monthly basis, and the Parliamentary Control Panel is to be informed at least once in six months.

Data which are obtained in the context of the extralegal “open sky” surveillance of foreign telecommunication by the BND do not fall under the G 10 Act. Thus, the foreign transfer of such data is regulated by Section 9 (2) of the BNDG read in conjunction with Sections 19 (2) or 19 (3) of the BVerfSchG (see above) – at least when they are collected at premises in Germany. If the above mentioned provisions also apply to BND data collection in foreign countries is contested.

The receipt of foreign intelligence is not regulated by German law, except from the requirement of Section 7a (1) No. 3 of the G10 Act that the exchange of communication surveillance data should follow the “principle of reciprocity” (*Prinzip der Gegenseitigkeit*), which means that data flow should be no oneway.

The legal provisions for data exchange of the intelligence services with other authorities are detailed by internal regulation that is usually classified.<sup>31</sup> The existence of a classified internal regulation on international data exchange of the BfV was, for example, reported, in April 2016 by an officer of the BfV during a hearing of the NSA Inquiry Committee.<sup>32</sup>

An important decision for the field of international security cooperation was proclaimed by the Federal Constitutional Court on 20 April 2016.<sup>33</sup> The court decided that new counterterrorism powers of the Federal Criminal Police Office (*Bundeskriminalamt*, BKA) and its regulation of international information exchange were partly violating fundamental rights. A group of complainants had challenged the amendment of the BKA Act from 2008 by which secret surveillance was authorised for the purpose to prevent and respond to international terrorism. At stake was also Section 14 of the BKA Act which regulates international data exchange with non-EU partners. The court noted that any transfer of personal data is an interference with the right to privacy. Therefore the BKA has to respect the constitutional limits which apply to domestic data transfers also when sharing information with foreign partners.

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<sup>30</sup> Germany, Act on the Restriction of the (*Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses*), 26 June 2001 as amended on 17 November 2015, available at: [www.gesetze-im-internet.de/g10\\_2001/BJNR125410001.html](http://www.gesetze-im-internet.de/g10_2001/BJNR125410001.html).

<sup>31</sup> Bruch, K.P. et al. (2013), *Abschlussbericht der Bund-Länder-Kommission Rechtsterrorismus*, Berlin, pp. 81 and following.

<sup>32</sup> *hib. heute im bundestag* (2016), Zeuge: Keine Hilfe bei Drohneneinsätzen, 28 April 2016, available at: [www.bundestag.de/presse/hib/201604/-/420824](http://www.bundestag.de/presse/hib/201604/-/420824).

<sup>33</sup> Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 966/09, 20 April 2016, [www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420\\_1bvr096609.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420_1bvr096609.html).

To satisfy this requirement information transfer needs to be limited to cases comparable with the situation in which the data were initially collected. For foreign countries to receive data they have to warrant an adequate level of data protection according to an assessment of the BKA. Any adequacy decision of the BKA needs regular update, external oversight and transparency.<sup>34</sup> In the light of these requirements, the court declared Section 14 of the BKA Act partly unconstitutional and demands a revision of the legislation until 30 June 2018. Several commentators see the decision also as an important signal for the intelligence services as the legal basis of their international information exchange stands on similar grounds.<sup>35</sup>

## Oversight of international cooperation

Executive oversight is very likely to face many practical problems when confronted with the dynamics of the extensive international cooperation in particular of the BND.<sup>36</sup> However, no legal limits exist for the supervision of the intelligence services by the federal ministries and the chancellery. Other mechanisms of oversight of the international cooperation of German intelligence services are limited in several ways, by law and in actual practice.

The powers of the Parliamentary Control Panel to make the intelligence services accountable ends when it comes to the “third party rule”. According to Sections 6 (1) and 6 (2) of the Parliamentary Control Panel Act the federal government is not obliged to provide information about information and objects (*Informationen und Gegenstände*)<sup>37</sup> that do not fall under the authority (*Verfügungsberechtigung*) of the federal services, or if it is necessary to withhold information to protect the access to sources. Even commentators who point out that the Control Panel is bound to secrecy conclude that is left to the foreign partner services to determine who are trustworthy “third parties”; any breach of the terms of cooperation could cause the disruption of information exchange and an isolation from the “intelligence community”. It is debated if German intelligence services should only accept information from foreign partners which could be shared with the Control Panel in general, or if conflicts between oversight and “third party rule” should be solved in individual situations by a revision of the cooperation with a particular foreign partner. However, these suggestions do not seem to inform the current practice.<sup>38</sup> A recent example for the limits of oversight by the Parliamentary Control Panel is the conflict about the “selectors” from the NSA being used by the BND to filter data

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<sup>34</sup> *Ibid*, paras. 323-354.

<sup>35</sup> Deutsches Institut für Menschenrechte (2016), ‘Urteil des Bundesverfassungsgerichts zum BKA-Gesetz: Institut begrüßt Vorgaben für menschenrechtskonforme internationale Sicherheitskooperation’, Press release, 20 April 2016, available at: [www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemittteilung-urteil-des-bundesverfassungsgerichts-zum-bka-gesetz-institut-begruesst-vorgaben-f/](http://www.institut-fuer-menschenrechte.de/aktuell/news/meldung/article/pressemittteilung-urteil-des-bundesverfassungsgerichts-zum-bka-gesetz-institut-begruesst-vorgaben-f/); Humanistische Union (2016), ‘Jetzt sind die Gesetzgeber in Bund und Ländern gefordert, endlich verfassungsgemäße Zustände herzustellen’, Press release, 20 April 2016, available at: [www.humanistische-union.de/nc/aktuelles/aktuelles\\_detail/back/aktuelles/article/jetzt-sind-die-gesetzgeber-in-bund-und-laendern-gefordert-endlich-verfassungsgemaesse-zustaende-herz/](http://www.humanistische-union.de/nc/aktuelles/aktuelles_detail/back/aktuelles/article/jetzt-sind-die-gesetzgeber-in-bund-und-laendern-gefordert-endlich-verfassungsgemaesse-zustaende-herz/); Kipker, D.-J. (2016), ‘Das aktuelle Urteil des BVerfG zum BKA-Gesetz – eine Nachhilfe in Sachen Verfassungsrecht für Gesetzgeber und Sicherheitsbehörden’, 3 May 2016, available at: [www.eaid-berlin.de/?p=1116](http://www.eaid-berlin.de/?p=1116).

<sup>36</sup> Gerhard Schindler, the president of the BND going to retire on 30 June 2016, reported in a recent interview that the BND cooperates with 450 foreign intelligence services. See: FOCUS (2016), ‘Gemeinsames Interview der Präsidenten Gerhard Schindler und Hans-Georg Maaßen’, 16 April 2016, available at: [www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/interviews/int-20160416-focus](http://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/interviews/int-20160416-focus).

<sup>37</sup> The German term „Gegenstände“ can mean both physical objects/artefacts and intangible subjects/matters. Neither from the written text of the law nor from commentaries it is clear if both meanings apply, and what „Gegenstände“ would cover if read as subjects/matters.

<sup>38</sup> Singer, J. (2015), *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes: Kontrollgremiumgesetz - PKGrG*, Heidelberg, Springer, pp. 112 and following. See also: Germany, German Bundestag (*Deutscher Bundestag*) (1999), Entwurf eines Gesetzes zur Änderung von Vorschriften über parlamentarische Gremien, Printed Document 14/539, 16 March 1999, p. 7, available at: <http://dip21.bundestag.de/dip21/btd/14/005/1400539.pdf>.

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flows in the course of its strategic surveillance of telecommunication. Finally, the federal government denied an inspection of the list of “NSA selectors” by the Control Panel.<sup>39</sup>

Similarly, also the NSA Inquiry Committee was denied access to the NSA selectors under its own terms. A compromise was discussed according to which the committee’s chairpersons of each party could scrutinize information at the premises of the Federal Chancellery but without being allowed to take copies or notes. This procedure is known as the “Treptow Procedure” (*Treptow-Verfahren*) by which top secret information that is protected by the “third party rule” is revealed to a selected group of MPs under top secret conditions. Precondition for such access to information is that the third party gave approval in intergovernmental consultations (*Konsultationsverfahren*) which are prescribed by memoranda of agreement or understanding between the intelligence services.<sup>40</sup>

Beyond the limits on “information and objects” which fall under the third party rule, the federal government is, at least in theory, obliged to proactively inform the Parliamentary Control Panel about the intelligence services’ “general activities” and “processes of particular importance” (*Vorgänge von besonderer Bedeutung*), and on request of the panel about “other processes”.<sup>41</sup> Since the Parliamentary Control Panel revised (and published) its rules of procedure in 2014 in response to its unawareness of many details of the cooperation between the BND and the NSA, an annex to the rules of procedure circumscribes categories of situations supposed to fall under the definition of “processes of particular importance” in order to harmonise the legal interpretation and inform practitioners. Among others, the annex lists “agreements about new cooperations of substantial importance”, the “establishment of joint units” and the “introduction of new methods and instruments of substantial importance in the context of international cooperation”.<sup>42</sup>

The case of the “NSA selectors” mentioned above has also shown the practical limits of the oversight by the G10 Commission who is, according to Section 15 (5) of the G10 Act authorized to demand information about all issues related to the implementation of the G10 Act and inspect all relevant documents, electronic data, software and premises. Whereas it is acknowledged that this does not entail any authority over foreign authorities, it is unclear if the “third party rule” limits the oversight by the G10 Commission.<sup>43</sup> The federal government demonstrated its legal opinion when it denied the G10 Commission *ex post* access to the NSA selectors that were used to filter data in the course of operation Eikonol that was approved by the Commission without knowing that its real purpose was not strategic surveillance of interna-

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<sup>39</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, Printed Document 18/7962, 21 March 2016, p. 8, available at: <http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf>.

<sup>40</sup> The „Treptow Procedure“ was invented when a former parliamentary inquiry committee that investigated the complicity of the BND in extraordinary renditions and the Iraq war from 2006 to 2009 demanded access to information shared by foreign intelligence services. See: heute im bundestag (2015), ‘Gravierender Vorfall’, 5 March 2015, available at: [www.bundestag.de/presse/hib/2015\\_03/-/364014](http://www.bundestag.de/presse/hib/2015_03/-/364014); Prantl, H. (2015), ‘Verflixtes Verfahren’, *Süddeutsche Zeitung*, 22 May 2015, available at: [www.sueddeutsche.de/politik/bnd-affaere-verflixtes-verfahren-1.2490608](http://www.sueddeutsche.de/politik/bnd-affaere-verflixtes-verfahren-1.2490608).

<sup>41</sup> Section 4 (1) of the Parliamentary Control Panel Act.

<sup>42</sup> Germany, Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) (2014), *Geschäftsordnung gemäß § 3 Abs. 1 Satz 2 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Kontrollgremiumgesetz – PKGrG) vom 29. Juli 2009 (BGBl. I S. 2346)*, 12 March 2014 as amended on 4 February 2015, available at: [www.bundestag.de/blob/366638/21f40aeb8bfb9ddf36e01511150a2add/go\\_pkgr-data.pdf](http://www.bundestag.de/blob/366638/21f40aeb8bfb9ddf36e01511150a2add/go_pkgr-data.pdf).

<sup>43</sup> Huber, member of the G10 Commission, emphasises that, unlike Section 6 of the Parliamentary Control Panel Act, the G10 Act does not mention any limits of oversight. See: Huber, B. (2014), ‘Artikel 10-Gesetz § 15’, in: Schenke, W. et al. (eds.), *Sicherheitsrecht des Bundes*, München, C.H. Beck, pp. 1451 and following. In contrast, Singer, who is supporting both the Parliamentary Control Panel and the G10 Commission in the administrative department of the German Bundestag, explicitly mentions the G10 Commission when referring to the “third party rule” in his comment on Section 6 of the Parliamentary Control Panel Act. See: Singer, J. (2015), *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes: Kontrollgremiumgesetz - PKGrG*, Heidelberg, Springer, pp. 113 and following.

tional communication to and from Germany but of foreign communication routed via German communication hubs. In reaction to the denial the G10 Commission lodged a legal complaint with the Federal Constitutional Court for the first time. The Court is reported to plan a hearing later this year.<sup>44</sup>

Similarly, the oversight by the Federal Data Protection Commissioner was contained when her staff inspected the SIGINT post of the BND at Bad Aiblingen and was denied access to a premise inhabited by the NSA with reference to “national security” according to Section 24 (4) of the Federal Data Protection Act (*Bundesdatenschutzgesetz, BDSG*).<sup>45</sup>

<sup>44</sup> Bundesverfassungsgericht (2016), ‘Übersicht für das Jahr 2016’, available at:

[www.bundesverfassungsgericht.de/DE/](http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/vs_2016/vorausschau_2016_node.html)

[Verfahren/Jahresvorausschau/vs\\_2016/vorausschau\\_2016\\_node.html](http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresvorausschau/vs_2016/vorausschau_2016_node.html). (The G10 case is application 2 BvE 5/15)

<sup>45</sup> Kreml, S. (2015), ‘NSA-Ausschuss: Datenschützerin wirft BND grobe Rechtsverstöße vor’, *heise online*, 12 November 2015, available at: [www.heise.de/newsticker/meldung/NSA-Ausschuss-Datenschuetzerin-wirft-BND-grobe-Rechtsverstoesse-vor-2920316.html](http://www.heise.de/newsticker/meldung/NSA-Ausschuss-Datenschuetzerin-wirft-BND-grobe-Rechtsverstoesse-vor-2920316.html).

## 1.3 Access to information and surveillance

### Right to access documents

Access to information held by federal authorities is regulated by the Act to Regulate Access to Federal Information (*Informationsfreiheitsgesetz*, IFG).<sup>46</sup> Section 3 of the IFG provides for the “protection of special public concerns”. Under these provisions no right to access information is granted, among others, if the emergence of the particular information may have “harmful effects” for international relations, military and other concerns of security-relevance for the Federal Armed Forces (*Bundeswehr*), or concerns of internal or external security (Section 3 No. 1 a-c IFG), if the emergence of the information endangers “public security” (Section 3 No. 2 IFG), if the information is classified by professional of public secrecy regulations (Section 3 No. 4 IFG) or was designated as confidential information by the originator (Section 3 No. 7 IFG).

As a general principle, the question of when particular information from the authorities has to be unveiled or not has to be decided on a case to case basis. Case law determined, for instance, that the formal classification of information is not sufficient to restrict access. Rather the classification has to be justified also in substantive respect which in effect means that older classifications have to be reassessed when access to information is requested.<sup>47</sup>

However, citizens have no right at all to request information from the three federal intelligence services and “authorities and other bodies of the federal state” that are listed, according to the Security Check Act (*Sicherheitsüberprüfungsgesetz*), by ordinance of the federal government to be handling information which is classified as “secret” or “top secret”, e.g. in the area of critical infrastructures.<sup>48</sup> In a recent decision the Federal Administrative Court (*Bundesverwaltungsgericht*) clarified that this general exemption from the right to freedom of access to documents does also cover documents originating from the intelligence services which are held by authorities of executive supervision.<sup>49</sup>

At the state level only 12 states have adopted freedom of information acts, namely Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg Western Pomerania, Northrhine Westphalia, Rhineland Palatine, Saarland and Saxony Anhaltinia, Schleswig-Holstein, Thuringia and, since January 2016, also Baden-Württemberg.<sup>50</sup> How the state intelligence services are treated differs: Whereas, for example, Baden-Württemberg excludes the state intelligence service from the right to information at all (Section 2 (3) of the Baden-Württemberg IFG), the Berlin IFG provides that information can only be withheld on a case by case basis (Section 5 to 11 of the Berlin IFG).

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<sup>46</sup> Germany, Act to Regulate Access to Federal Information (*Gesetz zur Regelung des Zugangs zu Informationen des Bundes*), 5 September 2005 as amended on 7 August 2013, available at: [www.gesetze-im-internet.de/ifg/index.html#BJNR272200005BJNE000300000](http://www.gesetze-im-internet.de/ifg/index.html#BJNR272200005BJNE000300000).

<sup>47</sup> Germany, Federal Commissioner for Data Protection and Freedom of Information (*Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) (2010), *Tätigkeitsbericht zur Informationsfreiheit für die Jahre 2008 und 2009. 2. Tätigkeitsbericht*, Bonn, pp. 19-20, referring to Federal Administrative Court decisions 7 C 21.08 and 7 C 22.08

<sup>48</sup> Section 3 No. 8 of the IFG.

<sup>49</sup> Germany, Federal Administrative Court (*Bundesverwaltungsgericht*), BVerwG 7 C 18.14, 25 February 2016, available at: [http://www.bverwg.de/entscheidungen/verwandte\\_dokumente.php?ecli=250216U7C18.14.0](http://www.bverwg.de/entscheidungen/verwandte_dokumente.php?ecli=250216U7C18.14.0)

<sup>50</sup> See the list at:

[www.bfdi.bund.de/DE/Infothek/Anschriften\\_Links/LandesInformationsfreiheitsbeauftragte/LandesInformationsfreiheitsbeauftragte\\_liste.html?nn=5571352](http://www.bfdi.bund.de/DE/Infothek/Anschriften_Links/LandesInformationsfreiheitsbeauftragte/LandesInformationsfreiheitsbeauftragte_liste.html?nn=5571352), and for the newly adopted State Freedom of Information Act Baden-Württemberg (*Landesinformationsfreiheitsgesetz Baden-Württemberg*), 17 December 2015, available at: [www.landesrecht-bw.de/jportal/portal/t/g2u/page/bsbawueprod.psml;jsessionid=7B9F63D2264ED25A8E80DA5127A56164.jp91?pid=Dokumentanzeige&showdoccase=1&js\\_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=jlr-InfFrGBWpP10&doc.part=X&doc.price=0.0#focuspoint](http://www.landesrecht-bw.de/jportal/portal/t/g2u/page/bsbawueprod.psml;jsessionid=7B9F63D2264ED25A8E80DA5127A56164.jp91?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=jlr-InfFrGBWpP10&doc.part=X&doc.price=0.0#focuspoint).

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## Data subjects' right to access

Individuals' right to request information about their personal data being stored in paper files and electronic systems by the intelligence services is regulated by Section 15 of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*, BVerfSchG), Section 7 of the Act on the Federal Intelligence Service (*Bundesnachrichtendienstgesetz*, BNDG) and Section 9 of the Act on the Military Counterintelligence Service (*Gesetz über den Militärischen Abschirmdienst*, MADG).

According to Section 15 of the BVerfSchG, individuals may exercise subjects access rights free of charge at the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV) but the conditions under which the BfV has to disclose information are narrowly defined. Firstly, the individual has to point to a "specific situation" (*konkreter Sachverhalt*), for example, an operation which was reported in the media. It is contested whether this means that affected persons are only entitled to ask for information held about them in relation to this specific situation, or if the reference to the specific situation functions as a door-opener to ask for his or her personal information in general.<sup>51</sup> Secondly, the individual needs to justify a "special interest" (*besonderes Interesse*), e.g. if he or she suspects that the information was obtained illegally or that false information caused negative effects when applying for a job in a high-security area entailing cross-checks with the BfV. Moreover, personal information held in paper files do only fall under the scope of the provision if they are indexed by the IT systems of the BfV.

The BfV has to dismiss a subject access request that is justified under the above listed conditions if the disclosure of information a) would threaten the implementation of its tasks, b) could put sources at risk or if there are reasons to fear that the request aims to investigate the state of knowledge or operational methods of the BfV, c) could threaten public security or would have detrimental effects on the well-being of the federation or a German state, or d) would conflict with the secret legal status or the secret nature of the information or the fact that it is being held, in particular if legitimate interests of third parties prevail. Exempt from the disclosure of information are details about originators or parties who received the information.

Decisions to dismiss requests have to be taken by the president of the BfV or a representative to whom this authority is delegated. In case that any explanation could pose a risk for the purpose why a request was dismissed, no justification has to be given to the requesting individual. A written justification has, however, to be documented in the files of the BfV.

Individuals whose requests have been dismissed may turn to the Federal Data Protection Commissioner who can then approach the BfV on behalf of them to ask for information. On the basis of this information the Federal Data Protection Commissioner reports to the individuals about the results of this or her assessment. Unless authorized, these reports must, however, not leave any room for conclusions about the state of knowledge of the BfV. In individual cases, the Federal Ministry of the Interior may prohibit an assessment by the Federal Data Protection Commission for reasons of national security.

More or less the same rules apply to the Federal Intelligence Service (BND) and the Military Counterintelligence Service (MAD) as Section 7 of the BNDG and Section 9 of the MADG simply refer to Section 15 of the BVerfSchG. BNDG and MADG only depart from the provisions of the BVerfSchG when they define the authorities that can prohibit an assessment of

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<sup>51</sup> For the former opinion see: Mallmann, O. (2014), '§ 15 BVerfSchG', in: Schenke et al. (eds.), *Sicherheitsrecht des Bundes*, München, C.H. Beck, pp. 1211-1218. For the latter opinion see: Germany, German Bundestag (*Deutscher Bundestag*) (2009), *Tätigkeitsbericht 2007 und 2008 des Bundesbeauftragten für den Datenschutz und die Informationsfreiheit. 22. Tätigkeitsbericht*. Printed Document 16/12600, p 61. See also the discussion at: Gusy, C. (2011), *Grundrechte und Verfassungsschutz*, Wiesbaden, VS Verlag für Sozialwissenschaften, pp. 85-119.

an individual's appeal by the Federal Data Protection Commissioner for reasons of national security. In case of the BND this is the Federal Chancellery, in case of the MAD it is the Federal Ministry of Defense.

Data subjects' access rights to information held by the intelligence services of the states are regulated by the state acts on the protection of the constitution. As with the regulation of access to documents at the state level, the provisions differ: Some states follow the rigid rules of the Federal Act on the Protection of the Constitution whereas others are less strict and provide for a broader access right which is not being limited by the necessity to refer to "specific situations" or a "special interest".<sup>52</sup>

## 1.4 Update the FRA report

### Introduction

#### *Complementary information*

The reference in footnote 11 is correct. A special report by the Federal Data Protection Commissioner submitted to the German Bundestag in November 2013 could be added.<sup>53</sup>

#### *Updates*

The Parliamentary Control Panel (cf. FRA Report, footnote 11) has discussed the wider implications of the Snowden revelations also after November 2013 according to its recently published activity report. The discussions were related in particular to information that became public in the course of the hearings of the "NSA Enquiry Committee" of the German Bundestag, namely the use of NSA selectors by the Federal Intelligence Service, the strategic surveillance of telecommunication by the service itself and the principles of international intelligence cooperation. In addition, the services' modernisation of internet monitoring technology was discussed. However, details are not reported in the short activity report.<sup>54</sup>

## 1 Intelligence services and surveillance laws

### 1.1 Intelligence services

#### *Complementary information*

The reference in footnote 63 is correct but would be more precise when adding the relevant paragraph, Section 1 (1) of the Act on the Federal Intelligence Service.

The reference to S. Sule (2006) is missing in the bibliography.

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<sup>52</sup> Examples for less rigid regulation are Section 31 of the Act on the Protection of the Constitution in Berlin (*Gesetz über den Verfassungsschutz in Berlin*), 25 June 2001 as amended on 1 December 2010, available at: [www.berlin.de/sen/inneres/verfassungsschutz/grundlagen/rechtsgrundlagen/vsg\\_bln\\_2010.pdf](http://www.berlin.de/sen/inneres/verfassungsschutz/grundlagen/rechtsgrundlagen/vsg_bln_2010.pdf), or Section 12 of the Act on the Protection of the Constitution in the State of Brandenburg (*Gesetz über den Verfassungsschutz im Land Brandenburg*), 5 April 1993 as amended on 17 December 2014, available at: <http://bravors.brandenburg.de/gesetze/bbgverfsg>.

<sup>53</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2013), *Abhöraktivitäten US-amerikanischer Nachrichtendienste in Deutschland: Unterrichtung durch den Bundesbeauftragten für den Datenschutz und die Informationsfreiheit*, Printed Document 18/59, 15 November 2013, available at: <http://dip21.bundestag.de/dip21/btd/18/000/1800059.pdf>.

<sup>54</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, 21 March 2016, available at: <http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf>, pp. 8 and following.

For the sake of completeness, it should be noted:

- 1) As its Swedish counterpart, also the German Federal Intelligence Agency (BND) has the competence to conduct activities for both military and civil objectives (pp. 13-14). Section 1 (2) of the Act on the Federal Intelligence Service states that the BND collects information for the purpose of foreign intelligence “ which is of importance for the foreign and security policy of the Federal Republic of Germany” . See also detailed addendum in table 1.5.1.
- 2) Also Germany grants “intelligence-like means to units specialised in a defined threat” such as the Federal Criminal Police Office (*Bundeskriminalamt*, BKA) in the area of counterterrorism,<sup>55</sup> and the Customs Criminal Investigation Office (*Zollkriminalamt*, ZKA) in the area of combating proliferation, smuggling, money laundering and other cross-border organised crime.<sup>56</sup> Also state police forces are allowed “to conduct non-criminal investigations and use secret surveillance methods” (p. 14) for the purpose of “preventive combating of crime” (*vorbeugende Bekämpfung von Straftaten*) according to many state police acts. As some of the state offices for the protection of the constitution are additionally tasked with the collection of intelligence on organised crime,<sup>57</sup> and “fusion centres” (*Gemeinsame Zentren*) and databases shared by the police and intelligence services (*Gemeinsame Dateien*) have been established since 2004, the line between the police and the intelligence services is blurring both in terms of tasks and organisation.<sup>58</sup>

## 1.2 Surveillance measures

### *Errata*

On p. 16 it is reported that in Germany “1,000 staff are working at the BND ” [on SIGINT out 6,500 staff in 2014]<sup>59</sup>

### *Updates*

On p. 18 the calls for legal reform are mentioned. Meanwhile, the parliamentary party of the Social Democrats (SPD) presented a white paper outlining a framework for the reform of the BND “open sky” surveillance in summer 2015. The paper claims that the privacy of correspondence, posts and telecommunications (Article 10 of Basic Law) has a global though gradual effect. It proposes the regulation of the strategic surveillance of foreign communica-

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<sup>55</sup> According to Subchapter 3a (Sections 20a to 20x) of the Act on the Federal Criminal Police Office (*Bundeskriminalamtgesetz*), 7 July 1997 as amended on 31 August 2015, available at: [www.gesetze-im-internet.de/bkag\\_1997/BJNR165010997.html](http://www.gesetze-im-internet.de/bkag_1997/BJNR165010997.html).

<sup>56</sup> According to the Customs Investigation Service Act (*Zollfahndungsdienstgesetz - ZFdG*) which, among others, provides for the establishment of a special body of the German Bundestag tasked with the oversight of the surveillance of telecommunications by the ZKA (Section 23c (8) ZFdG, 16 August 2002 as amended on 3 December 2015, available at: [www.gesetze-im-internet.de/zfdg/BJNR320210002.html](http://www.gesetze-im-internet.de/zfdg/BJNR320210002.html)

<sup>57</sup> For example, the Bavarian State Office for the Protection Constitution according to Section 1 (1) of the Bavarian Act on the Protection of the Constitution (*Bayerisches Verfassungsschutzgesetz*), 10 April 1997 as amended on 22 July 2014, available at: [www.gesetze-bayern.de/Content/Document/BayVSG/true?AspxAutoDetectCookieSupport=1](http://www.gesetze-bayern.de/Content/Document/BayVSG/true?AspxAutoDetectCookieSupport=1).

<sup>58</sup> Töpfer, E. (2013), *Informationsaustausch zwischen Polizei und Nachrichtendiensten strikt begrenzen. Konsequenzen aus dem Urteil des Bundesverfassungsgerichts zur Antiterrordatei*. Berlin: Deutsches Institut für Menschenrechte (Policy Paper, 21), pp. 5 and following, available at: [www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Policy\\_Paper\\_21\\_Informationsaustausch\\_zwischen\\_Polizei\\_und\\_Nachrichtendiensten\\_strikt\\_begrenzen.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Policy_Paper_21_Informationsaustausch_zwischen_Polizei_und_Nachrichtendiensten_strikt_begrenzen.pdf).

<sup>59</sup> Germany, Federal Intelligence Service (*Bundesnachrichtendienst*) (2014), *Der Auslandsnachrichtendienst Deutschlands*, Berlin, p. 34, available at: [www.bnd.bund.de/DE/Service/Downloads/Dateien/BND\\_Broschuere.pdf?\\_\\_blob=publicationFile&v=8](http://www.bnd.bund.de/DE/Service/Downloads/Dateien/BND_Broschuere.pdf?__blob=publicationFile&v=8).



tion which is routed via German communication hubs without involving connections in Germany and the strengthening of external oversight by the G10 Commission in particular through an increase in support staff.<sup>60</sup> After the presentation of this white paper the SPD started negotiating a legislative reform with the Conservatives (CDU/CSU) in secrecy. However, in April 2016 media reported that the negotiations were put on hold due to pressure from the Federal Minister of Finance, Wolfgang Schäuble, and other representatives of the Conservatives.<sup>61</sup>

### 1.3 Member States' laws on surveillance

#### *Errata*

When on p. 21 the report mentions the SIGINT activities of the BND that are “not regulated in detail by law” it refers to passages of the Act on the Federal Intelligence Service. Footnote 119 needs to be corrected as “shall collect and analyse information required for obtaining ...” is Section 1 (2) rather than Section 1 (1) of the BND Act.

Footnote 175 refers to “situations in which its [German] intelligence service may gather signal intelligence: armed attack, international terrorism ...” Whereas the list of “situations” is only defined in Sections 5(1) and 8 of the G 10 Act, Section 1 (2) in conjunction with Section 2 (1) of the BND Act do only provide for the general authority to collect and process personal information which is of importance for foreign and security policy or for purposes of self-protection and security checks. Hence, it is suggested to delete the reference to the sections of the BND Act when the footnote is meant to reference the list of situations on p. 26.

#### *Complementary information*

In chapter 1.3.1.1. on targeted surveillance, Germany should be added to the list of Member States” in which “such targets may either be a group of people [...] or an individual” (p. 20). Section 3 of the G10 Act defines the categories of suspects who might become subjects of targeted surveillance by the German intelligence services.

In footnote 122 also the opinion of Hans-Jürgen Papier, former judge of the Federal Constitutional Court, who was heard by the NSA Committee of Inquiry of the German Bundestag as the third legal expert on the issue of the legality of BND surveillance on 22 May 2014 should be added.<sup>62</sup>

#### *Updates*

On 21 November 2015, an amendment of the G10 Act that was provided for by Section 6 of the Act on the Improvement of Cooperation in the Domain of the Protection of the Constitution (*Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes*)

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<sup>60</sup> Germany, Social Democratic Party in German Bundestag (*SPD-Bundestagsfraktion*) (2015), *Rechtsstaat wahren – Sicherheit gewährleisten!: Erste Konsequenzen aus dem NSA-Skandal: Eckpunkte der SPD-Bundestagsfraktion für eine grundlegende Reform der Strategischen Fernmeldeaufklärung des BND mit internationaler Vorbildwirkung*, Berlin, 16 June 2015, available at: [www.spdfraktion.de/sites/default/files/2015-06-16-eckpunkte\\_reform\\_strafma-r-endfassung.pdf](http://www.spdfraktion.de/sites/default/files/2015-06-16-eckpunkte_reform_strafma-r-endfassung.pdf).

<sup>61</sup> Diehl, J., Gebauer, M., Knobbe, M., Reiermann, C., Sauga, M., Schindler, J., Schmid, F., ‘Ohne Knautschzone’, in: *DER SPIEGEL*, 18/2016, 30 April 2016, pp. 20-22.

<sup>62</sup> Papier, H.-J. (2014), *Gutachterliche Stellungnahme: Beweisbeschluss SV-2 des ersten Untersuchungsausschusses des Deutschen Bundestages der 18. Wahlperiode*, available at: [www.bundestag.de/blob/280842/9f755b0c53866c7a95c38428e262ae98/mat\\_a\\_sv-2-2-pdf-data.pdf](http://www.bundestag.de/blob/280842/9f755b0c53866c7a95c38428e262ae98/mat_a_sv-2-2-pdf-data.pdf).

came into force that expanded the surveillance powers of the intelligence services:<sup>63</sup> A new section 3 (8) of the G10 Act provides that targeted surveillance may also be ordered against persons who are suspected of planning, committing or having committed cybercrimes according to Sections 202a (spying out data), 202b (intercept data) and 303a (manipulate data), 303b (computer sabotage) of the German Penal Code. In addition, a new Section 5 (8) of the G10 Act provides that the BND can also monitor international telecommunication to and from Germany in order to detect and respond to “international criminal, terrorist or state-controlled attacks using malware or similar harmful means of information technology against the confidentiality, integrity and availability of IT systems in cases of significant importance for the Federal Republic of Germany” .

## **FRA key findings**

Nothing to add.

## **2 Oversight of intelligence services**

### *Complementary information*

As in Sweden (p. 30) internal controls by data protection officers (*behördliche Datenschutzbeauftragte*) do also exist at the German federal intelligence services, according to Section 4f of the Federal Data Protection Act (*Bundesdatenschutzgesetz*).

As in the Netherlands or France, the Parliamentary Control Panel Act (PKGr) does provide an avenue for “whistleblowers” who can contact the Control Act according to Section 8 (1) of the PKGr. However, they have to send their submission also to their superiors.

### **2.1 Executive control**

#### *Errata*

The reference in footnote 220 is not complete. It would be Germany, G10 Act, Sections 10 (determining the executive procedure for the surveillance order) and 15 (6).

### **2.2 Parliamentary oversight**

#### **2.2.1 Mandate**

#### *Errata*

Not only one member of the the Parliamentary Control Panel can participate in sessions of the Trust Panel and vice versa (p. 37). Correct is that three persons, namely the the chairs, their proxies and an another tasked member for each panel, can participate in the sessions of the others panels, according to Section 9 PKGrG.

According to Section 1 (1) of the Parliamentary Control Panel Act, the Control Panel is not authorised to supervise all German intelligence services but only the three federal intelligence services, namely the Federal Office for the Protection of the Constitution, the Military Counter-Intelligence Service and the Federal Intelligence Service (p. 37).

#### *Update*

<sup>63</sup> Germany, Act on the Improvement of Cooperation in the Domain of the Protection of the Constitution (*Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes*), 17 November 2015.

Footnote 254 – new activity report of the Parliamentary Control Panel: Germany, German Bundestag (*Deutscher Bundestag*) (2016), Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015), Printed Document 18/7962, 21 March 2016, [dip21.bundestag.de/dip21/btd/18/079/1807962.pdf](http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf).

## **2.2.2 Composition**

Nothing to add.

## **2.2.3 Access to information and documents**

Nothing to add.

## **2.2.3 Reporting to parliament**

Nothing to add.

## **2.3 Expert oversight**

### **2.3.1 Specialised expert bodies**

*Update*

Not all four current members of the G 10 Commission are past MPs (p. 44). Bertold Huber is a retired administrative judge. Among the four substitutes is only one current MP, the other three substitutes are past MPs. (May 2016)

Staff of the secretariat of the Parliamentary Control Panel and the G10 Commission was increased in the recent years; the staff is currently 13 rather than six persons (p. 44).<sup>64</sup>

*Complementary information*

As it is not mentioned anywhere it should be noted that the membership of the G10 Commission is a “public honorary post” rather than a professional job (Section 15 (1) G10 Act). Thus, it is questionable to what extent they have “time to dedicate to the matter” (p. 41).

### **2.3.2 Data protection authorities**

Nothing to add.

## **2.4 Approval and review of surveillance measures**

*Errata*

The description of the approval process on p. 55 is a bit misleading. The Parliamentary Control Panel is only involved in the general approval of “telecommunications relations” which define the geographic areas and states of interest (Section 5 (1) G10 Act). Individual surveillance requests [better translate as orders (*Anordnungen*) as the request/application (*Antrag*) is

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<sup>64</sup> Töpfer, E. (2015), *Rechtsschutz im Staatsschutz?: Das Menschenrecht auf wirksamen Beschwerde in der Terrorismus- und Extremismusbekämpfung*, Policy Paper, Berlin, Deutsches Institut für Menschenrechte, available at: [www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Policy\\_Paper/Policy\\_Paper\\_33\\_Rechtsschutz\\_im\\_Staatsschutz.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Policy_Paper/Policy_Paper_33_Rechtsschutz_im_Staatsschutz.pdf), p. 19.

submitted by the intelligence service to the supervising ministry according to Section 9 G 10 Act] to be approved by the G10 Commission have to specify the search terms (selectors), the area of information collection, the communication channels and the maximum share of communication to be monitored (Section 10 (4) G 10 Act).

### *Update*

In the context of the revision of the Federal Act on the Protection of the Constitution also the G10 Act was amended.<sup>65</sup> The revised Section 14 of the G10 Act now makes explicit the role of the Federal Ministry of the Interior to preliminarily order strategic surveillance in emergency cases, while the approval of relevant telecommunication relation has to be approved by the chair of the Parliamentary Control Panel or his proxy within three days. The full approval by the Control Panel has to be obtained within two weeks.

### **FRA key findings**

Nothing to add.

## **3 Remedies**

### **3.1 A precondition: obligation to inform and the right to access**

Nothing to add.

### **3.2 Judicial remedies**

#### *Errata*

On p. 66 the report states that in Germany the highest administrative court is competent to review surveillance complaints. This is only true for complaints against administrative acts, including surveillance, of the Federal Intelligence Services. According to Chapter 6 (in particular Section 45) of the Rules of the Administrative Courts (*Verwaltungsgerichtsordnung*) complaints against the Federal Office for the Protection of the Constitution (BfV) or the Military Counterintelligence Service (MAD) have to be lodged with the local administrative courts.<sup>66</sup>

#### **3.2.1 Lack of specialisation and procedural obstacles**

##### *Complementary information*

Peter Schantz published a critique of the decision of the Federal Administrative Court from 28 May 2014 in which the court rejected the complaint of a lawyer against the strategic surveillance of the BND. Schantz shows that, even if the BND „only“ extracts 20 percent of bundled communication at a connection it is very unlikely that no mail of the complainant was caught in the dragnet of the BND. Hence, Schantz argues that the court did ignore its own case law on to the burden of proof and rather chose to delegate responsibility to the Federal Constitutional Court.<sup>67</sup>

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<sup>65</sup> Germany, Act to Improve Cooperation in the Domain of the Protection of the Constitution (*Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes*), 17 November 2015.

<sup>66</sup> Germany, Rules of the Administrative Courts (*Verwaltungsgerichtsordnung*), 21 January 1960 as amended on 21 December 2015, available at: [www.gesetze-im-internet.de/vwgo/BJNR000170960.html](http://www.gesetze-im-internet.de/vwgo/BJNR000170960.html).

<sup>67</sup> Schantz, P. (2015), 'Rechtsschutz gegen die strategische Fernmeldeüberwachung: Ein "blinder Fleck" im Rechtsstaat?', *Neue Zeitschrift für Verwaltungsrecht*, pp. 873–877, available at: <https://netzpolitik.org/2015/rechtsschutz-gegen-die-strategische-fernmeldeueberwachung-ein-blinder-fleck-im-rechtsstaat/>.

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### 3.2.2 Specialised judges and quasi-judicial tribunals

Nothing to add.

### 3.3 Non-judicial remedies: independence, mandate and powers

#### 3.3.1 Types of non-judicial bodies

*Errata?*

On p. 70 it the report refers to “[o]versight bodies other than parliamentary committees, such as those entailing executive and expert oversight (other than DPAs)” and mentions Germany in this context. We assume that this refers to the G10 Commission. However, as the G10 Commission was already listed in chapter 3.2.2. as “quasi-judicial tribunal” the reference is a bit confusing. As the chapter on “non-judicial bodies” is focussing on DPAs and ombudspersons rather than quasi-judicial functions, I would prefer to categorise the G10 Commission only as quasi-judicial tribunal as it has the power to issue binding decisions. However, “non-judicial” does also include “quasi-judicial” as both types of bodies are formally no courts.

Also on p. 70 the report claims that “in all EU-28 there are general ombudsperson institutions” . At the federal level no ombudsperson exists in Germany but only the Petitions Committee (*Petitionsausschuss*) of the German Bundestag which can be also approached in case of complaints against the intelligence services according to Article 17 of the Basic Law (*Grundgesetz*). The committee may transfer such complaints to the Parliamentary Control Panel, according to Section 8 (2) of the Parliamentary Control Panel Act (*Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes*, PKGrG). Although Section 8 (2) of the PKGrG does not provide for formal remedy it is seen as an important tool for oversight. If the Petitions Committee, serving as “filter”, forwards a complaint to the Control Panel, the panel can investigate the matter by exercising the full powers provided for by the Parliamentary Control Panel Act. From November 2013 to November 2015, the Petitions Committee forwarded 65 petitions to the Control Panel of which 40 referred to suspected surveillance measures of the intelligence services.<sup>68</sup>

Unlike claimed in the explanatory note 1 to figure 6 the Federal Data Protection Commissioner is not authorized to issue binding decisions. The sharpest sword of the Federal DPA is the reclamation (*Beanstandung*) according to Section 25 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*). A reclamations can be issued by the DPA if she or he detects privacy violations; in case of the federal intelligence services it is submitted to the supervising ministry or the chancellery for comment. The comments by the government shall also report what has to be done in reaction to the reclamation. However, in contested cases the government may simply report its conflicting opinion.<sup>69</sup>

#### 3.3.2 The issue of independence

Nothing to add.

#### 3.3.3 Powers and specialisation of non-judicial remedial bodies

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<sup>68</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, Printed Document 18/7962, 21 March 2016, available at: <http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf>, p. 13.

<sup>69</sup> Dammann, U. (2011), ‘§ 25’ in: Simitis, S. (ed.), *Bundesdatenschutzgesetz*, Baden-Baden, Nomos, pp.1079-1083.

Nothing to add.

**FRA key findings**

Nothing to add.

**Conclusions**

Nothing to add.

## 1.5 Check the accuracy of the figures and tables published in the FRA report (see the annex on Figures and Tables)

### 1.5.1 Overview of security and intelligence services in the EU-28

Given the hybrid role and structure of the *Bundesnachrichtendienst* (BND) it is not possible to perfectly fit the authority into the table below: The BND has both civil and military functions and is, as a matter of principle, the foreign (external) intelligence authority, which has, however, limited powers to collect data within the German borders. See detailed explanation in the table.

	Civil (internal)	Civil (external)	Civil (internal and external)	Military
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<p><b>DE</b></p>	<p>Federal Office for the protection of the Constitution/ <i>Bundesamt für Verfassungsschutz</i> (BfV)</p> <p>Besides the BfV each of the 16 German states has its own internal intelligence services: the <b>state authorities for the protection of the constitution</b> (<i>Landesbehörden für Verfassungsschutz</i>).</p> <p>Whereas seven of the 16 authorities are separate offices under the supervision of the state ministries of interior, the other nine authorities are departments of the ministries of interior.<sup>70</sup> According to Section 1 para. 1 No. 1 G10 Act, the state authorities for the protection of the constitution are also authorised to intercept telecommunication under the G10 Act. The implementation of their telecommunication surveillance power is regulated by state G10 implementation acts, according to Section 16 G10 Act. These implementation acts detail the rules for the G10 Commissions of the states.</p>		<p>Federal Intelligence Service/<i>Bundesnachrichtendienst</i> (BND)</p> <p>As a matter of principle, the BND is the <b>foreign intelligence authority tasked with collecting intelligence of relevance for German foreign and security policies</b>, according to Section 1 para. 2 BND Act. Hence, the BND “integrates economic, political and military foreign reconnaissance”.<sup>71</sup> As the <b>BND also serves military purposes and closely cooperates with the Federal Armed Forces (<i>Bundeswehr</i>) and the Ministry of Defence</b> more than 10 per cent of its staff is military personnel and one of the BND Vice Presidents is a high-ranking soldier in charge of “military affairs”.<sup>72</sup></p> <p>The BND is also authorised to collect and process information for the protection of its staff, premises and sources as well as for purposes of security checks of future or current staff or sources (Section 2 para. 1 BND Act). Thus, <b>surveillance operations might also occur within the German borders</b>. Nonetheless, the core business of the BND is the collection of foreign intelligence.</p>	<p>Military Counter-Intelligence Service/<i>Militärischer Abschirmdienst</i> (MAD)</p> <p>Though the MAD is the only military intelligence service that is explicitly mentioned in Section 1 of the Parliamentary Control Panel Act, it is <b>discussed if also other branches of the Armed Forces are engaged in “intelligence activities”</b> (<i>nachrichtendienstliche Tätigkeit</i>) which would fall under the scope of Art. 45d para. 1 of the Basic Law providing for the appointment of a body for the control of such activities by the German Bundestag.<sup>73</sup> Though not explicitly mentioned it is likely that these debates apply to the <b>Strategic Reconnaissance Command (<i>Kommando Strategische Aufklärung</i>) of the Armed Forces</b>.<sup>74</sup></p>
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## 1.5.2 Figure 1: A conceptual model of signals intelligence

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<sup>70</sup> See for an overview: [www.verfassungsschutz.de/de/service/landesbehoerden/](http://www.verfassungsschutz.de/de/service/landesbehoerden/), 25.04.2016.

<sup>71</sup> Germany, Federal Intelligence Service (*Bundesnachrichtendienst*), ‘Auftrag’, [www.bnd.bund.de/DE/Auftrag/Auftrag\\_node.html](http://www.bnd.bund.de/DE/Auftrag/Auftrag_node.html).

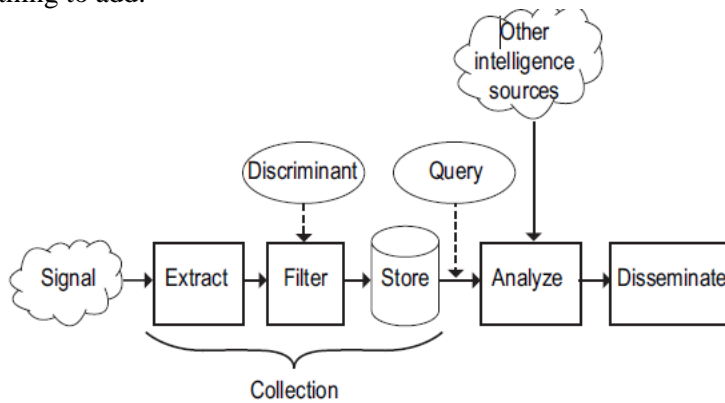
<sup>72</sup> Germany, Federal Intelligence Service (*Bundesnachrichtendienst*) (2014), *Der Auslandsnachrichtendienst Deutschlands*, Berlin, available at: [www.bnd.bund.de/DE/Service/Downloads/Dateien/BND\\_Broschuere.pdf?\\_\\_blob=publicationFile&v=8](http://www.bnd.bund.de/DE/Service/Downloads/Dateien/BND_Broschuere.pdf?__blob=publicationFile&v=8).

<sup>73</sup> Singer, J. (2015), *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes: Kontrollgremiumgesetz - PKGrG*, Heidelberg, Springer, p. 22-23; Germany, German Bundestag (*Deutscher Bundestag*) (2013), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2011 bis Oktober 2013): Unterrichtung durch das Parlamentarische Kontrollgremium*. Printed Document 18/217, 19 December 2013, p. 10, available at: <http://dip21.bundestag.de/dip21/btd/18/002/1800217.pdf>.

<sup>74</sup> For detailed information on the Strategic Reconnaissance Command see: Germany, Federal Armed Forces (*Bundeswehr*), ‘Die Dienststellen der Streitkräftebasis – Kommando Strategische Aufklärung’, available at: [www.kommando.streitkraeftebasis.de/portal/a/kdoskb/!ut/p/c/04\\_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK94uyk-OyUfL3s4kT9gmxHROCRV4XQ/](http://www.kommando.streitkraeftebasis.de/portal/a/kdoskb/!ut/p/c/04_SB8K8xLLM9MSSzPy8xBz9CP3I5EyrpHK94uyk-OyUfL3s4kT9gmxHROCRV4XQ/); Piper, G. (2014), ‘EloKa - die Abhörtruppe der Bundeswehr’, *Telepolis*, 9 August 2014, available at: [www.heise.de/tp/druck/mb/artikel/42/42478/1.html](http://www.heise.de/tp/druck/mb/artikel/42/42478/1.html).



Nothing to add.



### 1.5.3 Figure 2: Intelligence services' accountability mechanisms

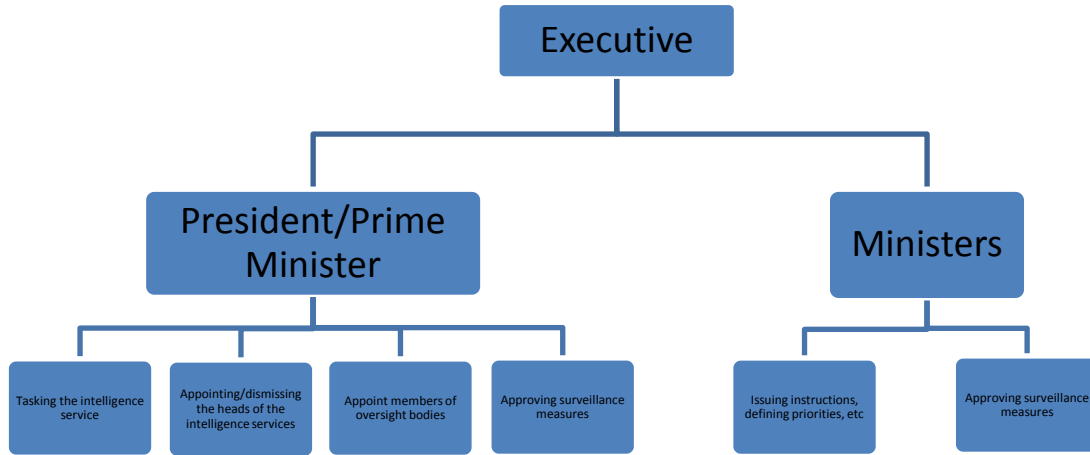
As also media and NGOs are displayed in the figure, the figure should also include institutions that control budgetary discipline of the intelligence services which is done in Germany by three members of the Federal Court of Auditors (*Bundesrechnungshof*).<sup>75</sup>



<sup>75</sup> Germany, Federal Intelligence Service (*Bundesnachrichtendienst*), 'Kontrolle durch den Bundesrechnungshof', available at: [www.bnd.bund.de/DE/Auftrag/Aufsicht\\_Kontrolle/Bundesrechnungshof/bundesrechnungshof\\_node.html](http://www.bnd.bund.de/DE/Auftrag/Aufsicht_Kontrolle/Bundesrechnungshof/bundesrechnungshof_node.html).

**1.5.4 Figure 3: Forms of control over the intelligence services by the executive across the EU-28**

Nothing to add.



**1.5.5 Table 1: Categories of powers exercised by the parliamentary committees as established by law**

The parliamentary committee in Germany was properly categorised.

Member States	Essential powers	Enhanced powers
DE		X

**1.5.6 Table 2: Expert bodies in charge of overseeing surveillance, EU-28**

The data are accurate for Germany.

EU Member State	Expert Bodies
DE	G 10 Commission ( <i>G 10-Kommission</i> )

**1.5.7 Table 3: DPAs' powers over national intelligence services, EU-28**

The data are accurate for Germany.

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			X
	12	7	9

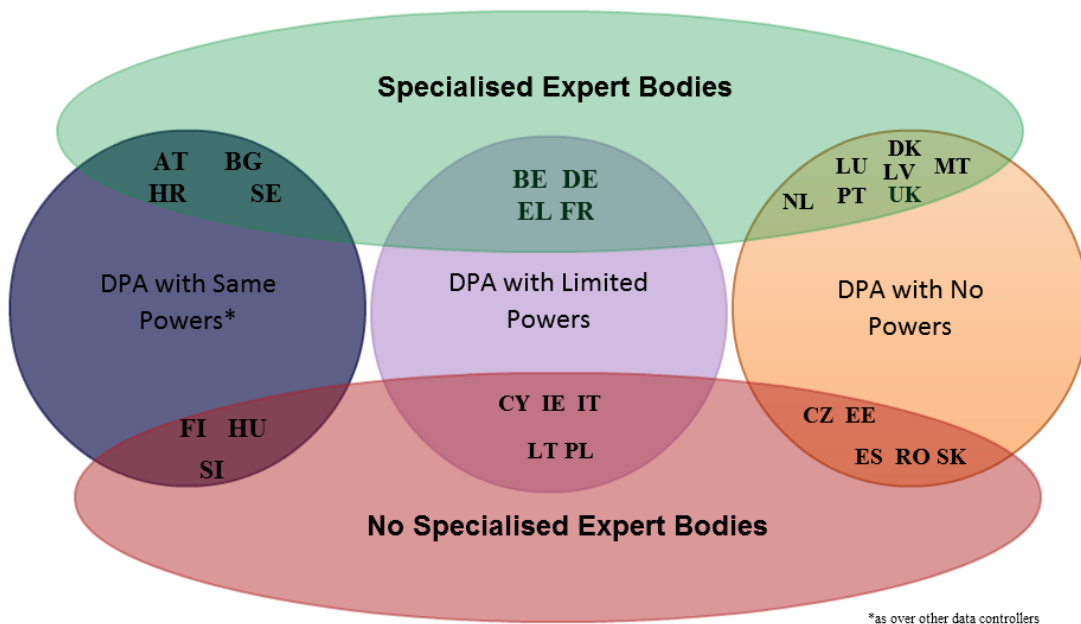
Notes: *No powers*: refers to DPAs that have no competence to supervise NIS.

*Same powers*: refers to DPAs that have the exact same powers over NIS as over any other data controller.

*Limited powers*: refers to a reduced set of powers (usually comprising investigatory, advisory, intervention and sanctioning powers) or to additional formal requirements for exercising them.

### 1.5.8 Figure 4: Specialised expert bodies and DPAs across the EU-28

The figure is accurate for the situation in Germany.



### 1.5.9 Table 4: Prior approval of targeted surveillance measures, EU-28

The table is accurate for the situation in Germany.

EU Member State	Judicial	Parliamentary	Executive	Expert bodies	None
DE				X	

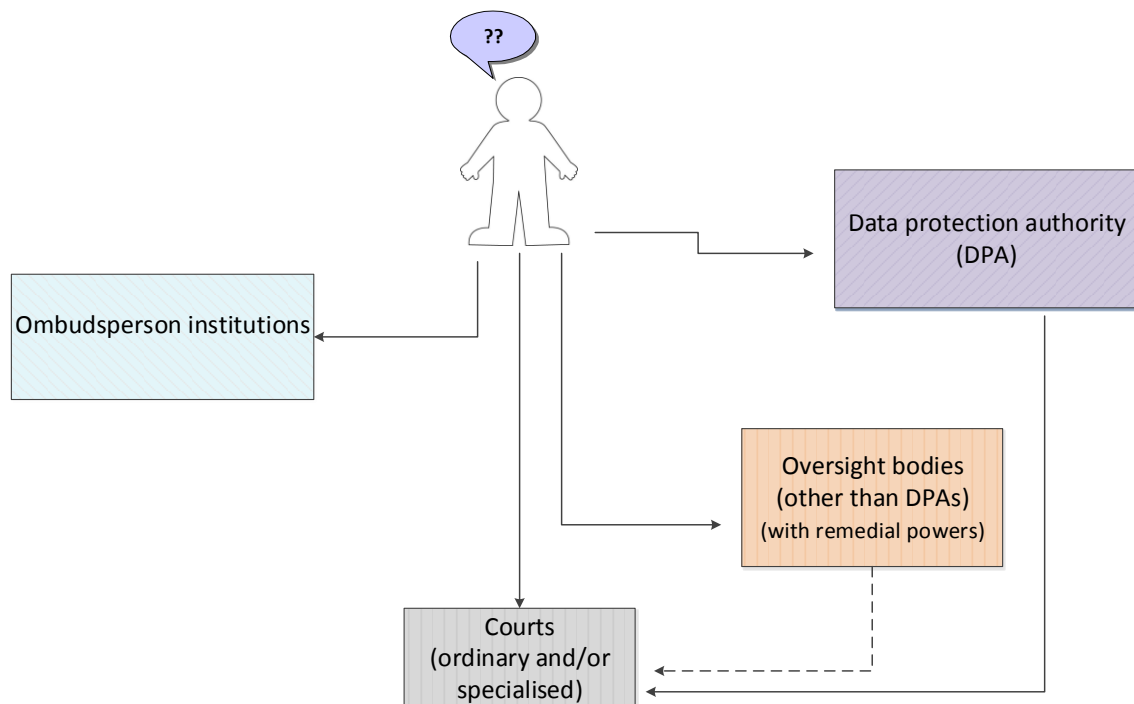
### 1.5.10 Table 5: Approval of signals intelligence in France, Germany, the Netherlands, Sweden and the United Kingdom

The expert body (G 10 Commission) also approves the area of information collection, the communication channel, and the share of communication to be monitored, according to Section 10 (4) read in conjunction with Section 15 (6) of the G 10Act.

EU Member State	Judicial	Parliamentary	Executive	Expert
DE		X (telco relations)		X (selectors, <u>area of information collection, communication channel, share of communication to be monitored</u> )

### 1.5.11 Figure 5: Remedial avenues at the national level

Figure 5 illustrates the situation in Germany in an accurate manner.

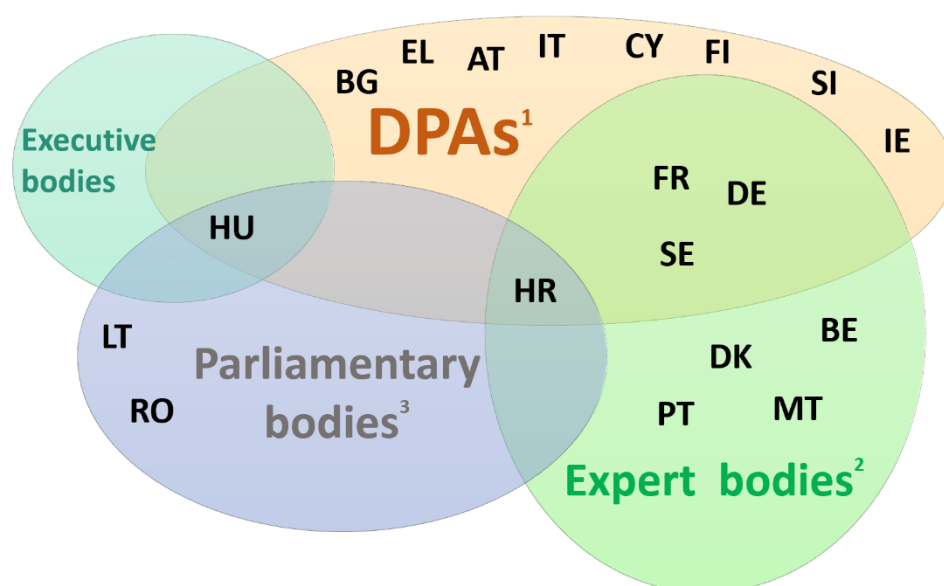


### 1.5.12 Figure 6: Types of national oversight bodies with powers to hear individual complaints in the context of surveillance, by EU Member States

According to Section 8 (2) of the Parliamentary Control Panel Act (PKGrG) citizens' petitions submitted to the German Parliament in exercise of the fundamental right to petition en-

shrined in Article 12 of the Basic Law may be forwarded by the Petitions Committee of the German Bundestag to the Parliamentary Control Panel for taking notice if the petitions refer to the intelligence services. The Petition Committee is supposed to act as ‘filter’ that pre-selects relevant petitions from those that are supposed to be irrelevant as, for example, they originate from ‘paranoia’.<sup>76</sup> Although Section 8 (2) of the PKGrG does not provide for formal remedy it is seen as an important tool for oversight. Hence, the Parliamentary Control Panel should be added for Germany as a body with the power to hear complains. From November 2013 to November 2015, the Petitions Committee forwarded 65 petitions to the Control Panel of which 40 referred to suspected surveillance measures of the intelligence services.<sup>77</sup>

Though individual complaints can be lodged with the Federal DPA against the federal intelligence services, they are not authorized to issue binding decisions as claimed in note 1 to the figure. The sharpest sword of the Federal DPA is the reclamation (*Beanstandung*) according to Section 25 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*). A reclamations can be issued by the DPA if she or he detects privacy violations; in case of the federal intelligence services it is submitted to the supervising ministry or the chancellery for comment. The comments by the government shall also report what has to be done in reaction to the reclamation. However, in contested cases the government may simply report its alternative view. In such cases the DPA can issue a recommendation on how to improve the level of data protection in accordance with Section 26 (3) of the Federal Data Protection Act. If the DPA deems that data subjects are affected seriously he or she may inform the German Bundestag and also affected persons.<sup>78</sup>



<sup>76</sup> Singer, J. (2015), *Praxiskommentar zum Gesetz über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes: Kontrollgremiumgesetz - PKGrG*, Heidelberg, Springer, pp. 145-146.

<sup>77</sup> Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Bericht über die Kontrolltätigkeit gemäß § 13 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes (Berichtszeitraum November 2013 bis November 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, available at: <http://dip21.bundestag.de/dip21/btd/18/079/1807962.pdf>, p. 13.

<sup>78</sup> Dammann, U. (2011), ‘§ 25’ in: Simitis, S. (ed.), *Bundesdatenschutzgesetz*, Baden-Baden, Nomos, pp.1079-1083.

- Notes: 1. *The following should be noted regarding national data protection authorities: In Germany, the DPA may issue **non-binding reclamations (Beanstandungen)** only in cases that do not fall within the competence of the G 10 Commission. As for 'open-sky data', its competence in general, including its remedial power, is the subject of on-going discussions, including those of the NSA Committee of Inquiry of the German Federal Parliament*
2. *The following should be noted regarding national expert oversight bodies: In Croatia and Portugal, the expert bodies have the power to review individual complaints, but do not issue binding decisions. In France, the National Commission of Control of the Intelligence Techniques (CNCTR) also only adopts non-binding opinions. However, the CNCTR can bring the case to the Council of State upon a refusal to follow its opinion. In Belgium, there are two expert bodies, but only Standing Committee I can review individual complaints and issue non-binding decisions. In Malta, the Commissioner for the Security Services is appointed by, and accountable only to, the prime minister. Its decisions cannot be appealed. In Sweden, seven members of the Swedish Defence Intelligence Commission are appointed by the government, and its chair and vice chair must be or have been judges. The remaining members are nominated by parliament.*
3. *The following should be noted regarding national parliamentary oversight bodies: only the decisions of the parliamentary body in Romania are of a binding nature.*