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Mass surveillance

Reply to Recommendation¹: Recommendation 2067 (2015)
Committee of Ministers

1. The Committee of Ministers has carefully studied Parliamentary Assembly Recommendation 2067 (2015) on “Mass surveillance”. It has transmitted it to the Steering Committee on Media and Information Society (CDMSI), the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) (T-PD) and the Steering Committee for Human Rights (CDDH), for information and possible comments.

2. The Assembly’s recommendation raises a number of issues that are of serious concern to member States and their citizens. The Committee of Ministers recalls its Declaration on Risks to Fundamental Rights stemming from Digital Tracking and other Surveillance Technologies of 2013, in which it stated in particular that mass surveillance “capabilities and practices can have a chilling effect on citizen participation in social, cultural and political life and, in the longer term, could have damaging effects on democracy. They can also undermine the confidentiality rights associated to certain professions, such as the protection of journalists’ sources, and even threaten the safety of the persons concerned”.

3. The Committee of Ministers also recalls that the Political Declaration adopted at the Council of Europe Conference of Ministers responsible for media and information society on freedom of expression and democracy in the digital age (Belgrade, 7-8 November 2013) stated, *inter alia*, that “growing technological capabilities for electronic mass surveillance and the resulting concerns, [...] emphasise that there must be adequate and effective guarantees against abuse which may undermine or even destroy democracy.” In the context of the follow-up to the conference and in particular Resolution No. 1 on Internet freedom adopted by the Ministers, the Committee of Ministers, in December 2013, instructed the CDMSI to examine closely, in the light of the requirements of the European Convention on Human Rights, the question of gathering and processing of electronic communications data on individuals by security agencies, with a view, as appropriate, to making proposals for further action. The CDMSI is thus elaborating a draft recommendation on Internet freedom, which also addresses issues of mass surveillance, which is expected to be finalised by the end of 2015.

4. The Committee of Ministers underlines that any measures taken in the interest of national security should rigorously meet the requirements set out in the European Convention on Human Rights, in particular regarding the right to private and family life (Article 8), freedom of expression and access to information (Article 10) and freedom of assembly and association (Article 11). It further emphasises that member States have both negative obligations, that is to refrain from interference with fundamental rights, and positive obligations, that is to actively protect these rights. This includes the protection of individuals from arbitrary restrictions by non-State actors such as online intermediaries. The Committee notes with interest that cases are pending before the European Court of Human Rights on mass surveillance with regard to Article 8 of the European Convention on Human Rights.

5. The Committee of Ministers would also make reference to the Council of Europe Guide to Human Rights for Internet Users, and its implementation through capacity building and co-operation assistance activities. The Guide states that Internet users must not be subjected to general surveillance or interception

1. Adopted at the 1237th meeting of the Ministers’ Deputies (7-8 October 2015).



measures but may only be subject to legitimate interference which is prescribed by law, such as a criminal investigation. In particular, users should have access to clear and precise information about the relevant law or policy and rights in this regard.

6. In this context, the Committee of Ministers highlights in particular the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108). It recalls that the fundamental right to respect for private life is protected under Article 8 of the European Convention on Human Rights, as well as under Convention No. 108 and its Additional Protocol, which is, to date, the only legally binding international instrument protecting individuals with regard to the processing of their personal data, thereby contributing to respect for their human rights and fundamental freedoms, and in particular their right to privacy and the protection of their personal data. The Committee of Ministers recalls that Convention No. 108 and its Additional Protocol provide for the establishment of a national independent supervisory authority with powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of the domestic law in relation to the protection of personal data. According to the Convention, Parties further undertake to establish appropriate sanctions and remedies for violations of the provisions of domestic law giving effect to the basic principles of data protection. The work to modernise the Convention, which is at its final stage, should strengthen the effectiveness of this tool. The present draft text of the revised Convention contains a specific obligation for the data controller to notify without delay, at least to the competent supervisory authority, the data breaches which may seriously interfere with the rights and fundamental freedoms of data subjects (Article 7, paragraph 2). The Committee of Ministers intends to step up its efforts for the promotion of Convention No. 108.

7. In the light of what has been stated above, the Committee of Ministers sees no reason at present to launch an initiative for the negotiation of an “intelligence codex” as requested by the Assembly (paragraph 2.3).²

8. Finally, the Committee will consider strengthening its co-operation with the competent bodies of the European Union on these issues and notes, in this respect, with interest the work under way at the EU Fundamental Rights Agency on the protection of fundamental rights in the context of large-scale surveillance (paragraph 2.4 of the recommendation).

2. In this respect, it refers to the work of the Council of Europe Commissioner for Human Rights ‘Democratic and effective oversight of national security services’ and that of the European Commission for Democracy through Law (Venice Commission) update of its 2007 report on democratic oversight of security services and report on the democratic oversight of signals intelligence agencies.