



CCBE RECOMMENDATIONS  
ON THE PROTECTION OF FUNDAMENTAL RIGHTS  
IN THE CONTEXT OF 'NATIONAL SECURITY'  
2019



“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean - neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master - that’s all.” (Lewis Carroll, “Alice in Wonderland”.)

#### DISCLAIMER:

The CCBE makes no warranty or representation of any kind with respect to the information included in this guide, and is not responsible for any action taken as a result of relying on, or in any way using, information contained herein. In no event shall the CCBE be liable for any damages resulting from reliance on, or use of, this information.

# CONTENTS

<b>INTRODUCTION</b> .....	<b>2</b>
<b>BACKGROUND AND CONTEXT</b> .....	<b>4</b>
<b>RELATIONSHIP BETWEEN NATIONAL SECURITY AND HUMAN RIGHTS UNDER INTERNATIONAL AND EUROPEAN LAW</b> .....	<b>6</b>
1. RELEVANT UN CONVENTIONS .....	6
2. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS .....	6
<i>a. The lack of definition of the concept of national security by the European Court of Human Rights</i> .....	6
<i>b. National security and surveillance</i> .....	7
<i>c. Surveillance and the right to a fair trial</i> .....	8
3. EUROPEAN UNION – TREATIES OF THE EUROPEAN UNION AND THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION.....	9
<i>a. National security exemption</i> .....	9
<i>b. The absence of a clear definition of national security</i> .....	9
<b>SURVEY ON THE SITUATION IN EU MEMBER STATES</b> .....	<b>10</b>
Q1. IS THERE A LEGAL CONCEPT OF NATIONAL SECURITY? .....	10
Q2. HOW IS THIS CONCEPT DEPLOYED (FOR EXAMPLE, IN DEROGATION FROM LEGAL RIGHTS, EITHER IN DOMESTIC LAW OR IN RELATION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS)? .....	11
Q3. IS NATIONAL SECURITY DEFINED IN LAW? IF NOT, HOW DOES YOUR LAW REGARD NATIONAL SECURITY?.....	13
Q4. IS NATIONAL SECURITY REFERRED TO IN LEGISLATION OR CASE LAW, EVEN IF IT IS NOT DEFINED? .....	14
Q5. UNDER WHAT CIRCUMSTANCES IS NATIONAL SECURITY INVOKED AND HOW OFTEN? .....	14
GENERAL CONCLUSIONS.....	15
<b>A DEFINITION OF NATIONAL SECURITY</b> .....	<b>16</b>
<b>THE CONCEPT OF PROCEDURAL JUSTICE</b> .....	<b>18</b>
<b>RECOMMENDATIONS</b> .....	<b>20</b>
1. <i>NEED FOR LEGISLATIVE CONTROL</i> .....	20
2. <i>JUDICIAL AND INDEPENDENT OVERSIGHT</i> .....	20
3. <i>LEGAL REMEDIES AND SANCTIONS</i> .....	21
4. <i>PROFESSIONAL SECRECY AND LEGAL PROFESSIONAL PRIVILEGE</i> .....	21
<b>CONCLUSION</b> .....	<b>22</b>

# INTRODUCTION

We live in times where the theatre of conflict is no longer restricted to national armies fighting on a battlefield: dangers from terrorist groups and individual actors are, or are perceived to be, ever-present on our streets and in our neighbourhoods, and conflicts can be waged remotely and covertly in cyberspace by terrorist groups and by individual actors.

The first duty of the State is to protect its citizens, and no one can doubt the need for the State to take exceptional measures in the interest of national security, but, unless there is a clear and precise understanding of what is, and is not, understood by the term ‘national security’, there is a clear threat to the democratic order. Therefore, it is important to critically analyse arguments invoking national security as a justification for measures which limit citizens’ fundamental rights.

A universally accepted definition of national security does not exist. Both at international and national level the term is not adequately defined. As a result, it is difficult for courts effectively to review infringements of fundamental rights which are based on the claimed justification of national security and, even among those States where domestic law does provide some definitional clarity, there may be radically different outcomes in different jurisdictions. The lack of a universally accepted definition of national security means that actions justified on the claimed basis of national security cannot be effectively reviewed in courts to ensure that they comply with a strict test of what is necessary and proportionate.

**This paper primarily deals with the question of how and whether the notion of ‘national security’ as a justification for surveillance measures and other intrusions upon the fundamental rights of citizens can be better embedded in national democratic systems, where effective judicial control and supervision of government actions remain essential elements of constitutionality.**

This issue is of specific relevance to the protection of the confidentiality of lawyer-client communication within the context of surveillance activities. For lawyers to be able to effectively defend their clients’ rights, there must be confidence that communications between clients and their lawyers are kept confidential. This principle – usually referred to as ‘professional secrecy’ or ‘legal professional privilege’ – is recognised by all EU countries and has been upheld by the European Court of Justice and the European Court of Human Rights in numerous cases. In some EU Member States the violation of professional secrecy constitutes not only a violation of a professional duty, but also a criminal offence.

Material which is potentially privileged will benefit from the heightened protection of Article 8 of the European Convention on Human Rights (ECHR). Additionally, lawyer-client communications in relation to contentious proceedings (criminal or civil litigation) also enjoy protection under Article 6 of the ECHR concerning the right to a fair trial. Article 6 rights (unlike Article 8 rights) are absolute in the sense that limitations or derogations cannot be applied to them.

In this sense, if ‘national security’ reasons are to be argued as an exception or justification *per se* for intercepting lawyer-client communications, this “exception” (especially the lack of a clear definition of what in reality constitutes ‘national security’) would render it impossible, for example, for suspects or accused persons to effectively invoke the right to confidentiality communications with their lawyer<sup>1</sup>. This would, therefore, jeopardise the rights enshrined in Article 6 and Article 8 in the sense that the lack of a basic definition of the concept of ‘national

---

1 CCBE’s Recommendations on the protection of client confidentiality within the context of surveillance activities, p. 11, available on the CCBE website via the following link: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/SURVEILLANCE/SVL\\_Position\\_papers/EN\\_SVL\\_20160428\\_CCBE\\_recommendations\\_on\\_the\\_protection\\_of\\_client\\_confidentiality\\_within\\_the\\_context\\_of\\_surveillance\\_activities.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20160428_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf).

security' would render the right to confidentiality of lawyer-client communications redundant, as any restriction to it could be justified on grounds of 'national security' without any further justification or any procedural safeguards.

# BACKGROUND AND CONTEXT

In the context of the threats referred to above, everyone would agree upon the need for each State to protect its national security. Almost all legal systems recognise the concept of national security and a majority considers a threat to national security as grounds to allow governments to suspend rights or obligations<sup>2</sup>, despite the fact that the State has a duty to uphold the rule of law and serve as a guarantor of human rights for its citizens. Ultimately, violations of fundamental rights can only be justified by utilitarian principles, i.e. the objective of ensuring the greatest benefit for the greatest number of people, for example, the violation by the State of a suspect's right to privacy by subjecting him to surveillance is justified by the reason that to do so enables the State to protect the fundamental rights of its citizens as a whole.

The paradox is that there is no consensus on what constitutes a matter of national security in international law, nor even a specific agreement as to what constitutes national security for the purposes of defining States' margin of appreciation under the European Convention on Human Rights.

This is not to say that certain common threads cannot be detected, but, ultimately, 'national security' is a concept that is generally defined by the State or, it may be, in practical terms, the government of the state.

For example, in the United Kingdom, during the passage of the Investigatory Powers Bill through the House of Lords in 2017, in declining to accept an amendment to the Bill which would have clearly defined 'national security' in law, Earl Howe, for the UK Government, stated:

*"It has been the policy of successive Governments not to define national security in statute. National security is one of the statutory purposes of the security and intelligence agencies. Threats to national security are, as we have heard, constantly evolving and difficult to predict, and it is vital that legislation does not constrain the security and intelligence agencies in their ability to protect the public from new and emerging threats... I think the key point is that to define national security in statute could have the unintended effect of constraining the ability of the security and intelligence agencies to respond to new and emerging threats to our national security."*

This statement, which is superficially plausible, raises immense issues touching on the rule of law. The fundamental principle is that no one is above the law. This, plainly, requires the conduct of the intelligence services to be made the subject of regulation. In this regard, most European States base the operation of their intelligence agencies upon a specific statutory or regulatory basis.<sup>3</sup>

In this way, the State seeks to regulate and constrain interference, and it may be necessary interference, with fundamental rights and freedoms that may result from measures taken by the State in pursuit of national security.

Such measures have the potential to threaten fundamental rights through means such as surveillance, military intervention, etc. The essential justification is that States may interfere with individual rights in exceptional circumstances, when, for example, their independence,

---

<sup>2</sup> Peers, Steve. National Security and European Law Yearbook of European Law, 1996. Vol.16(1), pp.363

<sup>3</sup> See, for example:

- *United Kingdom, Investigatory Powers Act 2016, Ch. 25.*
- *Netherlands, Intelligence and Security Services Act 2002 (Wet op de inlichtingen en veiligheidsdiensten 2002), 7 February 2002.*
- *France, Intelligence Law (Loi relative au renseignement), 24 July 2015 (completed by the Law of 30 November 2015).*

sovereignty, territorial integrity, constitutional order and/or public safety are threatened. Such threats are usually regarded as falling within the scope of the portmanteau expression ‘national security’ or similar terms, but the problem is that, in the absence of a definition, such terms are vague and open to different interpretations.<sup>4</sup>

If one looks again at Earl Howe’s statement, it will be seen that there is at the root of it a conflation of two quite separate issues.

On the one hand, what constitutes the national security of the State may seem to be a constant, but, on the other hand, the *manner* in which national security is threatened is constantly changing. No one would dispute the proposition that the State should ensure that the security services are not unduly constrained (in the context of the State’s regulation of those services) in dealing with those constantly changing threats, but this is about the nature of the challenge to national security, rather than the nature of national security itself. To take one example: any understanding of national security would include protection against the violent overthrow of the lawful government of the State. In historical times, the threat might have been one conspiracy to blow up Parliament by placing barrels of gunpowder in the cellars, planned through the sending of coded letters between the conspirators. In the present day, the conspiracy might relate to, for example, dropping radioactive waste from above by means of a drone, and be planned via encrypted communication on the dark web. These two modalities are entirely different, and the ability of the security services to meet the new threat should not be constrained, but what remains constant is that which is threatened – the national security of the State.

If ‘national security’ remains entirely undefined in law, then there is no clear basis upon which a court can determine whether the purpose for which an intrusive surveillance power might have been exercised is, or is not, in pursuit of national security.

In such a situation, the executive is left in sole charge of the field, the sole determiner of what constitutes national security, standing, in effect, outside the rule of law, or, as Lewis Carroll put it: “*which is to be master?*”

Therefore, the question of a definition of what constitutes national security is not only the shining of the hard light of definitional clarity upon an amorphous concept, but also fundamental to ensuring the primacy of the rule of law.

---

4 Report on National security and European case-law prepared by the Research Division of the ECtHR, para 25, p.4

# RELATIONSHIP BETWEEN NATIONAL SECURITY AND HUMAN RIGHTS UNDER INTERNATIONAL AND EUROPEAN LAW

## 1. RELEVANT UN CONVENTIONS

The UN Human Rights Committee (OHCHR) has observed that restrictions on fundamental rights may be justified on grounds of national security only if those restrictions are provided for by law and are necessary to achieve a legitimate purpose. In invoking such restrictions, the State concerned must specify the precise nature of the threat<sup>5</sup>.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has further developed this idea in its Siracusa Principles.<sup>6</sup> Principle B (vi) defines when a restriction can be said to serve national security: “National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.” Furthermore, it is stated that “National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order” and neither can it be “used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.”

It is recognised in international law that, during acute emergencies, States may be unable to perform the careful balancing act normally required to justify a restriction on freedom of expression. Article 4 of the ICCPR allows the signatory States to temporarily suspend some of their obligations under the Covenant, including Article 19.

## 2. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

### ***a. The lack of definition of the concept of national security by the European Court of Human Rights***

To date, the European Court of Human Rights (ECtHR) has not sought to define national security.<sup>7</sup> Case law from the ECtHR has focused instead on the conditions which justify an interference with an individual’s rights on grounds of national security. The European Commission of Human Rights believes that national laws do not require a complete definition of the concept of ‘the interests of national security’. It justified its position by underlining the fact that “many laws,

5 Views of the Human Rights Committee under Article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights - Fifty-fourth session – concerning Communication No. 518/1992, § 10.4, available here: <http://hrlibrary.umn.edu/undocs/html/vws518.htm>

6 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

7 Ibid.



*which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice*<sup>8</sup>.

National security is mentioned in paragraph 2 of Articles 8, 10 and 11 of the European Convention on Human Rights as one of the legitimate aims that may justify the restriction of rights. In particular, the issue of surveillance raises concerns mainly with regard to the right to respect for private and family life (Art.8).

#### **b. National security and surveillance**

##### *Interference with private life*

The case law of the ECtHR suggests that any interference in an individual's private life must be in accordance with law, justified by legitimate aims and that it must be necessary in a democratic society.

The moment a surveillance measure is used, it can generally both be assumed to be and in fact to be beyond dispute that an interference has occurred in an individual's private life, irrespective of any subsequent use of the information collected and stored, and whether or not the information is deemed to be sensitive<sup>9</sup>.

##### *Compliance with the law*

The ECtHR has explained that, for an interference in an individual's right to be "*in accordance with law*", three conditions must be met:

1. there must be a basis in national law for the interference;
2. the national law must be accessible to everyone;
3. and the law must have foreseeable consequences.

In the interception of communications, within the context of and for the purpose of police investigations, the ECtHR has accepted that an individual does not need to be able to foresee the interception of that individual's communications by the authorities in order for the foreseeability requirement to be fulfilled when assessing whether the interference was in accordance with the law. Nevertheless, it is necessary for the national law itself to state with sufficient clarity the scope of the discretion given to the competent or relevant authorities and the way in which this discretion is to be utilised, in order to provide an adequate safeguard against arbitrary interference<sup>10</sup>.

As an example, in the case of *Kopp v. Switzerland*<sup>11</sup>, where a lawyer had his telephone tapped, the ECtHR held that Swiss law did not have sufficient clarity on the extent of the authorities' discretion. The Court was not required to deal specifically with the issue of interception of communications in which privilege was claimed<sup>12</sup>.

##### *Necessary in a democratic society*

The ECtHR has recognised that States have the power to engage in certain forms of secret surveillance over communications, such as telecommunications or postal correspondence, in order to be able to effectively counter certain forms of espionage or terrorism<sup>13</sup>. It is also recognised that States enjoy a wide margin of discretion when selecting the ways in which they decide to preserve their national security<sup>14</sup>.

However, the Court has stressed that States do not possess unlimited discretion when subjecting their citizens to secret surveillance in the name of the struggle against espionage and terrorism, due to the dangers that such laws would pose to democracy. The corresponding legal act in a State, in protecting its

8 *Esbester v. the United Kingdom*, 2 April 1993, available here: <http://hudoc.echr.coe.int/eng?i=001-1537>

9 *Amman v. Switzerland* [GC], 16 February 2000, §§ 69-70.

10 *Malone v. the United Kingdom*, 2 August 1984, §§ 67-68, available here: <http://hudoc.echr.coe.int/eng?i=001-57533>

11 *Kopp v. Switzerland*, 25 March 1998, §§ 73-75, available here: <http://hudoc.echr.coe.int/eng?i=001-58144>

12 Concerning legal privilege in the context of surveillance activities, see the CCBE's Recommendations on the protection of client confidentiality within the context of surveillance activities, available here: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/SURVEILLANCE/SVL\\_Position\\_papers/EN\\_SVL\\_20160428\\_CCBE\\_recommendations\\_on\\_the\\_protection\\_of\\_client\\_confidentiality\\_within\\_the\\_context\\_of\\_surveillance\\_activities.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20160428_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf)

13 *Klass and Others v. Germany*, cit., § 48.

14 *Leander v. Sweden*, 26 March 1987, § 59, available here: <http://hudoc.echr.coe.int/eng?i=001-57519>

national security, must ensure that it is balanced against the seriousness of the interference with citizens' right to respect for their private lives<sup>15</sup>.

In particular, the ECtHR has stated that *"the judgment by the national authorities in any particular case in which national security considerations are involved is one which it is not well equipped to challenge. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention"*<sup>16</sup>.

Likewise, concerning the use of classified documents to support a decision justified by the protection of national security, the ECtHR has stated that *"even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that [...] measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and review the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary"*<sup>17</sup>.

This requirement makes clear that adequate and effective guarantees against abuses must be in place. Whether or not guarantees will apply or be effective depends upon the circumstances of any given case, for instance the nature and duration of the measures involved, the authorities competent to authorise, carry out and supervise them, and the remedies available under national law<sup>18</sup>.

The Court has also examined in some cases the long-term storage of information, finding that the continued storage of information collected many years earlier can constitute a disproportionate interference with the right to respect for private life, which is not justified by national security considerations<sup>19</sup>.

### **c. Surveillance and the right to a fair trial**

Surveillance by authorities on grounds of national security may undermine the protection afforded by Article 6 ECHR (right to a fair trial), and further to this, the right to an effective defence and equality of arms.

The issue of surveillance of confidential communications between lawyers and their clients is discussed more fully in the *CCBE Recommendations on the Protection of Client Confidentiality within the context of Surveillance Activities*<sup>20</sup>, but surveillance may also be conducted in relation to third party communications which are not subject to legal professional privilege or professional secrecy. In order to defend himself, an accused person may require *access to the intercepted material, but the State may refuse to allow such access on grounds of national security*.

In the ECtHR's jurisprudence, this issue arose in the form of a question as to whether the refusal of the authorities to grant access to certain confidential information had deprived the applicant of his right to a fair trial.

15 Ibid., § 59.

16 *Janowiec and Others v. Russia* [GC], 21 October 2013, §§ 213-214, available here: <http://hudoc.echr.coe.int/eng?i=001-127684>

17 *Ljatić v. The Former Yugoslav Republic of Macedonia, cit.*, § 35, available here: <https://www.refworld.org/pdfid/5afd648f4.pdf>

18 *Klass and Others v. Germany, cit.*, § 50; *Kennedy v. the United Kingdom*, 18 May 2010, § 153, available here: <http://hudoc.echr.coe.int/eng?i=001-98473>

19 *Segerstedt-Wiberg and Others v. Sweden*, 6 June 2006, available here: <http://hudoc.echr.coe.int/eng?i=001-75591>

20 CCBE's Recommendations on the protection of client confidentiality within the context of surveillance activities, available on the CCBE's website here: [https://www.ccbbe.eu/fileadmin/speciality\\_distribution/public/documents/SURVEILLANCE/SVL\\_Position\\_papers/EN\\_SVL\\_20160428\\_CCBE\\_recommendations\\_on\\_the\\_protection\\_of\\_client\\_confidentiality\\_within\\_the\\_context\\_of\\_surveillance\\_activities.pdf](https://www.ccbbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Position_papers/EN_SVL_20160428_CCBE_recommendations_on_the_protection_of_client_confidentiality_within_the_context_of_surveillance_activities.pdf)

In *Kennedy v. the United Kingdom*, the Court accepted that “the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings”<sup>21</sup>. The Court found that the restrictions on the applicant’s rights were necessary and proportionate. This case related in particular to secret surveillance measures, in respect of which it was important to keep the secrets and information confidential, taking into account a Member State’s need to keep certain surveillance measures secret in the fight against terrorism.

### 3. EUROPEAN UNION – TREATIES OF THE EUROPEAN UNION AND THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

#### a. National security exemption

As a starting point, it is necessary to note the national security exemption imposed by Article 4(2) of the Treaty of the European Union (TEU). This article states that:

*“the Union shall respect the equality of Member States (...) as well as their national identities (...) It shall respect their essential State functions, including (...) safeguarding national security. National security remains the sole responsibility of each Member State.”*

Therefore, EU law, including the Charter of Fundamental Rights of the European Union<sup>22</sup>, will not apply to questions concerning the national security of Member States.<sup>23</sup> This can notably be illustrated in the preamble the Directive on the right of access to a lawyer which states that “this Directive should also be without prejudice to the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Article 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Article 72 TFEU, pursuant to which Title V on an area of Freedom, Security and Justice must not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.<sup>24</sup>

#### b. The absence of a clear definition of national security

Therefore, the EU has no competence to legislate on matters which involve the national security of Member States. Furthermore, it is interesting to note that there is no unambiguous definition or clear guidance as to what is meant by ‘national security’ for the purposes of Article 4(2). In particular, perhaps inhibited by Article 4(2), the Court of Justice of the European Union (CJEU) has not established a clear definition or developed the concept of national security beyond stating that “national security [...] constitutes activities of the State or of State authorities unrelated to the fields of activity of individuals”.<sup>25</sup>

That said, it is worth noting that the EU and its Member States use many different terms that encompass the notion of national security, but these terms are also undefined. These similar concepts include, but are not restricted to, internal security, political security, State security, public security, private security and defence. These terms should all be distinguished from one another, but they are nevertheless, in a certain sense, interlinked.

21 *Kennedy v. the United Kingdom*, cit, §§ 184-187.

22 Official Journal C 364 of 18 December 2000

23 WP29 Working Document on surveillance of electronic communications for intelligence and national security purposes ([http://dataprotection.govmu.org/English/Documents/wp228\\_en.pdf](http://dataprotection.govmu.org/English/Documents/wp228_en.pdf)), 5 December 2014, p22-27

24 DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Recital 34, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=EN>

25 ECJ, *Productores de Música de España (Promusicae) v Telefónica de España SAU* (C-275/06, judgment of 29 January 2008), par. 51.

# SURVEY ON THE SITUATION IN EU MEMBER STATES

In order to get an overall picture of how the concept of national security is deployed in Europe, the CCBE conducted a survey of a representative sample of its member Bars and Law Societies, namely, Austria, Belgium, the Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Spain and the United Kingdom. The survey examined the definition of national security as a legal concept in each of these States. The results of this survey are published in tabular form which can be accessed via the following link: [https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/SURVEILLANCE/SVL\\_Guides\\_recommendations/EN\\_SVL\\_20190329\\_Annex-to-CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/SURVEILLANCE/SVL_Guides_recommendations/EN_SVL_20190329_Annex-to-CCBE-Recommendations-on-the-protection-of-fundamental-rights-in-the-context-of-national-security.pdf)

The survey found that all participating EU Member States have a legal concept of national security and have diverse ways in which the concept of national security is deployed. All respondents have some form of legislation referring to national security. Answers to Question 3 of the survey demonstrate that a straightforward definition of the concept of national security is absent in almost all of the Member States surveyed, with the exception of Spain (and, to a certain extent, Hungary). The few indications found in the jurisprudence of the majority of the Member States covered by the survey arguably fail to meet the standards of legal certainty required to ensure the proper functioning of the rule of law.

## Q1. IS THERE A LEGAL CONCEPT OF NATIONAL SECURITY?

All 11 of the member Bars and Law Societies surveyed stated that their respective States do have a legal concept of national security.

In **Austria**, the Government presented a report to Parliament on a new Austrian security strategy<sup>26</sup>. The Austrian Parliament passed a resolution to shape Austrian security policy in accordance with the general recommendations on a new security strategy for Austria agreed in the Austrian National Council Resolution of 3 July 2013<sup>27</sup>. The report on the new Austrian security strategy sets out the security values, interests and objectives of what is considered to be part of Austria's national security policy.<sup>28</sup>

In the **Czech Republic's** Constitutional Act, Article 1 stipulates that: *"It is the State's basic duty to ensure the Czech Republic's sovereignty and territorial integrity, the protection of its democratic foundations, and the protection of lives, health and property."* Furthermore, three types of emergency regimes can be declared:

1. A state of emergency;
2. A condition of threat to the State; and
3. A state of war.

The concept of national security in the Czech Republic is further outlined in *the Security Strategy of the Czech Republic*<sup>29</sup> which defines general security risks, long-term plans and measures aimed at the security of the Czech Republic and its citizens.

26 Austrian Security Strategy Security in a new decade— Shaping security, available here: [http://www.bundesheer.at/pdf\\_pool/publikationen/sicherheitsstrategie\\_engl.pdf](http://www.bundesheer.at/pdf_pool/publikationen/sicherheitsstrategie_engl.pdf)

27 Available here ([http://www.bundesheer.at/pdf\\_pool/publikationen/sicherheitsstrategie\\_engl.pdf](http://www.bundesheer.at/pdf_pool/publikationen/sicherheitsstrategie_engl.pdf)), see p. 16.§4.1

28 Austrian Security Strategy, Security in a new decade— Shaping security ([http://www.bundesheer.at/pdf\\_pool/publikationen/sicherheitsstrategie\\_engl.pdf](http://www.bundesheer.at/pdf_pool/publikationen/sicherheitsstrategie_engl.pdf)), point 3.

29 Security Strategy of the Czech Republic 2015, available here: [http://www.army.cz/images/id\\_8001\\_9000/8503/Security\\_Strategy\\_2015.pdf](http://www.army.cz/images/id_8001_9000/8503/Security_Strategy_2015.pdf)

In **Germany**, both state and federal law have a concept of national security. The German Constitution addresses national security narrowly, dealing with the use of the armed forces for defence and the exceptional use of the armed forces at home in case of “*imminent danger to the free democratic order of the Federation or a State*” (Article 87a German Basic Law). Some actions that endanger certain elements of national security are criminal actions under sections 81 ff. of the German Criminal Code (e.g. high treason against the Federation, sabotage). Some of these regulations refer to the security of the Federal Republic of Germany, which is defined as *external or internal security*. Regarding state laws, there is the much broader general standard, “*Öffentliche Sicherheit und Ordnung*” (Public Safety and Order), used in particular in the state police laws which include elements of national security.

In **Greece**, there is a legal concept of national security. However, it is not set out either in the Constitution or in law. ‘National security’ is understood to refer to national integrity, the protection of the country, its territory and its independence from external risks. This is confirmed by the definition of the term ‘National Defence’ in law 2292/1995 on the organisation of the Ministry of Defence and of the armed forces, pursuant to which “*National Defence includes all operations and activities deployed by the State which aim at the protection of territorial integrity, national independence and sovereignty, and the security of the citizens against any external offence or threat, as well as the support of national interests*”.

A listing merely indicative of the elements falling within the scope of national security, according to the *Glossary Intelligence*<sup>30</sup> in **Italy**, includes: the independence, integrity and sovereignty of the Republic, the community of which it is an expression, the democratic institutions established by the Italian Constitution, the international rule of the State, the fundamental freedoms and constitutionally guaranteed rights of citizens as well as the political, military, economic, scientific and industrial interests of Italy. A definition of national security can also be found in some Constitutional Court judgments in which reference is made to the territorial integrity of the nation, to its independence and to its survival. Additionally, a definition of public security can be indirectly found in Law 124/2007 (Articles 6 and 7) where national security is generically defined as “*the independence and integrity of defence against foreign threats*”.

In **Poland**, the legal concept of ‘state security’ which is mentioned in the Constitution, and ‘public security’ or ‘common security’ which are mentioned in other statutes can be treated as an equivalent of ‘national security’. Although these concepts are not clearly defined, according to the 2014 Report on the national security strategy of the Republic of Poland, “*national interests which are specified in Article 5 of the Constitution of the Republic of Poland constitute a foundation of national security interests*”. The same report then proceeds to list a number of these interests<sup>31</sup>.

In **France**, the ‘national security strategy’ was defined for the first time in the *2008 White Paper on Defence and National Security*<sup>32</sup>. In 2009, a law introduced the concept into Article L 1111-1 of the Defence Code.

## Q2. HOW IS THIS CONCEPT DEPLOYED (FOR EXAMPLE, IN DEROGATION FROM LEGAL RIGHTS, EITHER IN DOMESTIC LAW OR IN RELATION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS)?

All responding countries have diverse ways of deploying national security. In the **Czech Republic**, the Constitutional Act on the Security of the Czech Republic states that the government must specify which fundamental rights and basic freedoms are to be restricted, and to what extent, and which duties shall be imposed and to what extent. Furthermore, emergency regimes must have a specific purpose, can only exist for a fixed period, and may only cover a designated territorial area, as further detailed in the Annex to this paper.

30 Presidenza del Consiglio dei Ministri: Dipartimento delle Informazioni per la Sicurezza, « Glossario Intelligence : Il linguaggio degli organismi informativi », 2013, available here: <https://www.sicurezza nazionale.gov.it/sisr.nsf/wp-content/uploads/2013/12/Glossario-intelligence-2013.pdf>

31 2014 Report on national security strategy of the Republic of Poland, available here.: [https://www.bbn.gov.pl/ftp/dok/NSS\\_RP.pdf](https://www.bbn.gov.pl/ftp/dok/NSS_RP.pdf)

32 2008 White Paper on Defence and National Security, available here: [http://archives.livreblancdefenseetsecurite.gouv.fr/2008/IMG/pdf/livre\\_blanc\\_tome1\\_partie1.pdf](http://archives.livreblancdefenseetsecurite.gouv.fr/2008/IMG/pdf/livre_blanc_tome1_partie1.pdf)

In **France**, national security is used as a justification for the implementation of extraordinary measures by public authorities, especially in areas relating to the police, defence, the fight against terrorism, and as a justification of the regulation of the entry of foreigners from outside the EU. In French law, there is a balance to be struck between individual rights and requirements for the protection of society. This concerns all the legislative provisions involved in the implementation of these policies, such as:

- external security through diplomacy and defence of the territory;
- maintenance of public order;
- protection against major threats (terrorism, espionage, organised crime, violation of major national economic or scientific interests);
- justice;
- monetary sovereignty;
- fiscal sovereignty;
- public health;
- civil security.

In **Germany**, any action by a public authority interfering with private rights must be based on valid provisions set out in law. Any action by the State performed without being based on law is illegal. This principle applies even in times of crisis and no exemptions are made since public authorities are required to obey the law. Interference with private rights on grounds of national security can therefore only take place if it is expressly permitted by law. When authorities decide whether and how to act, they must respect the principle of proportionality by weighing the relevant interests (private rights and importance of security aspects). Provisions of international law, such as those set out in the European Convention on Human Rights, have been incorporated into domestic law and must therefore be respected as such by all public authorities.

In **Greece**, Law 2225/1994 as amended provides for a procedure for derogating from the right to privacy. This falls within the competence of the Appeals Court State Attorney in matters of National Security, and of the Judicial Council in the case of very serious crimes. The protection of personal data is guaranteed by Article 9A of the Constitution and can only be restricted by law through the application of the principle of proportionality provided for in Article 25 of the Constitution.

Article 19 of the Greek Constitution provides that: *“The secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guarantees, under which the judicial authority shall not be bound by this secrecy for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law.”* Article 19 further reads:

*“2. Matters relating to the constitution, the operation and the functions of the independent authority ensuring the secrecy of paragraph 1 shall be specified by law.*

*3. The use of evidence obtained in violation of this Article and of Articles 9 and 9A is prohibited.”*

Article 46 of the Basic Law of **Hungary** requires that activities relating to national security must be set down in a ‘cardinal act’ of the Parliament. Such *“a cardinal act regulates the rules of the organisation of police and national security services, their operation, and the rules on using national security tools and methods, and also the rules relating to national security activities”*. In Hungarian procedural law, national security appears only indirectly, together with some of the procedural guarantees for secret information gathering during the criminal procedure phase. Most of the details are regulated in the National Security Services Act (Act CXXV of 1995). Therefore, there are no provisions in procedural laws stating when a particular method of secret information gathering is made lawful, for example as the result of a national security exemption. In addition to the National Security Services Act, important provisions of sectoral regulations may lay down more specific requirements as to what national security services may require from certain providers: for example, they may request telecommunications service providers to install, at the provider’s own cost, certain monitoring equipment.

In **Italy**, given the complexity of the matter, no clear answer can be given to the question. The concept of national security, in its various forms, can be invoked under certain rules to exclude or limit the exercise of certain rights relating notably to transparency in public administration and to privacy.

**In Poland**, the law gives some examples of how rights can be derogated from, and according to which legal provisions. For full details, please refer to the Polish answers to the Survey, and, in particular Question 2.

**In Spain**, the protection of national security is understood as being a public service and is subject to State policy. The concept is based on domestic law.

In the **United Kingdom**, the concept is deployed in several contexts:

- as the basis for the authorisation of activities by security and intelligence agencies;
- for administrative matters, such as decisions on admission to the UK;
- for the development of services or capabilities, such as the creation and maintenance of protection of critical national infrastructure;
- as derogations or limitations on obligations (such as Section 28 Data Protection Act 1998, or Section 132 Communications Act 2003).

### Q3. IS NATIONAL SECURITY DEFINED IN LAW? IF NOT, HOW DOES YOUR LAW REGARD NATIONAL SECURITY?

**In Austria**, there is no legal definition of national security. In Article 229 of the Austrian Code of Criminal Procedure (StPO), the concept of national security encompasses the State's interest in protecting its values against threats and concerns, especially in the domains of foreign affairs, security policy and defence policy. Even if the concept of national security can be very wide and grant the authorities substantial discretionary power, its boundaries may not be stretched beyond its natural meaning.

**In France**, according to a possible definition of the concept in Article L1111-1 of the Code of Defence: *"The purpose of the national security strategy is to identify all the threats and risks that may affect the life of the Nation, particularly with regard to the protection of the population, the integrity of the territory and the permanence of institutions of the Republic, and to determine the responses that the public authorities must make. All public policies contribute to national security."*

In addition, the French Penal Code protects the 'fundamental interests of the Nation' which is a parallel concept of national security and is defined as the *"independence [of the Nation], the integrity of its territory, its security, the republican form of its institutions, its means of defence and diplomacy, the safeguarding of its population in France and abroad, the balance of its natural surroundings and environment, and the essential elements of its scientific and economic potential and cultural heritage"* (Article 410-1 Penal Code).

**In Germany**, there is no single definition of national security. Different laws contain different terms and wording. The most prominent definition is the one in Section 4 of the *Bundesverfassungsschutz-Gesetz* ("*BVerfSchG*" – Federal Act on the Protection of the Constitution, i.e. the Domestic Secret Service), however the courts will interpret national security differently depending on the contexts in which the issue is raised, even if the relevant laws use a similar wording.

**In Greece**, the term 'national security' is not specified in the Constitution or in law. However, there is a legal concept of national security (see answer to Question 1).

**Hungary** has a definition of the 'interest of national security' in the National Security Services Act (74. § a):

- a) *"The protection of the independence and the lawful order of Hungary, within the framework of this:*
- b) *detection of malicious attempts against the country's independence and territorial integrity;*
- c) *discovery and prevention of covert attempts that harm or threaten the political, economic and military interests of the country;*
- d) *obtaining of information concerning foreign countries or of foreign origin that are necessary for governmental decisions;*

- e) *detection and prevention of covert illegal attempts to alter or disrupt the country's legal order, to ensure the exercise of fundamental human rights, the representative multi-party democracy system and the functioning of legal institutions;*
- f) *detection and prevention of acts of terrorism, of illegal arms and drug trafficking, and illicit trafficking of internationally controlled products and technologies."*

In **Spain**, there is a single definition of 'national security', which is defined as a State action aimed at:

- Protecting the liberty, rights and welfare of citizens;
- Ensuring the defence of the State, its principles and constitutional value, and;
- Contributing together with the State's allies and partners to guaranteeing international security in compliance with commitments made.

In the **United Kingdom**, the government has resisted any attempt to create a clear statutory definition of national security. However, the Courts have sought to grapple with the concept. In particular, in the case of *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, the House of Lords articulated a number of principles:

- (i) *"National security' means the security of the United Kingdom and its people;*
- (ii) *the interests of national security are not limited to action by an individual which can be said to be targeted at the UK, its system of government or its people;*
- (iii) *the protection of democracy and the legal and constitutional systems of the State is a part of national security as well as military defence;*
- (iv) *action against a foreign state may be capable indirectly of affecting the security of the United Kingdom; and*
- (v) *reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom's national security."*

Though helpful in themselves, these comments fall a long way short of being a comprehensive definition of national security.

#### Q4. IS NATIONAL SECURITY REFERRED TO IN LEGISLATION OR CASE LAW, EVEN IF IT IS NOT DEFINED?

Such references are made in all of the States represented in the survey (for further details, see Annex).

#### Q5. UNDER WHAT CIRCUMSTANCES IS NATIONAL SECURITY INVOKED AND HOW OFTEN?

In **Austria**, national security is rarely invoked in the courts. The justification on national security is invoked when national security is considered to be in danger, for example when it comes to the publication of State secrets or issues relating to the defence of the State.

In **France**, it has been used only once (see Q5 in the Annex).

In **Germany**, there is a difference between the broad term "*Öffentliche Sicherheit und Ordnung*" (Public Safety and Order), used in particular in the state police laws, which is invoked permanently as the legal basis for most activities of the police, and the narrower term of national security as used in particular in the *Bundesverfassungsschutz-Gesetz*: only the latter may be invoked in order to justify any intrusions upon communications between lawyers and their clients and it is invoked only very rarely. In both cases, the citizens whose rights are affected by actions based on public safety and order or national security



are entitled to judicial review. Germany's current constitution was built to prevent proceedings in which a single person could unite all powers of the State. Therefore, each action of a public authority must be based on an authorisation granted by law and is subject to judicial review. This also applies to situations where it is alleged that national security is at stake.

In **Greece**, national security may be invoked only in connection with "*certain especially serious crimes against national security*"<sup>33</sup>.

In **Hungary**, in procedural law, secret data gathering can be carried out by certain institutions which are defined in the legislative framework governing law enforcement authorities and national security services.

As previously stated, the concept of national security in **Italy**, in its various forms, can be invoked by certain rules to exclude or limit the exercise of certain rights. However, it is not possible to give an answer as to how often national security is invoked in Italy because, for example, in the case of classified information, it is not possible to understand how the aspects of national security are invoked.

In **Spain**, national security may be invoked in areas that are of concern to the State. This can be done by following the rules specified in the law and under the framework of the National Security System. It can be invoked in matters relating to cybersecurity, terrorism, organised crime, financial and economic security, maritime security, energy security, health security or environmental preservation.

In the **United Kingdom**, it is not possible to give a list of the circumstances in which national security is invoked. Consistently, the government has declined to adopt a definition of national security, on the basis that the threats against which the legislation attempts to protect are evolving and difficult to predict. The concept has been invoked in, for example, Section 94 of the 1984 Telecommunications Act as a basis for the bulk acquisition of communications data by intelligence agencies. The provisions of the 2016 Investigatory Powers Act provide another example. While the concept of national security is not defined in any piece of legislation in the United Kingdom, its meaning has been considered by the courts. As noted above, in *Secretary of State for the Home Department v. Rehman*, national security was defined as the "*security of the United Kingdom and its people*".

## GENERAL CONCLUSIONS

These responses illustrate that the concept of national security is vague and unspecific in almost all of the Member States that took part in the survey. However, there is significant overlap relating to the role, requirement and the use of national security as a reason for a State to overcome certain legal restrictions, including legal and judicial oversight from a rule of law perspective. Consequently, citizens in signatory States to the European Convention on Human Rights, including EU Member States will, in many cases, have to trust the legitimacy of the concept of national security as set by their State.

Considering the above-mentioned findings, it appears that the concept of national security lacks precise definition in most States' legal systems. The overview table shows that the many and varied conceptual features attributed to the concept of national security remain flexible. There are several differing concepts of national security which are used in EU Member States, yet in most of the countries under examination there is no commonly held legal definition that meets the twin test of having legal certainty and being 'in accordance with the law'. This ambiguity leads to deficits and gaps in the accountability of the executive branches of each country, including their intelligence communities.

---

33 Article 19 of the Greek Constitution.

# A DEFINITION OF NATIONAL SECURITY

In this context, can a single internationally acceptable definition of national security' be developed?

While, common elements in all States' understanding of national security can be identified, for example the need to protect the State and its people from threats to violently and unlawfully overthrow the Constitution or system of government, and threats to the safety of the people of the State as a whole, how far can we go? Is a threat to the economy of the State a matter of national security? Perhaps, but what about threats arising from climate change? These are important, but do they threaten national security? Perhaps not for most countries, but what if the State in question is Vanuatu?

It is thus seen as difficult to develop a universal definition, but this does not mean that it should not be attempted.

Furthermore, certain principles can be derived from the various national approaches as discussed above and listed below:

- The interest of the State in protecting its values against threats and concerns in the domain of foreign affairs, security policy and defence policy (Austria);
- Sovereignty, territorial integrity, protection of its democratic foundations, protection of lives, health and property; in a state of emergency or threat to the State, basic rights may be limited; national security is invoked in natural catastrophes, or ecological or industrial accidents (life-threatening circumstances) (Czech Republic);
- Sovereignty (including monetary and fiscal sovereignty), protection of the people, territorial integrity, integrity of the institutions of State; basic rights may be limited but limitations must be proportionate (France);
- Imminent danger to the free democratic order; sovereignty and territorial integrity; security of the institutions of the State; the integrity of the Constitution (Germany);
- National sovereignty, territorial integrity, security of citizens against external threats, support of national interests (Greece);
- Sovereignty and lawful order; territorial integrity; *political, economic and military interests*; exercise of fundamental human rights; multi-party democracy system; functioning of legal institutions; protection of citizens against terrorism (Hungary);
- Independence, integrity and sovereignty of the State; democratic order and basic rights as set out in the Constitution; *political, military, economic, scientific and industrial interests* of the State; disturbance to foreign relations (Italy);
- Protection of liberty, rights and welfare of citizens; defence of the State; principles and constitutional value; invoked in the fields of cybersecurity, terrorism, organised crime, *financial and economic security, maritime security, energy security, health security or environmental preservation* (Spain);
- Security of the State and its people; system of its government; democracy and legal and constitutional security, military defence; disturbance to foreign relations; commitment to peaceful coexistence of nations (United Kingdom).

It is questionable to what extent the aspects shown in italics should be included in any universally acceptable definition of 'national security'. Terms such as 'political, economic and

military interests', which are only employed in a minority of the Member States surveyed, tend to suggest a rather low threshold for limiting fundamental human rights. If these interests are of such a scale that they may justify the limitation of basic rights, they are already contained in other aspects of national security (e.g. military interests will be contained in sovereignty, territorial integrity or foreign relations). Likewise, terms such as 'economic interests' are broad and ill-defined and likely to offend against the principle of proportionality.

In light of the above, the following definition of 'national security' is suggested:

***National security is understood as the internal and external security of the State, which consists of one or more of the following elements:***

- ***the sovereignty of the State;***
- ***the integrity of its territory, its institutions and its critical infrastructure;***
- ***the protection of the democratic order of the State;***
- ***the protection of its citizens and residents against serious threats to their lives, health and human rights;***
- ***the conduct and promotion of its foreign relations and commitment to the peaceful coexistence of nations.***

The limitation of fundamental human rights by invoking national security requires that it be subject to the safeguard of proportionality, except where the careful balancing act cannot be performed due to acute emergencies (in conformity with Articles 4 and 19 of the International Covenant on Civil and Political Rights).

# THE CONCEPT OF PROCEDURAL JUSTICE

The definition outlined above may not be universally accepted, either because of differing national circumstances (consider the hypothetical example given above of Vanuatu in the context of climate change) or otherwise, but the question is not one of definition only. The above discussion has revealed that the present lack of definition may owe as much to political factors as it does to a simple failure to grapple with the issue. The executive branch of government can often see a clear advantage in maintaining imprecision in the name of 'flexibility'. This was made explicit in respect of the United Kingdom by Earl Howe's comments in the House of Lords, quoted above, but it seems reasonable to suppose that similar factors may also be at play in other States.

This leads to a situation where the courts seek to fill the void by formulating principles governing the invocation by the State of national security, either by supplying some content to 'national security' (as in the *Rehman* case in the UK) or by formulating certain general principles as to reasonableness, for example that the executive's invocation of national security ought not to be "*contrary to common sense or arbitrary*", as in the judgment of the ECtHR in *Janowiec and others v. Russia*.

The problem inherent in an approach which invokes principles of common sense is precisely that if there is no underlying definition of national security, then the law remains uncertain because what may be permissible will depend on what a particular judge may consider to be 'common sense' on a given occasion. Of course, over time and over a number of cases, the courts might develop more precise principles as to what constitutes national security, but the above survey reveals that, in many States, the courts are far from developing clear definitions. It is therefore hoped that this Paper might, at least, provide a starting point for the courts and for other responsible bodies at national (and, possibly, international) level to begin to develop more precise, common definitions of what constitutes the national security of a State.

However, even if a definition can be developed and meets universal acceptance, it should not be assumed that the problem will be solved. The process of developing a definition of national security (whether or not it is universally accepted) and, indeed, definitions of national security in each State can become an empty exercise, unless there is procedural justice, which is to say that those who would invoke national security are subject to the rule of law and the citizen can have the assurance of a clear and fair procedure for the infringement upon their fundamental rights in the name of national security, appropriate independent oversight and appropriate judicial remedies.

This idea of procedural justice very much underpins the approach of the ECtHR in cases such as *Janowiec*, with its emphasis on "*adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons... and review the relevant evidence.*"

In these circumstances, the real key to effective control of infringements of fundamental rights in the name of national security, including the use of surveillance activities, may lie in the establishment of rigorous oversight processes, rather than simply by formulating a definition of national security. Nonetheless a clear understanding of what, under the rule of law, lies within the legitimate bounds of national security and a clear definition of national security is necessary in establishing context for the oversight process.

In this context, Section 6 below sets out a number of basic principles that are recommended to be employed in dealing with situations in which the executive seeks to rely upon national security as a basis, in any given case, for interference with fundamental rights. In making these recommendations, the CCBE is aware that it is traversing similar ground to that which has been covered, in detail, in other papers. Reference is made, for example, to *Ten Standards for Oversight and Transparency of National Intelligence Services* (University of Amsterdam)<sup>34</sup>; *Options for more Effective Intelligence Oversight* (Wetzling)<sup>35</sup>; and *the MAPPING Project Legal instrument*<sup>36</sup>.

However, the CCBE brings to the table its own experience in researching and publishing its *Recommendations on the Protection of Client Confidentiality within the Context of Surveillance Activities*, the conclusions of which are consistent with the common threads discernible in the papers cited above.

---

34 Available here: <https://www.ivir.nl/publicaties/download/1591.pdf>

35 Available here: [https://www.stiftung-nv.de/sites/default/files/options\\_for\\_more\\_effective\\_intelligence\\_oversight.pdf](https://www.stiftung-nv.de/sites/default/files/options_for_more_effective_intelligence_oversight.pdf)

36 Available here: <https://www.ohchr.org/Documents/Issues/Privacy/DraftLegalInstrumentGovernmentLed.pdf>

# RECOMMENDATIONS

Recognising the fundamental principle that the invocation by the executive of national security to override fundamental rights is subject to the rule of law and that such invocation should not be arbitrary or opaque or unreasonable, the CCBE recommends the following:

## 1. *NEED FOR LEGISLATIVE CONTROL*

There should be an internationally accepted definition of the national security of a State, as suggested in Section IV above. Whether or not such a definition is internationally agreed, each State must have a clear legal definition of the nature of national security and the prerequisites under which national security may be used as a basis upon which to justify the violation of civil rights.

Similarly, as is the case with any other lawful activity that impinges upon civil rights, the measures used in connection with national security need to be regulated with sufficient precision.

Legislation must provide sufficient guarantees in the event of total or partial outsourcing of national security measures to private entities (where such outsourcing is available to government authorities), so as to ensure that the government always retains full control and responsibility for the entire process, including the procurement, recovery or use of material.

Measures should only be permitted when the body wishing to undertake the activities impinging on civil rights can demonstrate that there are compelling reasons that sufficiently justify such measures.

## 2. *JUDICIAL AND INDEPENDENT OVERSIGHT*

In all cases where national security is invoked in order to justify State action, and that action impinges adversely upon civil rights, the persons whose civil rights are adversely affected should have an appropriate judicial or other equivalent remedy. The body responsible for granting that remedy should recognise the above principles.

When seeking to invoke national security as a justification for taking measures which impinge adversely upon civil rights, the following conditions must be met:

- There should be adequate supervisory control which must be entrusted to an independent judicial body. In particular, the supervisory judicial body must have the authority to decide whether the measure fulfils the requirement of proportionality. Proportionality requires that any measure encroaching on fundamental rights has a legitimate public purpose (i.e. actually serves national security) and is appropriate (i.e. the measure is at least useful in achieving the purpose), necessary (i.e. there are no other measures which achieve the same effect with less intrusion upon the rights of the individual – see also Article 8 para 2 ECHR), and proportionate in the strict sense (i.e. the intrusion must not be out of proportion compared to the purpose). A measure which does not meet these requirements should be regarded as unlawful.

- In the event of a warrant being granted for the use of the relevant measures for the protection of national security, supervision must take place on a case-by-case basis and should be required at all stages of the procedure.
- Once authorisation has been granted, a separate body, meeting the same requirements as the one granting authorisation, must supervise the implementation of the measure that has been authorised. This body must have the power to terminate the measure and/or destroy the material which has been intercepted if it finds that the surveillance measures were implemented in an unlawful manner.
- In order to fulfil its mandate, the oversight body must be given proportionate, adequate, and binding powers by law. These competences must enable the body to make fully informed and enforceable decisions.

### 3. *LEGAL REMEDIES AND SANCTIONS*

In order to enforce the rules described above and make the supervisory control effective, legal remedies and sanctions must be implemented in the event that the rules are breached. In this respect, the CCBE recommends:

Where relevant and appropriate, legal remedies should be made available to individuals and legal entities who have been subjected to unlawful measures. In particular, they should be informed without undue delay after the measures have been terminated, of the surveillance measures undertaken, the scope of the measures and the data collected. They should be able to challenge the legality of such measures before a judge.

Non-disclosure of the measures and the material collected should be exceptional and only be permitted in cases where there are substantial reasons to demonstrate that disclosure would interfere with the continuing investigation of a serious crime or matter of national security. Should that be the case, the scope of the measures taken and the material collected should be disclosed to a supervisory judicial body for review, accompanied by a clear statement of the reasons for the request to withhold the information and any supporting evidence justifying the non-disclosure. The judicial body should be empowered to inform the subject of the measures in the event that non-disclosure is found not to have been justified.

All government authorities which have been found to have been undertaking unlawful surveillance activities should be liable to have sanctions imposed upon them.

### 4. *PROFESSIONAL SECRECY AND LEGAL PROFESSIONAL PRIVILEGE*

With regard to information protected by professional secrecy or legal professional privilege, the CCBE affirms the following principles:

- States should be required to provide in law for explicit protection of professional secrecy and legal professional privilege. Only communications falling outside the scope of professional secrecy or legal professional privilege should be intercepted. In addition, lawyers should not be prevented from adequately protecting the confidentiality of their communications with clients.
- State agencies or law enforcement authorities should be required to use all technological and procedural means available to leave material protected by professional secrecy and legal professional privilege out of the scope of surveillance operations.
- The oversight body or bodies should be responsible for ensuring that surveillance measures do not infringe upon legal professional privilege or professional secrecy.
- These principles should not be subject to derogations based on claimed national security considerations.

# CONCLUSION

The protection of the State and its citizens is the primary function of any government, but this should not be used as a justification for arbitrary or disproportionate violations of fundamental rights, justified, if at all, by the expression: “*exceptional times demand exceptional measures*”. Dictators throughout history have invoked ‘exceptional times’ as a justification for arbitrary and overbearing restrictions on the rights and liberties of citizens. There have always been times in the tide of history where we have had to face difficult challenges and internal and external threats to the stability of the nation and the lives of its people. It is too easy to take one moment in time and treat it as exceptional when, in reality, that moment is full of threats that we have always had to face. The invocation of ‘exceptional times’ is seldom, if ever, a good reason to rebalance the rights of the citizen and the interests of the State in favour of the State.

This is not to say that democracies may not be confronted by serious, even existential threats, against which it is essential that they be given the means to protect themselves. Democracies, however, are States that are governed not by the whim of the despot, but by the rule of law. What the rule of law requires as a response to ‘exceptional times’ are not exceptional measures, but measures which are balanced, proportionate and considered.

In order to uphold the rule of law it is essential that laws are clear, certain and consistently applied. When broad portmanteau expressions like ‘national security’ are invoked, without any clarity as to what they mean, it is difficult for the courts, who are responsible for the administration of the rule of law, to sensibly deal with that difficult boundary between what is truly in the national interest and what relates to a lesser interest however important it may be. Yet, where the fundamental rights of citizens are under threat, the courts must seek to discern that dividing line, for on one side of it lies the legitimate interest of the State and its citizens in ensuring protection from external and internal threats, and on the other side lies tyranny.

It is for this reason that the CCBE presents this paper which seeks to highlight a concept which, in different places and different times, has tended to exist only in the shadows. To this end, the CCBE proposes a possible definition of ‘national security’ with the aspiration that it might achieve wide international acceptance, or, at least, may inform what is a continuing debate in all democratic societies.

Furthermore, the CCBE is mindful that whatever the definition of ‘national security’, it is pointless that such a definition exist without clear, robust procedures to ensure that the rule of law is upheld. To this end, the CCBE makes the above recommendations with regard to what is termed ‘procedural justice’, in other words seeking to ensure that robust procedures exist which guarantee a fair balance between considerations of national security and the fundamental rights of citizens.

By these means, democratic societies could respond to the external and internal threats they face, while upholding the democratic values upon which they are founded.