National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges

Didier Bigo, Sergio Carrera, Nicholas Hernanz and Amandine Scherrer

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Executive Summary

This study examines the way in which justice systems across a selection of EU Member States use and rely on intelligence information that is kept secret and not disclosed to the defendants and judicial authorities in the name of national security. It analyses the laws and practices in place from the perspective of their multifaceted impact on the EU Charter of Fundamental Rights (in particular its provisions related to the rights of the defence and freedom of information and expression), as well as on wider 'rule of law' principles. The analysis is based on a comparative study of the legal regimes, interpretations by domestic and European tribunals as well as key developments and contemporary practices concerning the use of intelligence information as ‘evidence’ and the classification of information as ‘state secrets’ during trials in the name of ‘national security’ in the following seven EU Member States (EUMS): United Kingdom, France, Germany, Spain, Italy, the Netherlands and Sweden.

The examination has highlighted a number of key research findings. It first shows a wide variety of national legal systems and judicial practices embedded in domestic historical, political and constitutional trajectories characterising each Member State jurisdiction (see Section 1 of the study and Annex 5 with detailed Country Fiches). The United Kingdom and the Netherlands are the only two Member States examined with official legislation allowing for the formal use of classified intelligence information in judicial proceedings. The United Kingdom constitutes an ‘exception’ in the broader EU landscape due to the existence of the much-contested ‘Closed Material Procedures’ (CMPs) – secret court hearings where only the judge and security-cleared special advocates are given access to sensitive intelligence material. The Netherlands operates a system of ‘shielded witnesses’ in courts, allowing intelligence officials to be heard before a special examining magistrate (Sections 1.1. and 1.2 of this study). Other EUMS analysed (Germany, Spain and Sweden) present indirect judicial practices in which certain evidence may be hidden from a party during trials under a number of conditions (Section 1.3).

Nevertheless, the study demonstrates that secret evidence is not always legal evidence. In countries such as Germany, Italy or Spain the rights of the defence and the right to a fair trial cannot be ‘balanced’ against national security or state interests as this would directly contravene their respective constitutional frameworks (Section 1.4). Yet, all EUMS under examination face a number of challenges as regards the difficult and often controversial declassification or disclosure of intelligence materials, which too often lacks proper independent judicial oversight and allows for a disproportionate margin of appreciation by state authorities (Section 1.5 of this study).

Another issue resulting from the comparative investigation relates to the fuzziness and legal uncertainties inherent to the very term ‘national security’ (as evidenced in Section 1.6 and Annex 3). While this notion is quite regularly part of political and legal debates in EU and national arenas, the study reveals that a proper definition of what national security actually means is lacking across a majority of EUMS under investigation. The few definitional features that appear in EUMS' legal regimes and doctrinal practices fail to meet legal certainty and 'rule of law' standards, such as the “in accordance with the law” test (see below). This too often leads to a disproportionate degree of appreciation for the executive and over-protection from independent judicial oversight, which is further exacerbated in a context where some EUMS have bilateral systems of mutual respect of state secrets with third countries such as the US. Moreover, the disparities and heterogeneous legal protection regimes among EUMS also mean that EU citizens who are suspects in judicial procedures are protected differently or to divergent degrees across the EU. There are variable ‘areas of justice’ in the EU when it comes to the rights of defence of suspects in cases dealing with national
security and state secrets. This diversity is at odds with the ambition of developing a common AFSJ and achieving non-discrimination between EU nationals when it comes to the delivery of fundamental rights.

A second key finding of the study relates to a growing transnational exchange of intelligence and use of these intelligence materials before courts (as developed in Section 2 and Annex 1 of this study). The 2013 Snowden revelations provide the general context within which EUMS’ regimes and practices need to be analysed. There has been a growing expansion of intelligence cooperation across the world, which is mainly transatlantic and asymmetrical in nature due to the more prominent role played by the US. This has strengthened the view that transnational threats require a more extensive sharing of raw data on individuals collected by Internet or mobile devices. This trend poses a number of dilemmas from the perspective of judicial accountably and the rule of law (Section 2.1 of this study). One relates to the difficulties in assessing the quality, lawfulness and accuracy of the information, and the extent to which this very information can be considered ‘evidence’ in trials (Section 2.2). The current reliance on intelligence information is, moreover, problematic in light of insufficient or deferential judicial oversight of executive decisions taken ‘in the name of national security’. This is particularly also the case in respect of the ways in which the use of state secrets can disrupt government officials’ accountability in cases of alleged ‘wrongdoing’ (Section 2.3).

A third finding concerns an emerging set of European judicial standards from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) on issues related to intelligence information, national security and state secrets, in particular when these affect the rights of the defence (refer to Section 3, Annex 1 and Annex 2 of this study). One of the most important legal standards when assessing national security and intelligence information is the “in accordance with the law” principle. The ECtHR has outlined three main conditions composing this test: first, the measure under judicial scrutiny needs to have its basis in domestic law; second, the law needs to be accessible and sufficiently clear to the individual involved; and third, the consequences must be foreseeable. The ECtHR has repeatedly called for domestic laws to afford sufficient legal protections, with sufficient clarity, to prevent the exercise of arbitrariness and unfettered powers by the executive (as evidenced in Section 3.1).

Obscure laws, or laws allowing the use of secrecy, are therefore not laws, as they fail to respect European judicial standards. This has been confirmed by the CJEU in several rulings dealing with the legality of executive interferences on the rights of the defence in the context of EU antiterrorism policies and national security. Here the Luxembourg Court has recalled the essential nature of the principle of effective judicial protection by the Community judicature even in cases related to national security. The CJEU has further clarified that for the rights of the defence to be respected, the evidence available against an individual needs to be disclosed to him/her and include at least a summary of the reasons upon which the case rests (see Section 3.2).

The freedom of the press (information and expression) and the protection of journalists and their sources are considered as vital for the functioning of modern liberal democracies (Section 4 of this study). A third cross-cutting finding of this study is that the freedom of the press is still systematically jeopardised when national security is invoked in a majority of EUMS under examination. A number of legal restrictions to the rights of journalists and whistle-blowers on grounds of national security are often found across EUMS. In the United Kingdom, the debate over press freedom and national security is particularly vivid in the context of Snowden’s revelations and their reporting by investigative journalists, as demonstrated in the Miranda case. In the Netherlands, a judgment by a national court compromising the sources of journalists was challenged by the ECtHR. This study has found that the legal protection granted to whistle-blowers in national security cases in the Member States examined is far from sufficient.

The study ultimately shows that there are significant barriers to the judiciary’s role of effectively adjudicating justice and guaranteeing the rights of the defence in the majority of EUMS under examination. Claims of secrecy obstruct judicial scrutiny, and judicial authorities too often have to trust the quality and lawfulness of the information provided by the intelligence services and the legitimacy of state secrets claims. The resulting picture is that judicial authorities across the EUMS under examination have a high degree of trust in claims made by governments and intelligence communities in judicial proceedings that national security is under threat, that EUMS readily accept the ‘state secrets’ arguments which prevent judicial and legal oversight on the lawfulness of the information used in trials and that they accept the legitimacy of executive claims on secrecy. That notwithstanding, various court cases presented in this study and Snowden’s revelations on unlawful practices of large-scale mass surveillance illustrate the
ways in which the trust-based relationship between independent judicial authorities and intelligence services’ practices has been increasingly under pressure.

In view of all these challenges, the study concludes that there is a risk that practical transnational arrangements prevail over efforts to use new mechanisms led by the spirit of the Lisbon Treaty that could improve respect for fundamental rights and the rule of law across the Union, while not interfering with Member States’ national sovereignty in questions related to national security. The recommendations outlined hereafter seek to avoid this risk. It is necessary to strengthen the ways in which the courts and judicial actors fulfil their duty to uphold the rule of law with increased vigilance. The EU can play a role in consolidating, promoting and ensuring a more effective implementation of supranational fundamental and human rights principles developed by European Courts and the rule of law. In the light of this, the following policy recommendations are put forward in this study:

- **The new EU Framework to strengthen the Rule of Law should be used to encourage concerned EU Member States to modify their current legislation concerning the use of national security, state secrets and intelligence information in judicial proceedings.** The growing reliance of certain Member States on the use of secret evidence in courts constitutes a direct challenge to judicial scrutiny, as well as to the rights of the defence and freedom of the press laid down in the EU Charter of Fundamental Rights. The European Parliament could call on the new European Commission to use this case as a test bed for making operational the EU Rule of Law Framework. Concerned EUMS would need to put in place the necessary national reforms in order to fully ensure respect for the rights of the defence as provided for in Articles 47 and 48 of the EU Charter.

- **A professional code for the transnational management and accountability of data in the EU should be adopted.** The European Parliament could call for the elaboration and inter-institutional adoption of an EU Code for the Transnational Management and Accountability of Information addressed to the intelligence communities in the Member States. The goal should be to ensure that the practices of intelligence services are in accordance with fundamental rights and ‘rule of law’ principles and European judicial and legal ‘rule of law’ standards. The Code would provide EU guidelines for invoking national security and secrecy in the EU. Most important, it would present a common EU understanding of the basis on which national security should not be invoked by EUMS authorities (what national security is not).

- An ‘EU Observatory’ should be established to map and follow up EUMS’ uses and evolving interpretations of national security and state secrets. The EU Observatory would additionally facilitate a better understanding of when the ‘national security’ justification should not be used by EUMS.

- **The EU should better streamline the promotion and effective implementation of fundamental rights and 'rule of law' standards laid down in relevant international and regional instruments.** The European Parliament should call for a consolidated partnership with supranational human rights actors such as the Council of Europe and the United Nations.

- **An EU level framework for the protection of whistle-blowers in cases related to national security should be adopted.** The systematic protection of whistle-blowers should include strong guarantees of immunity and asylum.