

The rights of notification after surveillance is over: ready for recognition?

Presentation given at the conference:
Human Rights in the Digital Era,
16th of September 2011, School of Law, Leeds

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I. Introduction

Surveillance has increased in several ways in recent years:

- ▶ databases
- ▶ profiling
- ▶ scanning of (tele)communication data

Usually for crime fighting purposes



I. Introduction

- ▶ One crucial question:
Should individuals be informed after they have been subject to surveillance measures?
- ▶ No harmonised approach in the EU.
- ▶ Belgium and Germany: +
- ▶ The Netherlands: +/-
- ▶ ECtHR: ~

Overview

- (I. Introduction)
- II. The notification duty in EU-law
- III. CoE and notification, case-law
- IV. Concluding remarks

II. The notification duty in EU-law

- ▶ Article 10 and 11 Directive 95/46.
- ▶ Applies to ordinary data processing.
- ▶ Not regulated in the FDPJ.
- ▶ Coherence in view of the Lisbon Treaty?

III. CoE and notification, 1. ECtHR, first steps

► *Klass v. Germany* (1978):

- No circumvention of the guarantees of Art. 8 ECHR by the fact that the person concerned is kept uninformed of the violation of his rights.
- Adequate and effective safeguards against abuse.
- One tool = effective remedy in cases of misuse.
- The question of notification is therefore linked to the possibility of independent control and effective remedies.
- The German Court: “person concerned must be informed after the termination of the surveillance measures as soon as notification can be made without jeopardising the purpose of the restriction”.

III. CoE and notification, 2. Rec. R (87) 15 – the forgotten right?

- ▶ Principle 2.2. of Recommendation R (87) 15 (1987)
notification of the individual concerned when data about him have been collected and stored without his knowledge, as soon as the object of the police activities is no longer likely to be jeopardised.
- ▶ Principle applies in Germany, § 101 (4) Criminal Code
part of the ordinary criminal procedure, works in practice since years. Why not in other states/EU?
- ▶ No notification at EU-level (Europol, SIS II), not in surveillance cases, not as regards the transfer or entry of data.

III. CoE and notification, 3. ECtHR confirmation of *Klass* and more protection than Rec. R (87) 15

► *Weber and Saravia v. Germany* (2006):

- Stipulation of important minimum requirements before enacting surveillance measures.
- Recognition of the clandestine aspect of surveillance.
- Nonetheless, notification is necessary.
- Additional protection: only if the data had not been used during their retention period, it was allowed to abstain from the notification duty, ECtHR: +, more protection than princ. 2.2. of Rec. R (87) 15.
- Plus: independent commission responsible for overseeing the application of the notification.

III. CoE and notification, 4. ECtHR after 2006

- ▶ *Ekimdzchiev v. Bulgaria* (2007): A clear statement for the notification as an important safeguard against abuse.
- Standard: guarantees in the German cases.
- Notification = safeguards not only during the authorization procedure of surveillance, but also beyond the surveillance activities, in particular when they have ended (Bulgarian: no notification at all, even prohibition of notification).
- Consequences of the Bulgarian law:

= Violation of Art. 8 and 13 ECHR



III. CoE and notification, 5. Passive “notification”?

► *Kennedy v. the United Kingdom* (May 2010):

- No “German” notification system.
- But independent and accessible tribunal to review the surveillance measure.
- Independent and accessible authority guarantees an effective remedy.
- Important is that the individual must have the possibility to obtain information on possible surveillance measures ordered against him.
- Is the Kennedy case a practical solution?



III. CoE and notification, 6. The use of a Global Positioning System (GPS)

► *Uzun v. Germany* (Sept. 2010):

- Interference: +
- But foreseeability: less strict than in visual or acoustical surveillance cases.
- Crucial question: small interference = no notification necessary?
- No: although GPS surveillance is less infringing, notification is nonetheless required.



III. CoE and notification, 7. An exception from the notification duty?

► *Mosley v. the United Kingdom* (2011):

- Remedy: +, however, Art. 8 violation?
- Balance between the freedom of the press and the respect for privacy.
- ECtHR: Hypothetic effectiveness test of a pre-notification duty? Arguments base on the fact that the press may nonetheless act illegal.
- Exception from the notification duty like in Directive 95/46.



III. CoE and notification, 8. Summary

- ▶ The ECtHR seems to be in favor of a notification duty after surveillance has ended.
- ▶ The case-law shows that notification is seen as an important safeguard against abuse and as tool to guarantee an effective remedy.
- ▶ The *Ekimdzchiez* case is a clear recognition of the notification duty.
- ▶ *Mosley* and *Kennedy* are exceptions from the duty.
- ▶ Violation of Art. 8 and Art. 13 ECHR if notification duty is not respected.

IV. Conclusion

1. The notification is a general principle of human rights developed by the ECtHR (Article 8 and 13, recognition in *Ekimdzhiev*): safeguard against abuse and an important tool to guarantee an effective remedy, nonetheless it seems to be forgotten.
2. Principle 2.2 of Recommendation R 87 (15) must eventually be applied → also in the ordinary criminal procedure like in Germany.
3. It is time to recognise the notification duty not only in the framework of Directive 95/46.
4. The *Mosley* case is an important specification of the notification duty.

Thank you very much
for your attention!