

Morrison & Foerster Client Alert

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MoFo Privacy Minute

France: Lower House of Parliament Adopts Controversial Draft Law on Surveillance

By Sotirios Petrovas

The mood is shifting in the debate between privacy and security as France prepares to enact a controversial terrorism surveillance law critics have nicknamed the “French Patriot Act.”

In the wake of the revelations about the NSA’s activities and CIA operations conducted in Europe, EU countries have been quite vocal in condemning U.S. Government’s practices, despite indications that the same type of surveillance may already be taking place back home. In April 2014, the decision of the European Court of Justice to annul directive 2006/24/EC (joined Cases C-293/12 and C-594/12), long criticized for interfering with fundamental rights and the respect for private life, seemed to indicate that online freedom and privacy were finally gaining ground – until last week, when France took a long stride the opposite way.

On Monday May 5, 2015, the lower house of Parliament, the *Assemblée Nationale*, adopted a draft surveillance law with an overwhelming majority of 438 in favor and 86 against (42 abstentions), with the support of both larger parties, the Socialist party (at power) and the center-right UMP.

The law aims at providing France with a comprehensive legal framework around the activities of its intelligence services, but privacy advocates fear that it may legalize highly intrusive surveillance without sufficient democratic guarantees. The following are some key provisions of the law:

- Intelligence services will be able to place cameras and recording devices in individuals’ homes and geolocation sensors on their cars and intercept communications without prior authorization from a court (Articles 2 & 3).
- Electronic communication and Internet service providers will have to allow intelligence services to install electronic “black-boxes” to collect metadata from virtually all Internet users in France. The metadata will then be analyzed for suspicious patterns of behavior (Article 6). Although the data would be anonymous, it will be possible for intelligence services to investigate deeper and to acquire the actual identities of users.
- France’s financial intelligence cell “TracFin” will be able to collect data pertaining to the customers of transportation companies and travel agencies (Article 9).

UNITED STATES

California

Tiffany Cheung	(415) 268-6848
Kimberly R. Gosling	(858) 314-5478
Rebekah Kaufman	(415) 268-6148
Christine E. Lyon	(650) 813-5770
David F. McDowell	(213) 892-5383
Purvi G. Patel	(213) 892-5296
Andrew Serwin	(858) 720-5134
Stephanie Sharron	(650) 813-4018
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
David M. Walsh	(213) 892-5262

New York

Cindy Abramson	(212) 336-4178
Melissa Crespo	(212) 336-4354
John F. Delaney	(212) 468-8040
Michael B. Miller	(212) 468-8009
Sotirios Petrovas	(212) 336-4377
Suhna N. Pierce	(212) 336-4150
Marian Waldmann Agarwal	(212) 336-4230
Miriam H. Wugmeister	(212) 506-7213

Washington, D.C.

Patrick Bernhardt	(202) 887-8771
L. Richard Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Libby J. Greismann	(202) 778-1607
Julie O'Neill	(202) 887-8764
Cynthia J. Rich	(202) 778-1652
Nathan David Taylor	(202) 778-1644

EUROPE

Berlin

Hanno Timmer	49 30 72622-1346
Lokke Moerel	44 20 79204054
Alex van der Wolk	44 20 79204054

Brussels

Karin Retzer	32 2 340 7364
Alja Poler De Zwart	32 2 340 7360

London

Susan McLean	44 20 79204045
--------------	----------------

ASIA

Beijing

Paul D. McKenzie	86 10 5909 3366
------------------	-----------------

Hong Kong

Gordon A. Milner	852 2585 0808
------------------	---------------

Singapore

Daniel P. Levison	65 6922 2041
-------------------	--------------

Tokyo

Toshihiro So	81 3 3214 6568
Yukihiro Terazawa	81 3 3214 6585

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One of the main points of criticism of the law is that it lacks routine judicial review. Requests to begin surveillance will have to go through a new independent administrative authority, the “CNCTR” (National Commission for the Control of Intelligence Techniques), partly composed of judges and Members of Parliament. The CNCTR, however, will merely have a consultative function, and can be overridden by the Prime Minister. Also, in situations of emergency, the government may act without the CNCTR’s opinion. The CNCTR and individuals who are targets of surveillance activities will have the ability to lodge complaints with the *Conseil d’Etat*, the Supreme Court of the administrative jurisdictional order in France, but it is unclear how this may play out in practice.

Opponents consider the draft law as a way for France to keep up with the international arms’ race in terms of espionage and surveillance powers, to the detriment of civil liberties and the rule of law. Prime Minister Valls fiercely defended the bill, saying that it is indispensable in light of new threats and stressing that the current legal framework on wiretapping, established in 1991, is outdated. The law was proposed before the January 2015 attacks at the offices of satirical newspaper Charlie Hebdo and a kosher supermarket in Paris, but its adoption has become more urgent in the wake of ongoing terrorist threats by jihadist groups and even the Islamic State (ISIS).

To become law, the upper house of Parliament, the Senate, must examine and adopt the draft, and the President of the Republic must sign it into law. Because the draft law has the backing of both larger parties, and the Senate is traditionally and structurally more conservative than the *Assemblée Nationale*, we expect that the draft law will be enacted without any obstacles.

The draft law as adopted by the *Assemblée Nationale* is available in French at:
<http://www.assemblee-nationale.fr/14/ta/ta0511.asp>

An overview of the legislative procedure leading to the draft law is available in French at:
<http://www.assemblee-nationale.fr/14/dossiers/renseignement.asp>

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