REGERINGSKANSLIET

Stockholm, 23 February 2016
UDFMR2012/144/ED

Ministry for Foreign Affairs
Sweden
Department for International law,
Human Rights and Treaty Law (FMR)

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 35252/08

Centrum för rättvisa

v.

Sweden

SUPPLEMENTARY OBSERVATIONS OF THE GOVERNMENT OF SWEDEN ON THE MERITS

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1. These supplementary observations on the merits of the application introduced by Centrum för rättvisa (hereinafter the applicant firm) are submitted on behalf of the Swedish Government in response to the letter from the Court dated 10 February 2016, in which the Government is informed that its request to submit supplementary observations is granted.

Report from European Union Agency for Fundamental Rights

2. In its observations of 10 December 2015 (hereinafter "the applicant firm's observations") the applicant firm made certain assertions with reference to a recent report from the European Union Agency for Fundamental Rights (para. 6 of the applicant firm's observations). The applicant firm has alleged that the report reveals that the "Swedish system lack an effective parliamentary control" and that there are "question marks as to the structural independence of the overview". In this respect the Government wishes to add that the Agency expressly stated in its report that it has chosen to focus its scrutiny on five countries that all have detailed legislation on signal surveillance intelligence. Sweden is one of those countries; France, Germany, the Netherlands and the United Kingdom are the other four. The applicant firm has expressed its own conclusions from the report. In the Government's view the report does not contain any criticism of the Swedish legislation.

The scope of the Swedish Foreign Intelligence Inspectorate's scrutiny

3. The applicant has further alleged that the National Defence Radio Establishment may keep unprocessed material which would fall outside the scope of the Swedish Foreign Intelligence Inspectorate's scrutiny (the applicant firm's observations, paras. 14-15). In this respect the applicant firm refers to email correspondence between applicant firm and the Swedish Foreign Intelligence Inspectorate (appendix 1 to the applicant firm's observations).

4. In this respect the Government would like to stress that the email correspondence referred to by the applicant firm expressly relates to the supervision that the Inspectorate is obliged to perform at the request of an individual, *i.e.* as regulated in Section 10a of the Signals Intelligence Act (see the reply from the Inspectorate of 2 July 2015, appendix 1 to the applicant firm's observations). This specific task of the Inspectorate is separate from its overall mandate for supervision and audit as regulated by Section 10 of the Signals Intelligence Act and by the Ordinance containing instructions for the Swedish Foreign Intelligence Inspectorate (2009:969) (see the Government's

initial observations of 27 April 2012, paras. 88–91, the Government's observations of 25 January 2013 paras. 17-22 and the Government's observations of 8 May 2015 paras. 48–57). Thus, there are no such limitations of the mandate of the Inspectorate in its scrutiny of signals intelligence work and the handling of personal data as the applicant firm alleges.

5. The applicant firm has made the assertion that even though the first selection in cables is done in real time, it is not required by law to do so and that consequently, the National Defence Radio Establishment could have changed their routines, and can do so in the future, without contravening any legislation (para. 16 of the applicant firm's observations). In this respect the Government finds it pertinent to recall that the signal surveillance intelligence task is exclusively regulated in the Signals Intelligence Act and the ordinance (see the Government's initial observations paras. 40–65 and 72–87, the Government's observations of 25 January 2013 paras. 23–24 and the Government's observations of 19 November 2015, paras. 22 and 59). Collection of signals from cables must be done automatically and must have been identified through the use of selectors (Section 2 and 3 of the Signals Intelligence Act, see also the Government's observations of 27 April 2012 para. 76). The National Defence Radio Establishment is obliged, as all other authorities, to adhere to applicable laws and ordinances.

6. In the *travaux préparatoires* to the Signals Intelligence Act the Government clarified that, in theory, an automated collection could be performed through collection and storing of all existing traffic for subsequent processing. However, that would constitute a disproportionate interference in the personal privacy. This approach would also require unrealistic capacity for the storage of data that would only be of very limited relevance to signals intelligence. Signals collection should therefore only be allowed through a pre-determined selection that ensures that the collection is only performed for data that is of relevance to the intelligence service (Government Bill 2006/07:63, p. 76).

7. In this respect the Government also wishes to point out that when the Foreign Intelligence Court grants permission for the collection of data, the Court has to determine, *inter alia,* which specific signal carriers the National Defence Radio Establishment is granted access to and which selectors or categories of selectors are to be used in the collection (Section 5a of the Signals Intelligence Act). The Government also finds it pertinent to reiterate that the Swedish Foreign Intelligence Inspectorate has a mandate to audit, *inter alia*, the use of selectors in particular (Section 10 of the Signals

Intelligence Act and Section 2 of the Ordinance containing instructions for the Swedish Foreign Intelligence Inspectorate (SFS 2009:969), (see the Government's observations of 8 May 2015, para. 48).

The possibility to collect signals from cables

8. Moreover, the applicant firm has expressed its opposition to the Government's statement that collection from cables was not possible until after 1 December 2009. The applicant firm has made this allegation, *inter alia*, due to the fact that the operators were obliged to hand over information as to enable access to signals as of 1 January 2009. The applicant firm has also referred to email correspondence between the applicant firm and the National Defence Radio Establishment (the applicant firm's observations, paras. 22-24 and its attachment 2).

9. The Government maintains, as repeatedly stated in the Government's observations, that collection from cables was not possible until after 1 December 2009, i.e. from the third period onwards, when the regulation concerning the obligation on the part of the cable owners to make traffic available entered into force (see the Government's initial observations paras. 35 and 58, and the Government's observations of 25 January 2013 paras. 34-35). The National Defence Radio Establishment did not have any access to cables before that date, either by any voluntary means or within any framework for international cooperation. According to the *travaux préparatoires* to the Electronic Communications Act, the reason why the obligation to make traffic available at interaction points entered into force at a later stage than the obligation to hand over information was to give operators more time for the technical preparations required for transmitting the signals (Government Bill 2006/07:63, p. 125–126).

10. As regards the obligation for operators to hand over information to the National Defence Radio Establishment, the Government finds it pertinent to make a few clarifications. This obligation is imposed to make it easier to deal with the signals and is separate from the obligation for operators who own cables to hand over signals to interaction points (Chapter 6, Section 19a paras. 1 and 2 of the Electronic Communications Act, 2003:389). In order to enable meaningful surveillance of signals, electronic signals must be easily accessed, which requires a procedure of data reduction. The main part of the signals delivered is reduced from further processing. To enable the surveillance, the National Defence Radio Establishment requires certain input values from an operator, including from operators that do not own cables. These may contain the naming of the connection, its architecture, the bandwidth,

directions, type of signalling, details of who is renting the connection from the operator, etc., but does not contain detailed information regarding specific protection of confidentiality that the operator exclusively grants its end customers. This information is essential for the further processing of data (see the *travaux préparatoires* to the Eletronic Communications Act, Government Bill 2006/07:63, p. 86).

Conclusion

11. In conclusion, the Government wishes to emphasise that it fully maintains its position as outlined in its previous observations to the Court. The fact that all the issues raised by the applicant firm in its latest observation are not commented upon should not be taken to mean that the Government accepts those parts that are not specifically addressed.