

## Editorial

The recent judgment of the European Court of Human Rights (ECtHR) in the case of *Big Brother Watch*<sup>1</sup> seems to divide scholars, practitioners and activists alike. On the one hand, it is argued that the Court has been too lax towards the United Kingdom and has only found minor violations with respect to Article 8 of the European Convention on Human Rights (ECHR), containing the right to privacy. In addition, most of these violations were already acknowledged (and some of them repaired) by the UK. Finally, the main fact is, these commentators suggest, that the Court is willing to recognize the validity of mass surveillance systems as such, although such systems may be subject to conditions and requirements. Consequently, the judgment is called a Pyrrhic victory<sup>2</sup> and it is stressed that it normalizes mass surveillance.<sup>3</sup>

Others are outspokenly positive about the judgment, such as those that have initiated the case, calling it a 'landmark judgment',<sup>4</sup> and Edward Snowden, who stated: 'Today, we won. Today, we won'.<sup>5</sup> They point to the fact that the ECtHR did find a violation of the Convention on a number of points, that it did recognize that processing metadata is subject to scrutiny and that it did rule that information sharing practices should more or less abide by the same rules as information gathering. In its ruling, the Court continued to focus on procedural requirements that ensure the basic legitimacy and legality of surveillance activities by intelligence agencies. The ECtHR has never, going back to the *Klass* judgment in 1978,<sup>6</sup> been an outright critic of mass surveillance programs as such, but has always confirmed that the requirements as embedded in paragraph 2 of Article 8 ECHR must be respected, even in the fight against terrorism. The case of *Big Brother Watch* is no exception in that respect.

The case originated in three separate applications (application nos 58170/13, 62322/14 and 24960/15) and concerned complaints by journalists and rights organisations about three different surveillance regimes: (1) the bulk interception of communications; (2) intelligence sharing with foreign governments; and (3) the obtaining of communications data from communications service providers. The Court held that the bulk interception regime violated Article 8 ECHR as there was insufficient oversight both of the selection of Internet bearers for interception and the filtering, search and selection of intercepted communications for examination, and the safeguards governing the selec-

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1 *Big Brother Watch and Others v the United Kingdom* App nos 58170/13, 62322/14 and 24960/15, (ECtHR, 13 September 2018).

2 Theodore Christakis, 'A Fragmentation of EU/ECHR Law on Mass Surveillance: Initial Thoughts on the Big Brother Watch Judgment' (*European Law Blog*, 20 September 2018) <<https://europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-echr-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment/>> accessed 6 December 2018.

3 Marko Milanovic, 'ECtHR Judgment in Big Brother Watch v. UK' (*EJIL: Talk!*, 17 September 2018) <<https://www.ejiltalk.org/ecthr-judgment-in-big-brother-watch-v-uk/>> accessed 6 December 2018.

4 Christakis (n 2).

5 Tweet by Edward Snowden (13 September 2018) <<https://twitter.com/Snowden/status/1040204470280441858>> accessed 6 December 2018.

6 *Klass and others v Germany* App no 5029/71, (ECtHR, 6 September 1978).

tion of 'related communications data' for examination were inadequate. Importantly, the regime for obtaining communications data from communications service providers violated Article 8 as it was not in accordance with the law. In addition, both the bulk interception regime and the regime for obtaining communications data from communications service providers violated Article 10 ECHR (freedom of speech) as there were insufficient safeguards in respect of confidential journalistic material. Finally, the European Court of Human Rights stressed that the same rules for gathering data must apply to sharing data with other intelligence agencies, because otherwise, agencies could circumvent the rules and conditions in their laws by obtaining data from foreign agencies that are not subject to these legal restrictions.<sup>7</sup>

This judgment continues the path the ECtHR has chosen in recent years, in which it moves away from the more case to case based approach it used to embrace. Although this approach is still the most dominant one, the Court also recognizes that judgments ruled on a case by case basis have a number of downsides.

First, some countries did not adopt measures to remedy the law or policy that resulted in a specific complaint; thus, sometimes hundreds of cases were issued against a country, with the underlying problem not being tackled. In reaction to this issue, the possibility of a pilot judgment has been introduced, which allows the ECtHR to make a statement on the fact that and potentially also how a country needs to change its laws.<sup>8</sup>

Second, the relationship between the legislative and the executive branch has changed over time. When the ECHR was adopted in the wake of the Second World War, the main concern of the authors of the Convention were the tentacles of the executive branch and the need to curb those. Consequently, the Convention suggests that a limitation on the right to privacy must serve a public interest, have a basis in a law and that law must be necessary in a democratic society. That is why early jurisprudence with respect to the 'accordance with the law' requirement focused on the question of whether the actions of the executive branch had a basis in the law, adopted by the legislative branch, and whether it had respected the conditions for exercising the powers as laid down in the law. Gradually, the Court used this criterion to lay down conditions for the legislator vis-à-vis citizens: the legislative branch had the obligation to ensure that the laws were accessible and the consequences foreseeable for citizens. Finally, it added formal requirements for the legislative branch vis-à-vis the executive branch. What the ECtHR saw with dismay is that the legislative branch gave away powers to the executive branch, especially special police units and intelligence agencies, in a blanket fashion, without providing for sufficient guidance on when, how and to what extent these powers could be used and without setting clear standards on oversight by judicial authorities. Thus, the ECtHR introduced the notion of 'quality of law', which it also used in the *Big Brother Watch* case.

7 Paraphrase of: ECtHR, 'Some aspects of UK surveillance regimes violate Convention' (Press release, 13 September 2018) <<https://bit.ly/2xf5JIO>> accessed 6 December 2018.

8 CM\_Resolution\_12052004\_2.

To provide a final example, which also relates to the *Big Brother Watch* judgment, the normal approach of the European Court of Human Rights was, with respect to Article 8 ECHR, to focus on the claims of natural persons, in the circumstances of the case, and only accept claims when the applicants could prove that they had been substantially affected by a measure by the executive branch. If the infringement had not followed the three requirements contained in Article 8 § 2 ECHR, the victim would be rewarded a form of (financial) compensation. In recent times, the ECtHR has accepted *in abstracto* claims, meaning that the applicants do not claim to have suffered loss from the violation of the Convention; rather, these claims regard the validity and the legality of the laws and policies of the legislative branch as such, inter alia related to the requirement of the quality of law. Thus, the Court tasks itself with analysing what a national constitutional court would coin the ‘constitutionality’ of the laws and what the ECtHR calls the ‘conventionality’ of the laws. It assesses whether there are sufficient limits to the powers granted by the legislative branch to the executive branch, whether there are clear conditions provided in the law, how and when the executive branch is allowed to use its powers and whether the law mandates and allows for oversight and judicial (and parliamentary) scrutiny.

Although the Court’s case law is still very much focused on assessing matters on a case by case basis and on providing relief where the executive branch has transgressed its powers as laid down in the laws adopted by the legislative branch, a second approach is emerging. First, the ECtHR is increasingly willing to look at the actions of the legislative branch, while it used to focus first and foremost on the executive branch (and marginally assessed the procedural aspects of judgments by national courts). Second, it increasingly develops standards for procedural justice, instead on laying down material rules and prohibitions. It lays emphasis on how the legislative branch must operate, what conditions, procedures and safeguards should be embedded in the law. Rather than discussing the validity and necessity of mass surveillance, or other matters, as such, it will assess whether the law or policy meets the minimum standards of legality and necessity, or what has sometimes been called the minimum principles of law.<sup>9</sup>

Turning to this issue of EDPL, I’m excited to host the best five papers received for our annual Young Scholars Award. The Young Scholars Award was installed three years ago and has grown in significance and number of submission ever since. It aims to provide a platform for students and young professionals that show exceptional academic qualities. This year was an especially tough competition, with many good and thought provoking arguments and insights from both practice and theory. It was hard to choose, but from all of the papers we received, I selected the ten best for review by the jury. These papers were reviewed by myself, Franziska Boehm (KIT) and Maja Brkan (Maastricht University). As always, when one of the three jury members knows or is directly connected to one of the authors of the submission, that person abstained from

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9 L.L. Fuller, *The Morality of Law* (Yale University Press 1969).

the discussion. Included in this edition are, in alphabetical order of the authors, the five best papers we have received.

These are Emre Bayamlioglu, Phd student at Tilburg University, with *Contesting Automated Decisions: A View of Transparency Implications*, Luiza Jarovsky, PhD candidate at the Buchmann Faculty of Law at Tel Aviv University, with *Improving Consent in Information Privacy through Autonomy-Preserving Protective Measures (APPMs)*, Adam Panagiotopoulos, graduated at the University of Edinburgh, with *Genetic Information and Communities: A Triumph of Communitarianism over the Right to Data Protection under the GDPR?*, Teresa Quintel, Phd at Luxembourg University and Uppsala University, with *Interoperability of EU Databases and Access to Personal Data by National Police Authorities under Article 20 of the Commission Proposals*, and Annelies Vandendriessche, also a Phd student at Luxembourg University, with *Legal Developments in the Protection of Whistleblowers in the European Union*. The authors of the best three papers will present their work at EDPL's Young Scholars Award session at the 2019 Computers, Privacy and Data Protection Conference (CPDP), held yearly in Brussels at the end of January. These are Emre Bayamlioglu, Luiza Jarovsky and Teresa Quintel. The winner will receive the award and get a free subscription to EDPL from our publisher, Lexion. Interested in who that is? Please join us at CPDP on the 31th of January!

I'm also honoured that we have two forewords by two esteemed scholars that have agreed to write on the topic: the future of privacy. Gary Marx is Professor Emeritus from the Massachusetts Institute of Technology. He has worked in the areas of race and ethnicity, collective behaviour and social movements, law and society and surveillance studies, and has recently published a very insightful book *Windows Into The Soul: Surveillance and Society in an Age of High Technology*. Woodrow Hartzog is a Professor of Law and Computer Science at Northeastern University, where he teaches privacy and data protection law, policy, and ethics. He too has just published a book, which received much attention, namely *Privacy's Blueprint: The Battle to Control the Design of New Technologies*.

As always, special mention should be made of the reports section led by Mark Cole, which is the backbone of this journal. Giusella Finocchiaro continues our GDPR Implementation Series with a focus on Italy. Raphaël Gellert and Teresa Quintel both report on developments on EU level, namely the Draft Lists of Competent Supervisory Authorities Regarding the Processing Operations Subject to DPIAs respectively the Regulation Concerning Identity Cards. Court cases and decisions are discussed in reports about Germany, the United Kingdom and the United States by Jan Henrich, Eleni Kosta and Katrien Keyaerts. Finally, the Practitioner's Corner contains two reports, one on blockchain in the light of the GDPR by Patrick Van Eecke and Anne-Gabrielle Haie, and a comparison between China's approach to data protection and that of the EU, written by Sarah Wang Han and Abu Bakar Munir.

The case note section led by Tijmen Wisman and Maja Brkan contains four cases. The somewhat older but still significant case of *Schrems v Facebook* is discussed in a live-

ly fashion by David Gutiérrez Colominas. Charlotte Ducuing, Jessica Schroers and Els Kindt write about *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*, which has not received the attention it deserves, as the authors make clear. In addition, there are two case notes on ECtHR jurisprudence, two very interesting cases and case notes, about the collection of personal data in the fight against serious crime. Nataša Pirc Musar has written about *Benedik v Slovenia* and Plixavra Vogiatzoglou about the (in)famous *Centrum for Rattvisa v Sweden*.

Finally, the book review section, led by Alessandro Mantelero, contains two very interesting book reviews, namely one by Laurens Naudts, who presents Eubanks' *Automating Inequality* and Gianclaudio Malgieri, who discusses Ferguson's *The Rise of Big Data Policing*.

Let me also take this opportunity to thank Alessandro for his efforts. For the last two years, he has been an associate editor of this journal and responsible for the book review section. He has ensured stability, quality and continuity of the section and has also contributed with reviews himself. Now, Alessandro has indicated that it is time to pass on the torch. On behalf of Lexxion, all associate editors, and the entire editorial team, a sincere thanks to Alessandro for the work he has done. Happily, Alessandro will remain on our editorial board. We are also honoured to announce that as per next edition, we will welcome a new book review editor - Gloria Gonzalez Fuster. Gloria is a research professor at the Free University of Brussels, Belgium. She is considered an international expert on privacy and data protection and her book *The Emergence of Personal Data Protection as a Fundamental Right of the EU* is considered one of the best and most intelligent books written about European Data Protection Law.

In addition to our normal sections, we have three pieces from the 40th International Conference of Data Protection and Privacy Commissioners (ICDPPC), where our journal was distributed among participants. We have included the opening speech by the European Data Protection Supervisor Giovanni Buttarelli, the keynote speech by Tim Cook, CEO of Apple, and a report on the EAID Side Event 'Hacking Democracy'.

I hope you enjoy reading this edition of the European Data Protection Law Review!

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