

Legal Regulation & Education: Doing the Right Thing?

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Smart surveillance: options for legislative innovation in a post-Snowden Europe

The EU's January 2012 Data Protection Reform Package (DPRP) looks set to be left out in the cold as it is most likely that the European Parliament would be dissolved and new elections held in May 2014 without the DPRP having been adopted at all stages of the EU's bicameral system. In all likelihood this will mean that a new Parliament and a new Commission would need to start all over again on the process of drafting, discussing and agreeing a new set of legislative proposals for this sector. Even had the DPRP gone through as approved by the LIBE Committee of the European Parliament in October 2013 it would still not have made any significant advances in the regulation of smart surveillance carried out by automated systems capable of recognising identified or identifiable individuals and generating personal data about these individuals in a way whereby decisions may be taken in an automated manner. Indeed it is most likely that the DPRP would have done little to advance the state of the art over the situation obtained by CFD 977/JHA/2008 wherein section 7 prohibited the use of any automated decision system whereby an adverse affect could be produced for the data subject unless relevant appropriate safeguards were provided for by law. While the number of surveillance systems, including automated systems, has continued to multiply, the number of laws providing appropriate safeguards is conspicuous by their absence. This paper traces the progress achieved between 2011 and 2104 in drafting a model law to be used in providing safeguards in the case of deployment of smart surveillance systems. This model law which was drafted in the context of the EU-supported SMART project is intended to be capable of deployment across and outside Europe and will be the subject of a policy brief to be submitted to the European Commission in spring 2014 and is expected to be later forwarded for the consideration of the newly re-constituted LIBE Committee in or after autumn 2014. The paper outlines the major issues addressed by the model law and the principal safeguards proposed, taking into account theoretical underpinnings as relevant to data protection law as well as any other relevant findings from the SMART research project. In doing so it also considers any pertinent revelations from the Snowden disclosures and specifically those dealing with any forms of smart surveillance which may have been employed in programmes such as PRISM and TEMPORA where GCHQ's lawyers said it would be impossible to list the total number of people targeted because "this would be an infinite list which we couldn't manage". The paper concludes that those clauses of RIPA which may have been relied upon to conduct

such surveillance would probably not reach or comply with the European standard of appropriate safeguards provided for by law as intended in both CGD/977/JHA and the EU's recent DPRP.