

## STUDY

### **2. "Protected" professions: special attention is paid to requests for persons whose parliamentary or professional activities cannot legally be monitored**

1. A special procedure to prevent the risk of an intelligence technique leading to monitoring the exercise of a mandate or profession protected by law

Article L. 821-7 of the French Internal Security Code prohibits a member of parliament, a magistrate, a lawyer or a journalist from being the subject of an intelligence technique due to the exercise of his or her mandate or profession.

This provision was introduced during parliamentary work<sup>1</sup> having led to the adoption of the law of 24 July 2015 so that it takes particular account of the situation of persons whose function or profession deserves, in the interest of a democracy, enhanced protection vis-à-vis intelligence techniques. During the discussions that accompanied the examination of this text, the risk of a technique being used in such a way that the political spying of a parliamentarian, an infringement of the independence of the judicial authority, the monitoring of exchanges between a lawyer and his or her client in the exercise of the rights of the defence, or the access of an intelligence service to the secrecy of the sources of a journalist had been raised. The law, in order to prevent such risks, has therefore expressly prohibited intelligence services from requesting authorisation to use a technique against those persons for reasons arising from the exercise of their mandate or profession.

This prohibition, intended to protect parliamentarians, magistrates, lawyers and journalists against the risk of surveillance of their parliamentary or professional activities, does not mean that these persons enjoy, in their capacity, full immunity from intelligence techniques: any person holding a parliamentary mandate or exercising one of these professions may legally be subject to supervision if her or her behaviour reveals the existence of actions not falling within the normal course of his or her parliamentary or professional activities and constituting a threat

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<sup>1</sup> See, in particular, Amendments No. 386 (Rect) and No. 410 (Rect) defended by the Government at the National Assembly meeting of 13 April 2015, as well as Amendment No.COM-42 presented by the rapporteur of the Senate Law Committee at its meeting of 18 May 2015.

to the fundamental interests of the Nation. Only a service may be authorised to do so provided that it has submitted a specially reasoned request, and only after the Commission has carried out in-depth verifications: it must ensure, in particular, that the reasons invoked in this request are, without a doubt, "detachable" from the parliamentary or professional activity of the person concerned, that they can legally base the use of an intelligence technique on them, and that the facts described by the service reveal a proven risk of threat to the fundamental interests of the Nation.

The legislator, for the exercise of this control, has put in place a specially adapted procedure.

First of all, CNCTR's opinion on the legality of an application relating to a "protected" profession can only be delivered in plenary session, i.e. in its most solemn formation. This method of deliberation, which promotes internal debate between the members, is reserved for the examination of applications which, by their nature or the particular issues they raise for the protection of freedoms, are reserved for an in-depth discussion. Such an examination is therefore systematic for any request made targeting a parliamentarian, a magistrate, a lawyer or a journalist. The diversity of origin, status and experience of the members called to deliberate constitutes an additional guarantee to prevent any risk of circumvention of the law.

The emergency procedure, which allows the Prime Minister to order the immediate implementation of a technique despite an unfavourable opinion of CNCTR, is not applicable when one of these persons is concerned.

Finally, the law requires that in the event of authorisation, CNCTR is automatically the recipient of the transcriptions made by the agents of the service concerned. It is thus called upon to verify the product of the implementation of the intelligence techniques concerning these persons; it will thus ensure, noting the results of their use, that the authorisation to use them has not been diverted from its purpose.

## 2. Vigilance, a priori and a posteriori, which leads CNCTR to decide on sensitive issues

Pursuant to this special procedure, CNCTR carries out a particularly attentive verification, *a priori* and *a posteriori*. When the techniques are centralised and accessible to the Commission directly from its premises using the IT tools made available to it by the GIC, this control is systematic and exhaustive.

**CNCTR ensures that the intelligence services systematically report in their requests that their target exercises a parliamentary mandate or a protected profession.**

Any request targeting a member of parliament, a magistrate, a lawyer or a journalist must explicitly mention the mandate he or she holds or the profession he or she exercises. The Commission ensures that the intelligence services do not disregard the situation of these persons when drafting their requests, so that no failure or irregularity in this respect deprives them of the protection to which they are entitled.

If the services, as a general rule, endeavour to write their requests seriously, describing, most of the time in a detailed manner, a behaviour, facts or activity likely to reveal indications of a threat, the control of the CNCTR nevertheless remains dependent, in the case of such persons as in others, on the quality of the information communicated to it. As it does not have its own investigative powers to verify the situation of these persons, it is the responsibility of the services, for the proper application of the procedure provided for in Article L. 821-7 of the French Internal Security Code, to verify themselves, on the basis of the information at their disposal, the profession or function of the persons who are the subject of their requests: it is only after having sought, on the basis of precise and objective criteria, any indication to verify the capacity of the person concerned, that the service may submit a request.

At this stage of the examination of requests, the Commission must therefore verify that this condition has been previously and correctly met, if necessary by engaging in a dialogue with the author of a request it deems incomplete or which contains uncertain information on the situation of the person concerned. In case of doubt about the status of the person, the plenary session is in any case called. It is up to the session to assess whether the Commission's information is sufficient and, if so, whether the "target" must be recognised for the protection provided by law.

CNCTR thus verifies the quality of the requests it receives, ensuring that they accurately describe the situation of persons whose professional activity or function cannot be monitored.

- The case of requests targeting a journalist

CNCTR has a delicate responsibility, which is to indicate to the services how to recognise the quality of journalist of a person within the meaning of the French Internal Security Code.

Two definitions coexist in positive law, that given by the Law of 29 July 1881 on freedom of the press and that contained in Article L. 7111-3 of the French Labour Code. The two, as noted by the doctrine, are largely tautological: thus, according to the French Labour Code, a professional journalist is *"any person who has for his or her main, regular and paid activity the practice of his or her profession in one or more press companies, daily and periodic publications or press agencies and who derives the majority of his or her resources therefrom"*.

CNCTR has adopted the definition of the Law of 29 July 1881, this text being, in its mind, the inspiration of the provisions of the French Internal Security Code: what is at stake is the protection of the secrecy of sources, a condition for guaranteeing the freedom to inform. Therefore, in the Commission's view, a journalist is *"any person who, practising his or her profession in one or more press companies, communication to the public online, audiovisual communication or one or more press agencies, practises, on a regular and remunerated basis, the collection of information and its dissemination to the public"*<sup>2</sup>.

The Commission therefore does not require that this activity be carried out on a primary basis, as the French Labour Code does. However, it must be *"remunerated"*, without it being necessary, unlike under the Labour Code, for the person to derive *"the majority of his/her resources"* therefrom.

CNCTR also takes into account, as the Law of 1881 has done since its amendment by the Law of 4 January 2010 on the protection of the secrecy of sources of journalists<sup>3</sup>, the activity carried

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<sup>2</sup> See Article 2 of the Law of 29 July 1881 on freedom of the press.

<sup>3</sup> See Law No. 2010-1 of 4 January 2010 on the protection of the secrecy of sources of journalists.

out within the framework of online public communication or audiovisual communication services.

The definition used is thus protective by its extensive nature and in perfect agreement with the spirit and letter of the 1881 Law.

However, it is not always easy to manage, either because the service does not have sufficient factual elements to attribute this qualification, or because one is faced with a situation at the margins of the law. This is the case not only with certain activist activities whose journalistic nature is uncertain but also due to the development of new online information services: blogs, podcasts, interviews broadcast online, etc.

In any event, in order to fully address the desire for protection expressed by the legislator, the Commission considers that doubt must benefit the "target".

- Other protected qualities

In the case of parliamentarians, magistrates and lawyers, the issue is less difficult. With the exception of requests under the international electronic communications surveillance regime, for which the protection of the law applies only in the event of exercise in the national territory of the parliamentary mandate or the profession concerned<sup>4</sup>, this protection applies regardless of the country of installation of the persons concerned, provided that the person concerned is in France.

The CNCTR must therefore decide on the qualification with regard to persons operating, where applicable, in a foreign framework, according to the rules of this country.

The general lines of the doctrine drawn up by the Commission in this respect are set out in its Deliberation no. 1/2015 of 29 October 2015, available on its website.

It has thus applied, for the quality of parliamentarian, a valid definition regardless of the political system in question. Thus, in addition to French parliamentarians and senators, as well

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<sup>4</sup> See the provisions of Article L. 854-3 of the French Internal Security Code.

as Members of the European Parliament, *"any person, regardless of their nationality, who in their country of origin holds through direct or indirect universal suffrage a national or federal office"* is regarded as a "Parliamentarian". It is obviously not for the Commission to decide on the sincerity of the election or, more broadly, on the democratic character of the country in which the office is exercised.

The same approach has prevailed for judges and lawyers. According to the CNCTR, protection must apply to *"any person who, in his or her country or in an international context, holds, for a State or an inter-state organisation, the power to decide disputes independently or to impose sanctions by enforceable decisions by means of the public force"* in the case of the former, or those who, *"for the benefit of a recognised qualification, holds under the law the power to represent or assist a person before a court established by a State and is subject to professional and ethical obligations"*, with regard to the latter.

In its opinions, CNCTR also stated, with regard to the legal profession, that the protection established by law was not limited to jurisdictional activities carried out by a lawyer but also applied to functions as legal counsel.

### **The prevention of indirect harm**

The Law of 29 July 1881 on freedom of the press states that infringement of the secrecy of the sources of journalists, which is prohibited, may be direct as well as indirect.

The Commission naturally endorses this approach. An intelligence service cannot therefore use a technique against a relative of the journalist or a member of his or her entourage when the purpose of the surveillance would be to access data related to the journalist's investigation and documentation activity.

The same applies to other protected mandates and professions. In order to prevent any circumvention of the law, CNCTR holds that when the information or documents sought by the monitoring of an objective directly related to a person exercising a protected profession are, in fact, related to the activity of the latter, the objective must benefit from the guarantees, particularly procedural guarantees, provided for by law.

For example, an intelligence technique requested with regard to the assistant of a member of parliament in order to collect information that the interested party can hold only because of his particular proximity to that Member will be examined by the plenary session of the Commission, which will examine, where appropriate, the "detachability" of the elements sought.

### **The delicate question of "detachability"**

As has been said, the French Internal Security Code does not grant full immunity to persons practising a protected profession. It does not prohibit the surveillance of actions that differ from the normal exercise of the profession or mandate and would harm the fundamental interests of the Nation.

Similarly, the law of 29 July 1881 reserves the case where a "*predominant imperative of public interest*" justifies an infringement of the secrecy of the journalist's sources.

CNCTR's assessment is easy if the act in question is absolutely foreign to the profession. It is more delicate when actions are involved that may interfere with the practice of the profession. This is the case for a foreign journalist who appears to be in contact with the intelligence services of his or her country. In such a case, the Commission admits the possibility of surveillance under the "prevention of any form of foreign interference". It will, however, ensure that the information collected and exploited relates only to activities classified as "interference".

Finally, it should be noted that the development of certain forms of "hybrid war", resulting in influence approaches, the presence on social networks of fictitious personalities presenting themselves as carrying out a public information activity and, more generally, the restructuring of the information activity make the Commission's control difficult.

The recent work carried out, particularly in Parliament<sup>5</sup>, on the interference of foreign powers illustrates these difficulties of appreciation.

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<sup>5</sup> In particular those carried out in the National Assembly by the Committee of Inquiry on political, economic and financial interference of foreign powers - States, organisations, companies, groups of interests and private persons - aimed at influencing or corrupting French decision-makers, leaders or political parties.

CNCTR will only give a favourable opinion after ensuring that there is a real interference, i.e. a personal involvement of the interested party in light of indications showing that he or she is in relation to a foreign power. *On the other hand*, an intelligence technique cannot be used with regard to a parliamentarian or journalist on the sole ground that the information he or she disseminates or the opinions he or she defends contribute to the strategy of influence of a foreign power.

### **Operation under close control**

In the event of authorisation, the services may only transcribe or extract, from the information collected from protected persons, information useful for the prevention of the threat that justified this decision: therefore, other information which does not relate to this objective, including the elements of the professional or parliamentary life of the person subject to surveillance, cannot be kept.

In order to guarantee compliance with this requirement, CNCTR must be the recipient of the "productions" made during the operation phase of the technique, i.e. its results. For techniques centralised by the GIC, the Commission directly accesses all transcripts and extractions carried out by the services from its premises.

The facilities offered by this remote access enabled CNCTR to verify in 2022 all the productions relating to protected persons.

The Commission then ensures the serious and rigorous nature of the transcriptions made by the agents of the service concerned and draws useful lessons from them in view of a possible request for extension of surveillance: it is only after having compared the product of this surveillance with the objectives initially sought, that CNCTR, meeting in plenary session, will issue its opinion.

In addition, the implementation of techniques with regard to a member of parliament, a magistrate, a lawyer or a journalist gives rise to *a posteriori* reinforced control of the Commission, resulting in frequent travel to the offices of the services.





Although CNCTR has never detected, during its audits, any irregularity that would demonstrate a fraudulent intention on the part of an intelligence service, every year it nevertheless finds defects in the way in which the data collected is used, mainly due to insufficient discipline. 2022 is no exception, since the Commission had to order the destruction of transcriptions of conversations that were part of an activity protected by law.