

The NSA: the impact of the wiretapping scandal on German-American relations

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Edward Snowden revealed that America's National Security Agency (NSA) had tapped Chancellor Angela Merkel's mobile phone and had collected data en masse. This has caused the largest crisis of confidence in relations between Germany and the US since the Iraq war. Due to the technological advantage which American intelligence services have, Germany wishes to continue close co-operation with the US but is making efforts to change the legal basis of this co-operation dating back to Cold War times.

Berlin would like to secure part of provisions similar to the Five Eyes alliance – agreements signed between the US, the UK, Canada, New Zealand and Australia in the second half of the 1940s, aimed at intelligence sharing and a ban mutual bugging. This could spell the end of the last (not including the military presence) relic of Germany's dependence on the US which emerged following World War II and took shape in the shadow of the Cold War. The process of Germany's emancipation in trans-Atlantic relations, which began after Germany's reunification, would be complete. The US is however opposed to such far-reaching changes as it is interested in continued co-operation with Germany without limiting it. Were it not to sign agreements satisfactory for Berlin, this would lead to a protracted crisis of confidence in German-American relations.

American security service surveillance in Germany

According to the information disclosed in June 2013 by Edward Snowden, a former NSA employee, the US used the PRISM programme in order to run large-scale surveillance operations outside the country, including in the territory of the European Union. According to the *Der Spiegel* weekly, Germany were one of the countries most targeted, with the NSA intercepting approximately 500 million phone calls, e-mails and text messages at the turn of 2012 and 2013¹. In July 2013 the German press revealed

that the US had also used PRISM in the ISAF mission in Afghanistan with the knowledge and consent of German intelligence and the Bundeswehr. Furthermore, information surfaced that the Federal Intelligence Service (BND) and the Federal Office for the Protection of the Constitution (BfV) use the American spying programme XKeyscore, which gives the NSA the complete access to all data thus collected. On 24 October the news broke out that along with the surveillance of German inhabitants the telephone of the German chancellor, Gerhard Schroeder had been tapped since 2002. Later Angela Merkel received the same treatment. President Barack Obama claims that the US administration was unaware that this was happening.

The scandal in connection with the NSA operations in Germany developed in two stages. Dur-

¹ Compare: *Der Spiegel*, Geheimdokumente: NSA überwachet 500 Millionen Verbindungen in Deutschland, 30 June 2013; <http://www.spiegel.de/netzwelt/netzpolitik/nsa-ueberwachet-500-millionen-verbindungen-in-deutschland-a-908517.html>

ing the first stage between June and September 2013 allegations appeared that large-scale bugging of telephone connections in Germany was taking place. The largest controversies and firm reactions from German politicians were however caused by the information revealed in October about Chancellor Merkel's telephone being tapped and the scope of co-operation between the German and American security services.

The reactions of German politicians

The fact that German citizens were being spied upon by the US security services was revealed in the middle of the Bundestag election campaign. The opposition parties (the SPD, the Green Party and the Left Party) tried to make use of the scandal by discrediting the ruling Christian Democrats and Liberals. The liberal FDP sought to emphasise the necessity to protect personal data and civil liberties, which has traditionally been an important item on the party's political agenda. The reaction of the Christian Democrats at both stages of the scandal proved to be the mildest. Nonetheless, even they toughened their stance when further information leaked regarding the methods used by the American agency. Since the beginning of the scandal over the NSA operations in Germany, the federal government in Berlin claims that it did not know about the surveillance of German citizens by Americans, let alone about Chancellor Merkel's telephone being tapped. While MPs from the FDP, in particular Justice Minister Sabine Leutheusser-Schnarrenberger, firmly demanded that the US clarify the issue and be held accountable for it, the Christian Democrats attempted to smooth it over. Chancellor Angela Merkel and Interior Minister Hans-Peter Friedrich called on the US to respect German law. Representatives of the Federal Ministry of the Interior and the German security services paid two visits to the US where they met with their American counterparts and negotiated an agreement on bringing to a halt intelligence operations carried out against each

other. On the other hand, in Germany Friedrich emphasised the advantages of co-operation between the security services of the two countries. The reaction of the opposition was much more severe and has led to the establishment of an investigative committee in the Bundestag. Ronald Pofalla, the head of the Federal Chancellery, who coordinates the work of the security services, was among those to be heard by this committee. The SPD and the Left Party criticised the federal government for its inept handling of the situation. During the election campaign for the Bundestag, the Social Democrats also demanded that the work on the free trade agreement between the US and the EU be suspended. The opposition parties reproached the government for being slow to respond to the NSA scandal and for the disproportionate reaction to the revealed scale of the surveillance. Peter Schaar, the Federal Commissioner for Data Protection and Freedom of Information, also criticised the government for its passivity.

The revelation that Chancellor Angela Merkel's telephone was tapped prompted a strong reaction from the German government. Negotiations on the agreement to end mutual intelligence operations have also been intensified.

After it was revealed that Chancellor Merkel's telephone had been tapped the reactions from politicians began to converge. The government responded more critically than before – Foreign Minister Guido Westerwelle summoned the US ambassador to provide an explanation and Chancellor Merkel termed the NSA operations. The negotiations to sign the agreement about stopping intelligence operations against each other have also been intensified. It is, however, the opposition parties who have been at the forefront of the debate on the NSA's activity. During the coalition negotiations the SPD held

back from attacking the Christian Democrats but still called for the US to be held accountable. It is mainly due to the Social Democrats that the provision regarding the NSA activity was includ-

German society reacted to the revelations about the surveillance in two ways. On the one hand, the survey indicates an important decline in confidence towards the US. On the other hand, the majority of Germans do not feel threatened by the NSA's activity in Germany.

ed in the CDU/CSU-SPD coalition agreement². The Left Party and the Greens are calling for the establishment of another investigative committee in the Bundestag, this time to deal with the fact that Merkel's telephone had been tapped. As proposed by the opposition politicians, this committee would summon Edward Snowden among other people. The Green Party is the most active in this issue as data protection is becoming an increasingly important item on their political agenda. The party's renowned politician Hans-Christian Stroebel even met with Snowden in Moscow in order to discuss the possibility of his appearing before the committee.

The reactions of German society

German society, which is sensitive to the issue of data protection, has reacted to the information about the NSA surveillance in two ways. On the one hand, a survey commissioned by the public TV station ARD in July 2013 indicates that confidence in the USA has substantially declined from 65% to 49% – for the first time since Barack Obama became US president³. In November the num-

ber of Germans who believed that the US is a reliable partner for Germany stood at only 35%. The majority of Germans also declared themselves dissatisfied with the position of the federal government on the NSA scandal (over 70% of those surveyed). Part of the intellectuals and politicians whose political agendas are based on the concept of data protection (including the Green Party, the Pirate Party) is vehemently opposed to the surveillance of Internet activity by foreign security services. Seven German-speaking writers have also protested against it; as a group called "Writers Against Mass Surveillance" they have initiated a petition against these practices. On 10 December their manifesto was published by 30 European daily newspapers. On the other hand, a majority of Germans (76%) do not feel threatened by the NSA actions in Germany, and 44% believe that too much significance has been assigned to the surveillance by the American agency⁴.

The legal context of the NSA activity in Germany

As the media reported and representatives of German ministries announced, the agreements regarding co-operation between the German and American security services which were in force at the time when the scandal broke out date back mainly to the 1960s. They include: an additional agreement to the North-Atlantic Treaty regarding the deployment of military forces, signed in 1963; the law of 1968 relating to limiting the confidentiality of the post and telecommunications (under which the BND shares collected data with the military forces of the allied countries which are deployed in Germany), and the administrative agreements of 1968. Under these provisions the US intelligence services are entitled, as part of the protection of their citizens (initially, the troops deployed in bases in Germany) to use data gathered by the BND wiretapping and to independently run their own

² The potential coalition partners have committed themselves to clarifying the circumstances of NSA activity in Germany and to making efforts towards the signing an anti-espionage agreement.

³ <http://www.zeit.de/news/2013-07/05/d-umfrage-vertrauen-der-deutschen-zu-usa-leidet-unter-nsa-af-faere-05001603>

⁴ <http://www.stern.de/politik/ausland/umfrage-zu-us-spi-onage-deutsche-laesst-nsa-af-faere-kalt-2068615.html>

data collection operations. Additionally, in 2002 in the context of the war on terror being fought by the US, an agreement was signed about the establishment of a satellite tracking station (SIG-NIT) whose tasks would include the protection of the troops on missions, also in Afghanistan.

On 2 August 2013 the Federal Ministry of Foreign Affairs of Germany announced that it had terminated the administrative agreement regarding the law on limiting the confidentiality of the post and telecommunications with the US and the UK by mutual consent, through the exchange of diplomatic notes. This does not spell the end of co-operation between the German and American intelligence services but merely the abandonment of a provision which was already a relic of a bygone age. The remaining legal acts which regulate co-operation between the German and American services have not been abrogated.

The implications of the NSA scandal

In the wake of the information that Chancellor Merkel's telephone may have been tapped by the NSA and that other German citizens may have been eavesdropped, the government in Berlin is demanding that the present legal framework of intelligence co-operation between the two countries be changed. So far it has enabled close co-operation between Germany and the US but has not included a ban on mutual espionage.

Germany at present is seeking to sign two new agreements with the US which would supersede the present regulations: an intergovernmental agreement and an agreement between the intelligence services of the two countries. They will regulate both co-operation between the services and limit the scope of operations of American intelligence agencies in Germany. In the intergovernmental agreement of a political nature, Germany would like to include provisions which would rule out mutual surveillance, economic espionage in bilateral relations, espionage with the use of operational techniques in Germany and the bugging of the heads of the two states. As

was reported in *Der Spiegel*, Germany would like to ensure that certain provisions are included similar to those in the Five Eyes agreements, that is, the agreements between the US, the UK, Canada,

Germany is currently striving for two new agreements with the US to be signed which will replace the present regulations: an intergovernmental agreement and an agreement between the security services of the two countries.

New Zealand and Australia signed in the second half of the 1940s with regard to intelligence sharing and prohibiting mutual surveillance⁵. Merkel's foreign policy advisor, Christoph Heusgen is responsible for negotiating the intergovernmental agreement for Germany, which proves that this document has been given top priority by Chancellor Merkel. There are opinions in Germany that the EU's largest countries should first conclude similar agreements between themselves since this would strengthen their negotiating position in talks with the US. Officially, Germany has stressed the individual character of these agreements from the outset. This may also mean that it wishes to emphasise the singularity of these German-American documents in the context of attempts to change the basis of relations between the two countries. Nevertheless, the US has ruled out negotiations of similar agreements with a larger number of parties. Already during the current talks Washington is opposed to setting a precedent with regard to the legal exclusion of wiretapping as it fears that similar demands will be made by other states⁶. This may mean that the

⁵ Compare R. Neukirch, R. Pfister, L. Poitras, M. Rosenbach, J. Schindler, F. Schmid, H. Stark, Ohnmächtige Wut, *Der Spiegel*, no 45/2013, p. 31.

⁶ Compare D. E. Sanger, A. Smale, U.S.-Germany Intelligence Partnership Falters Over Spying, *NYT*, http://www.nytimes.com/2013/12/17/world/europe/us-germany-intelligence-partnership-falters-over-spying.html?hp&_r=0 (access: 16.12.2013).

German demands will not be met by signing the agreement with the US, which in practice would mean that the current US intelligence operations aimed at Germany will continue.

From the German perspective the further co-operation between the German and American intelligence services is necessary in order to guarantee security both for German citizens in Germany and for Bundeswehr troops involved in foreign missions (particularly in Afghanistan). This is mainly due to the US advantage in the field of cybersecurity. With regard to this, the

In the long term the revision of the present principles of co-operation would result in the removal of one of the last relics of post-war relations between Germany and the US. Germany would thus enter a further – and perhaps the final – stage of emancipating its foreign policy, which would see the creation of the basis of co-operation between the two partners.

German security services (above all the BND and the BfV) widely use intelligence gathered by the US⁷. The NSA scandal has further intensified the debate on the necessity to extend the cybernetic competences of German intelligence and the defence capacities of counterintelligence to deal with cyber-attacks. This debate has also been part of the discussion over the reform of the BfV and the Federal Office for the Protection of the Constitution (LfV) and co-operation between the services in the case of the NSU scandal (the three-person National Socialist Underground which murdered nine immigrants and a German policewoman in 2000-2007; clarifying the circumstances of the murders and their extreme right-wing background was possible only after

⁷ Interview with the head of the BfV, Hans-Georg Maaßen, *Starke Spionageabwehr wichtig*, <http://www.verfassungsschutz.de/de/oeffentlichkeitsarbeit/interviews/int-20131126-wdr2> (access: 10.12.2013).

one member of the group denounced herself to the police in November 2011 and two other members committed suicide).

There is traditional opposition in Germany to the security services being strengthened and to the concentration of their competences (one of the fundamental principles with regard to the work of these services prohibits the intelligence and the investigative competences – *Trennungsgebot* – being combined). The NSA scandal may thus serve as an argument to persuade public opinion that more competences are needed by the BND and the BfV to enable them to become more effective and less dependent on American intelligence.

Extending the competences of the German services will require increased funding for both scientific research, technological development, and the development of the capacities of the services themselves, including personnel. Such measures are presented in the new coalition agreement between the CDU/CSU and the SPD; additional funding is mentioned in order to strengthen the Federal Office for Information Security (BSI) and the Cyber-Defence Centre (*Cyber-Abwehrzentrum*) and other services in the area of cyber capacities. These are however long-term measures and in the short term Germany will be forced to use information from American intelligence agencies. Representatives of the German services admit that the detection of certain attempted attacks in Germany was possible exclusively due to intelligence obtained from foreign services (due to numerous connections this refers above all to American services) as in the cases of Sauerland-Gruppe and members of Deutsche Taliban Mudschahidin⁸. Furthermore, Germany is interested in intelligence intercepted by the US

⁸ Due to intelligence which the US services shared with German intelligence and counterintelligence, the German police arrested those suspected of planning terrorist attacks. Members of both groups, independent of each other, were being trained at the Afghan-Pakistani border and were planning attacks in Germany. The trial of the Sauerland-Gruppe members ended in 2010, while members of the Deutsche Taliban Mudschahidin received sentences in the court in Berlin in 2013. Compare R. Neukirch, *op. cit.*, p. 34.

from the regions of Afghanistan, Pakistan and North Africa and intelligence regarding organised crime and illegal immigration, which may help Germany's internal security.

The conclusions

The current crisis of confidence in relations between Germany and the US is the most important one since Germany expressed its opposition to the US intervention in Iraq in 2003 in the UN Security Council. The new agreements currently being negotiated are aimed at mutual non-surveillance and are intended to ease the tension and to reassure public opinion in Germany which demands that Chancellor Merkel respond to this situation. At the same time they will not have an important influence on the present co-operation between the intelligence services of the two countries due to its large scale and the common areas of collecting data which is used by both the US and Germany. America fears setting a precedent and is reluctant to limit its own competences. It will therefore not extend the intelligence alliance with Anglo-Saxon states (the Five Eyes agreement) to Germany and will probably not agree to a bilateral agreement with Germany to regulate new principles of co-operation between the intelligence services, including the ban on mutual espionage. In the long term a revision of the present principles of co-operation would result in the removal of one of the last relics of post-war relations between Germa-

ny and the US. Germany would thus enter a further – and perhaps the final – stage of emancipating its foreign policy following the fall of the Berlin Wall, which would see the creation of the basis of co-operation between the two partners. Germany has used the information about the NSA operations to build a new foundation in its transatlantic relations. This foundation is aimed at reflecting Germany's strong political and economic position as the EU's most important state which is developing co-operation with the BRICS states and the new regional powers (*Gestaltungsmächte*). One of Berlin's goals is to confirm its strong position in the international arena and this may be seen in the country's efforts to gain permanent membership on the UN Security Council. American opposition to Germany's proposal regarding the provisions in the agreements means that the German part in the NSA scandal will not be closed and will impact both German-American relations and Germany's internal relations (for example, the demands made by the opposition that Germany grant asylum to Snowden will resurface). Despite the visit of US Secretary of State John Kerry, which has been scheduled for the beginning of this year (it had initially been thought that the agreements between Germany and the US would be signed during this visit) and Chancellor Merkel's confirmed visit to the US this year, a breakthrough in bilateral relations should not be expected. They will remain tense and full of mutual distrust.

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