



Challenges of implementing procedural law from the perspective of fundamental rights safeguards and guarantees

*Alexandros-I. Kargopoulos,
Programme Officer - SNE, FRA*

17 Nov 2021

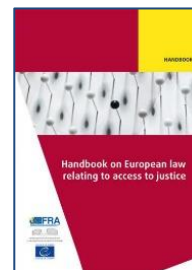
Octopus Conference 2021

- FRA's mandate and work
- Project on Cybercrime and Fundamental Rights
 - Description
 - Procedural challenges of digital and online investigations
- Available findings on cybercrime investigations and fundamental rights challenges.
 - Compulsion for obtaining passwords
 - Advanced and intrusive investigative tools

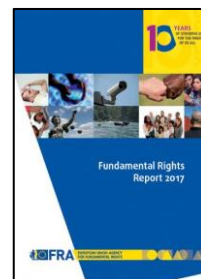
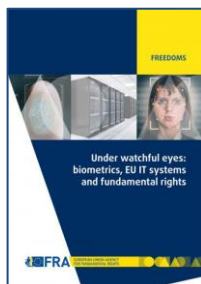
What we do

- **Legal opinions** (e.g. *FRA opinion on the removal of online terrorist content (2019)*)
- **Legal handbooks** (e.g. *Handbook on European law relating to access to justice*,
Handbook on European non-discrimination law)

- **Annual Fundamental Rights Report**



- **Reports**



A tool to raise awareness



The revised European Data Protection Law Handbook in partnership with



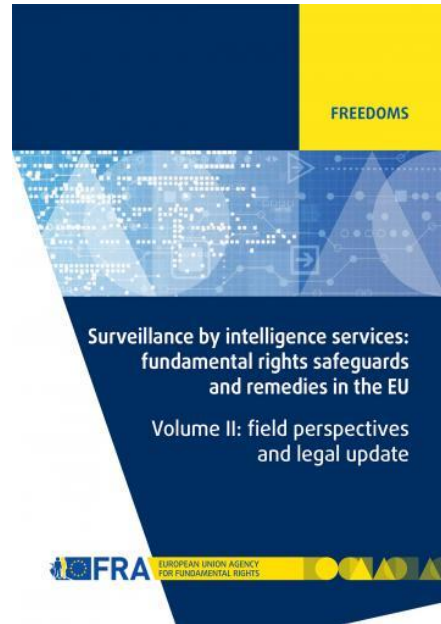
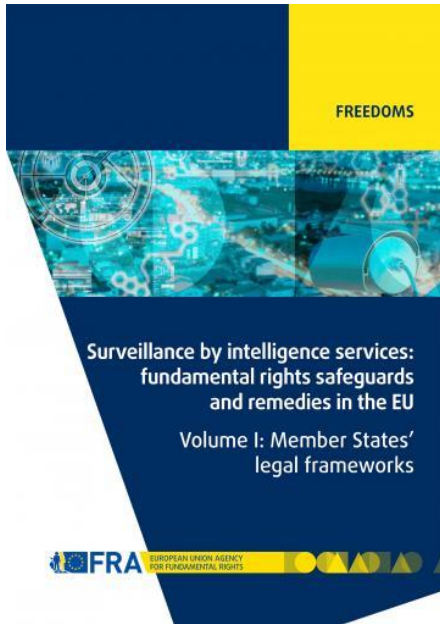
COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



- Surveillance by intelligence services - Volume I: *Member States' legal frameworks*
- Surveillance by intelligence services: fundamental rights safeguards and remedies in the EU - Volume II: *field perspectives and legal update*

- A Handbook on European law related to cybercrime and fundamental rights
- Aims at:
 - *Informing on the European legal framework*
 - *Highlighting the key fundamental rights challenges*
 - *Mapping the obligations of EU Member States*
 - *Identifying promising practices*

- Main challenges relate to procedural law and powers
- Electronic evidence is of paramount importance

Experts identify challenges:

- Application of data protection principles in criminal investigations
- Cross-border and direct access to data
- Encryption and the right against self-incrimination
- Legal ‘hacking’ techniques
- Exchange of digital information with intelligence services

FRA Report: *Presumption of Innocence and Related Rights, 2021*

**Directive
2016/343**

art 7(3)

*Lawful
compulsion to
obtain
evidence
existing
independent of
the will of
defendants.*

Defendants cannot be compelled in majority of EU MS

- Defendants cannot be required to ‘communicate’ information
- Right to remain silent applicable also to providing evidence

Defendants can be compelled in Belgium

- Constitutional Court (20 Feb 2020), Cassation Court (04 Feb 2020)
- Professionals have diverging views

FRA Report: *Directive on Combating Terrorism, 2021*

- ❑ Online investigations and digital evidence crucial for investigating terrorism
- ❑ New intrusive hacking and online surveillance tools in some EU MS
 - ‘covert intrusion’ into PCs, mobile phones, etc.
 - covert online investigation using a pseudonym
- ❑ Common concerns on their compatibility with fundamental rights
- ❑ Constitutional complaints for violating fundamental rights
 - Germany, Federal Constitutional Court, 20 April 2016
 - Austria, Constitutional Court, 11 December 2019
 - Italy, Court of Cassation, 28 April 2016



Thank you!

fra.europa.eu