Attention:

European Commission
Directorate-General Internal Market and Services
B - 1049 Brussels
Belgium

Request that the European Commission bring infringement proceedings under Article 226 EC against the Kingdom of Sweden for violation of Articles 12 and 49(1) EC, read in conjunction with Article 6 EU

Submitted by: **Signed, 18 July 2008**

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[X] "I authorise the Commission to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

Summary

The new Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework institute a system of general and automatic monitoring of all electronic signals which physically cross Sweden's borders by wire. This will include all communications between lawyers and clients as soon as either party is in Sweden and the other in a different country, including a different Member State.

Privileged communications is an essential component of the services of legal advice and representation. General and automatic monitoring of such communications are contrary to the general principles of EU law recognised by the European Court of Justice and Articles 6 and 8 of the European Convention on Human Rights as interpreted by the European Court of Human Rights. By reserving the benefit of privileged communications to lawyer-client relationships where both the service provider and the recipient of the service are established or resident in Sweden, the Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework clearly *discriminate against service providers established in other Member States* who wish to provide the services of legal advice and representation to recipients in Sweden, *as well as against recipients of such services resident or established in Sweden* who wish to receive such services from a service provider established in another Member State. Sweden thus violates Articles 12 and 49(1) EC, read in conjunction with Article 6 EU.

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I. Legal context

I.1. Relevant provisions of national law

1. On Wednesday 18 June 2008 the Swedish Parliament (*Riksdagen*) adopted Government Bill 2006/2007:63.[1] By modifying the Defence Intelligence Activities Act 2000:130[2], the Electronic Communications Act 2003:389[3] and the Secrecy Act 1980:100[4], and by enacting a new Signal Surveillance Act in Defence Intelligence Activities, the vote paved the way for a new legal framework for the monitoring of electronic communications passing Sweden's borders by the National Defence Radio Establishment (*Försvarets radioanstalt* or FRA).

2. Central to the new legislation is the Signal Surveillance Act in Defence Intelligence Activities (the Act). Paragraph 1 of the Act enables the institution designated by Government (in practice, the FRA) to engage in signal surveillance in accordance with guidelines laid down by Government. Paragraph 2 states:

   'Collection [of signals] in wire may only relate to signals which cross the Swedish border in wire owned by an operator.'[5]

   Paragraph 3 makes it clear that collection will be automatic and guided by key-terminology. Paragraph 4 states that signal surveillance under the Act may not target a specific individual. Paragraph 7 stipulates that information gathered under the Act is immediately to be destroyed if the content a) relates to a particular individual and is deemed of no consequence with reference to the guidelines laid down by Government in accordance with Paragraph 1, b) relates to information protected by provisions on freedom of the press and freedom of speech, or c) relates to privileged communications between a suspect or accused and her/his legal representative. Paragraph 12 refers to the provisions in the Electronic Communications Act 2003:389 on the practical organisation of the collection of signals provided for in the Act.

3. A new Paragraph 19(a) is inserted into the Electronic Communications Act 2003:389 which places an obligation on all operators which own wire through which signals cross Sweden's border to relay such signals through "cooperation nodes" where the FRA are to filter them. New Paragraph 19(a) further obliges the operators to hand over any information which could facilitate the collection of the signals *and* to cooperate in such a way as to safeguard the confidentiality of the activity.

4. In its Paragraph 10, the Act provides for a Government appointed authority to carry out *ex post facto* reviews of the legality of activities under the Act. A special unit within this authority, to be presided over by active or retired judges, will be empowered to order the cessation of certain specific collections of signals and also the

[1] *En anpassad försvarsunderrättelseverksamhet* [An adapted military intelligence activity], submitted on 8 March 2007.
[2] *Lagen (2000:130) om försvarsunderrättelseverksamhet.*
[3] *Lagen (2003:389) om elektronisk kommunikation.*
[4] *Sekretesslagen (1980:100).*
[5] *'Inhämtning som sker i tråd får endast avse signaler som förs över Sveriges gräns i tråd som ägs av en operatör.'*

destruction of illegally retained materials. Paragraph 11 of the Act provides for the governmental appointment of a council within the authority designated under Paragraph 1 internally to monitor compliance with the Act.

5. Paragraph 13 of the Act excludes judicial review of decisions taken in accordance with its provisions.

6. The legislative framework described above enters into force on 1 January 2009 but according to information on the Swedish Parliament's website, the FRA 'will have access to communications from telephone operators as from 1 October 2009.'[6]

I.2. Relevant provisions of EU law

7. Article 12, first indent, EC states:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

Article 49(1) EC states:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

Article 50 EC states:

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

"Services" shall in particular include:

[...]
(d) activities of the professions.

'Without prejudice to the provisions of the chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

Article 54 EC states:

[6] See: http://www.riksdagen.se/templates/R_PageExtended____16402.aspx

'As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 49.'

8. Article 46(1) EC (applicable to services by virtue of Article 55 EC) states:

'The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

9. Article 6(1) EU states:

'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

Article 6(2) EU states:

'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

I.3. Relevant provisions of the European Convention on Human Rights (ECHR)

10. Article 6 ECHR ('Right to a Fair Trial') provides as follows. Paragraph 1:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

Paragraph 3 states:

'Everyone charged with a criminal offence has the following minimum rights:

[...]

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

[...]'

11. Article 8 ECHR ('Right to respect for private and family life') provides as follows. Paragraph 1:

'Everyone has the right to respect for his private and family life, his home and his correspondence.'

Paragraph 2 states:

'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

II. The provision of legal advice and representation is a 'service' protected by EU law

12. It is clear from Article 50 EC that the provision of legal advice and representation by lawyers comes within the ambit of the Community law notion of a 'service' as it falls within category d) 'activities of the professions.'[7] It is further clear from the case law of the European Court of Justice (ECJ) that the Community protection of the freedom to provide services covers not only the provision of services in a Member State other than the Member State in which the service provider is established, but also the right for a consumer to receive services from a Member State other than the Member State of her or his residence or establishment.[8]

13. With respect to the provision of legal advice and representation, EU law requires the legislation of Member States to respect the right of lawyers established in one Member State to provide services to clients resident or established in another Member State and, vice-versa, the right of natural or legal persons resident or established in one Member State to receive legal advice and representation from lawyers established in another Member State. In the context of the services of legal advice and representation the ECJ has stated that as long as the lawyers in question comply with the applicable rules and regulations – as laid down notably in Directive 77/247 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services[9] – EU law '*requires the abolition of all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.*'[10]

14. It is submitted that the fundamental equality which EU law requires to be guaranteed between service providers as well as between recipients of services needs to be appreciated with reference to the essential characteristics of the service in question. As will be shown in the following section, one of the fundamental characteristics of the services of legal advice and representation is the guarantee that that advice and representation can be provided in conditions of near-absolute privilege.

[7] See, e.g., Case 33/74 *Van Binsbergen*, judgment of 3 December 1974, ECR [1974] 1299.
[8] See Case 286/82 *Luisi and Carbone*, judgment of 31 January 1983, ECR [1984] 377, especially at para. 10. See also Case 186/87 *Cowan*, judgment of 2 February 1989, ECR [1989] 195.
[9] OJ L 78, 26.3.1977, p. 17–18.
[10] Case 427/85 *Commission v Germany*, judgment of 25 February 1985, ECR [1985] 1123, at para. 11; see also Case C-294/89 *Commission v France*, judgment of 10 July 1991, ECR [1991] I-3591.

III. The centrality of privileged communications to the provision of legal advice and representation

III.1. General Principles of EU Law

15. According to the Grand Chamber of the ECJ, '*the right to a fair trial, which derives inter alia from Article 6 of the ECHR, constitutes a fundamental right which the European Union respects as a general principle under Article 6(2) EU.*'[11] Crucially, in the same case, the Court stated that:

    '*Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations.*'[12]

16. The privileged nature of communications between lawyers and their clients in the context of judicial proceedings or the preparation for such proceedings as guaranteed by Article 6 ECHR is thus a general principle of EU law which the EU legal system, within the sphere of its competences, must protect and uphold. The conditions under which exceptions to the principle of guaranteed privilege of communications between lawyers and their clients are admissible can be found in the case law of the European Court of Human Rights (ECtHR) interpreting Articles 6 and 8 ECHR.

III.2. The case law of the European Court of Human Rights

17. In the case of *S. v. Switzerland*, the ECtHR stated the fundamental principle that:

    '*an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) [...] of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness [...]*'[13]

    Importantly, in ruling that the surveillance measures put in place by the Swiss authorities constituted a violation of Article 6(3)(c) ECHR, the ECtHR pointed out that '*[a] violation of the Convention does not necessarily imply the existence of damage.*'[14]

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[11] Case C-305/05 *Ordre des barreaux francophones et germanophone*, judgment of 26 June 2007, ECR [2007] I-5305, at para. 29.
[12] *Ibid.*, at para. 32.
[13] Judgment of 28 November 1991 (Application no. 12626/87; 13965/88), at para. 48.
[14] *Ibid.*, at para. 50.

18. In the Case of *Brennan v. the United Kingdom*, the ECtHR expounded on the circumstances under which the principle established in *S. v. Switzerland* could be departed from. In this regard it found that:

'*While it is not necessary for the applicant to prove, assuming such were possible, that the restriction had a prejudicial effect on the course of the trial, the applicant must be able to [...] claim to have been directly affected by the restriction in the exercise of the rights of the defence.*'[15]

The surveillance measures in question involved the presence of a police officer during the applicant's first interview with his lawyer and the ECtHR did find that the purpose of the measure – to prevent information from being passed on to suspects still at large – was legitimate. However, '*there was [...] no allegation that the solicitor was in fact likely to collaborate in such an attempt [...]*'[16] Given that there were no particular circumstances which could have led the authorities to suspect that the interviews of Mr Brennan with his lawyer were a particular source of risk to the ongoing investigation, '*the Court cannot but conclude that the presence of the police officer would have inevitably prevented the applicant from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance of the case against him.*'[17] Consequently, there had been a violation of Article 6(3)(c) taken in conjunction with Article 6(1) ECHR.

19. In the case of *Lanz v. Austria*[18], finding that Austria had violated Article 6(3)(b) and 6(3)(c) ECHR, the ECtHR again confirmed that '*[s]urveillance by the investigating judge of the contacts of a detainee with his defence counsel is a serious interference with an accused's defence rights and very weighty reasons should be given for its justification. [...] In the present case such extraordinary features cannot be made out.*'[19]

20. There is thus a significant body of case law to substantiate the conclusion that in the absence of extraordinary justificatory circumstances, surveillance of interviews between a client and his lawyer constitutes a violation of Article 6 ECHR.[20] In addition the ECtHR has recognised that such surveillance can constitute a violation also of Article 8 ECHR.

21. In the context of claims under Article 8 ECHR once an interference with the right to respect for correspondence under Article 8(1) has been substantiated, the question becomes whether this interference can be justified under Article 8(2). Such justification requires that the measure a) was imposed in accordance with the law, b) pursued a legitimate aim, and c) was necessary in a democratic society.

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[15] Judgment of 16 October 2001 (Application no. 39846/98), at para. 58.
[16] *Ibid.*, at para. 59.
[17] *Ibid.*, at para. 62.
[18] Judgment of 31 January 2002 (Application no. 24430/94).
[19] *Ibid.*, at para. 52.
[20] See also *Öcalan v. Turkey*, judgment of the Grand Chamber of 12 May 2005 (Application no. 46221/99), at paras. 132-133.

22. In the case of *Campbell v. the United Kingdom*[21], a case which concerned the opening of letters sent between a prisoner and his lawyer, the ECtHR referred to its judgment in *S. v. Switzerland*, outlined above, and held that '*similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing, particularly where such correspondence relates, as in the present case, to claims and complaints against the prison authorities.*'[22] The ECtHR continued: '*That such correspondence be susceptible to routine scrutiny, particularly by individuals and authorities who may have a direct interest in the subject matter contained therein, is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client.*'[23]

23. In the same case the ECtHR further discussed the circumstances under which correspondence between a lawyer and her or his client could be monitored. Replying to an argument made by the respondent government that it was difficult to distinguish between correspondence concerning contemplated litigation and correspondence which did not, the ECtHR saw '*no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8 [...]*'[24] Developing its reasoning further, the ECtHR stated the following:

    '*This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as "reasonable cause" will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused [...]*'[25]

24. Also in the same case the ECtHR did not accept that the existence of other channels of communication could serve to justify an interference with the right to the respect for correspondence under Article 8 ECHR: '*correspondence is a different medium of communication which is afforded separate protection under Article 8 [...] [T]he objective of confidential communication with a lawyer could not be achieved if this means of communication were the subject of automatic control.*'[26]

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[21] Judgment of 25 March 1992 (Application no. 13590/88).
[22] *Ibid.*, at para. 47.
[23] *Ibid.*
[24] *Ibid.*, at para. 48.
[25] *Ibid.*
[26] *Ibid.*, at para. 50.

25. A final case which deserves mention in this regard is *Erdem v. Germany*.[27] This case is noteworthy not least because it is one of the rare occasions when the ECtHR has found that the monitoring of communications between a lawyer and her or his client was justified. The case concerned a provision in the German Code of Criminal Procedure which provided for the monitoring by a judge of correspondence between lawyers and their clients detained and awaiting trial. The provision operated in

    '*a very specific field, namely the prevention of terrorism, its purpose, according to the case-law of the Federal Court of Justice, being to prevent prisoners suspected of offences under Article 129a of the Criminal Code from continuing to work for the terrorist organisation to which it is alleged they belong and contributing to its survival [...]*'[28]

26. The starting point for the ECtHR's assessment was the principle that

    '*the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason [...] that rule may only be derogated from in exceptional cases and on condition that adequate safeguards against abuse are in place [...]*'[29]

    However, given the precision of the legislative provision with respect to the category of persons subject to surveillance, the restrictions put on the use of such surveillance to act as safeguards, the limited scope of the surveillance leaving oral discussions free from surveillance, and, finally, '*the threat posed by terrorism in all its forms*', the ECtHR held that '*the interference in issue was not disproportionate to the legitimate aims pursued.*'[30]

27. Although of dubious relevance in the context of the present case, for completeness sake mention should also be made of two recent rulings by the ECtHR on the compatibility with the ECHR of national legislation providing for more general monitoring of cross-border communications. The first is the admissibility decision in *Weber and Saravia v. Germany*[31] and the second the judgment in *Liberty and Others v. the United Kingdom*[32] which applied the principles established in *Weber and Saravia*.

28. It should first of all be emphasised that in contrast to the Swedish legislation at the centre of the present request, the German and British legislations at issue in *Weber and Saravia* and *Liberty and Others* both provided that general monitoring of cross-border communications could only take place following the issuing of a specific order by the minister responsible. These orders were always of limited duration.

29. As to the quality of the legislation providing for general monitoring of communications in order for it not to fall foul of Article 8 ECHR, the ECtHR had the following to say:

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[27] Judgment of 5 July 2001 (Application no. 38321/97).
[28] *Ibid.*, at para. 62.
[29] *Ibid.*, at para 65.
[30] *Ibid.*, at paras. 66-69.
[31] Admissibility decision of 29 June 2006 (Application no. 54934/00).
[32] Judgment of 1 July 2008 (Application no. 58243/00).

'*the Court reiterates that foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly [...] However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident [...] The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures [...]*'[33]

30. It is obvious from the above quotation that the minimum requirement for general monitoring of communication is that it should be of a maximum duration defined in law. Further, the ECtHR requires the legislation to be very clear on the circumstances in which general monitoring may be ordered:

'*in view of the risk that a system of secret surveillance for the protection of national security may undermine or even destroy democracy under the cloak of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse [...] This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law [...]*'[34]

31. The German legislation in *Weber and Saravia* made general surveillance of communications the subject of an impressive array of detailed provisions regarding the conditions in which it could be resorted to, who could request it, its duration, the storage and destruction of material intercepted, etc. The ECtHR therefore concluded that it complied with the requirements of Article 8(2) ECHR. The British legislation in *Liberty and Others*, however, was far less detailed and was found to be in violation of Article 8 ECHR.

III.3. Conclusion on the centrality of privileged communications to the provision of legal advice and representation

32. It is clear from the case law referred to above that the privileged nature of communications between a lawyer and her or his client is an integral part of the service of providing legal advice and representation. In the context of judicial, in particular criminal, proceedings this privilege is guaranteed by Article 6 ECHR which cannot be derogated from. In all situations the privileged nature of correspondence between a lawyer and her or his client is protected by Article 8 ECHR and infringements of this privilege can only be justified under exceptional circumstances clearly defined in advance.

33. The EC Treaty, and in particular its Article 49(1), guarantees the free provision of the services of legal advice and representation *in their full extent*. The confidentiality of

[33] *Weber and Saravia*, at para. 93, quoted in *Liberty and Others*, at para. 62.
[34] *Weber and Saravia*, at para. 106.

communications between lawyer and client is not an 'optional extra' in this context; it is one of the defining characteristics of the service itself. It is the free provision of this integral service which the EC Treaty protects.

34. It follows that in a situation where the legislation of a Member State violates the principles which serve to define the service in question in such a way as to distort or prevent the freedom of EU citizens to provide or to receive these services across the internal market, it is the obligation of the EU institutions, and in particular the European Commission as the 'Guardian of the Treaties', to ensure the amendment or repeal of the offending legislation.

IV. The new legal framework for the monitoring of electronic communications passing Sweden's borders by wire violates Articles 6 and 8 ECHR and consequently general principles of EU law

35. In the Government Bill, the issue of the compatibility of the new legislative framework with the provisions of the ECHR is little more than touched upon. The discussion there is[35] focuses almost exclusively on the Article 8 issue and then, again, almost exclusively on the first criterion to justify an interference under Article 8(2), i.e. that it be strictly regulated in law. The text asserts that most findings of a violation of Article 8 ECHR have been the result of insufficiently precise legislation and then concludes that the proposed framework would remedy any lack of clarity there may be under Swedish law.

36. It is submitted that the new legislative framework violates Articles 6 and 8 ECHR for the following reasons.

37. By its very nature the legislative framework puts in place a general and automatic interference with the right to respect for correspondence including correspondence between lawyers and their clients. It is clear from the case law of the ECtHR reviewed above that any such interference, if it is to pass muster under Article 8 and thus, *a fortiori*, under Article 6 ECHR, must be based on considerations pertaining to a particular lawyer-client relationship. The automatic and general monitoring of such correspondence, as would be the result of the Swedish legislation, has never found favour with the ECtHR.

38. The fact that this general and automatic interference with the right to respect for correspondence between lawyers and their clients is limited to correspondence which passes Sweden's borders is in reality a further argument against the proportionality of the legislation. The Swedish government can only argue that such correspondence poses a general risk to national security if they provide for the general and automatic interference with *all* such correspondence, irrespective of the geographical location of the sender *vis-á-vis* the recipient. As we have seen, the Swedish government has, on the contrary, gone to great lengths to exclude intra-Sweden correspondence from the general and automatic monitoring provided for in the new legislation.

39. In respect of the effects of the new legislative framework on the right to a fair trial under Article 6 ECHR, the Government Bill shows that the Swedish government has failed completely to consider this issue which is separate from the issue under Article 8 ECHR. Given the following considerations it is difficult to see how the system of general and automatic monitoring of communications put in place by the Swedish legislation could be compliant with Article 6: First, the ECtHR is even stricter with national measures which threaten to deprive individuals of the possibility of a 'fair trial.' Second, and finally, the threshold for establishing a violation of Article 6 ECHR by interferences with the principle of privilege of communications between lawyers and their clients seems to be the mere arguability that the measures prevented a full and frank discussion between them.

[35] See above, f.n. 1, Section 7.2.3., at pp. 64-65.

40. In this regard it is not a justification that the new Signal Surveillance Act in Defence Intelligence Activities provides for the destruction of communications covered by lawyer-client privilege. The destruction can only intervene after that the intelligence services have ascertained that the communication in question falls within the category of privileged communications. This 'safeguard' thus presupposes the very violation Articles 6 and 8 ECHR are meant to protect against.

41. Finally, as we have seen, general monitoring of communications can be compatible with the ECHR provided that it is only resorted to temporarily and in conditions strictly defined in the enabling legislation. There is no need for a detailed assessment of the new Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework against these criteria. The Swedish legislation does not deal with them at all. It therefore falls foul of Article 8 ECHR by default.

V. The new legal framework for the monitoring of electronic communications passing Sweden's borders by wire violates the freedom to provide and receive cross-border services of legal advice and representation

42. The new Swedish framework for the collection of signals passing Sweden's borders in wires owned by operators provides for the automatic monitoring of all forms of communications using this means of transmission. Consequently, all e-mails, telephone conversations, faxes, and text messages are subject to automatic monitoring and are thus susceptible to being read or listened to by the FRA. Ironically, the only form of communication which, in principle, would still be able to pass Sweden's borders un-scrutinised is letters.

43. The legislation makes it very clear that it is only signals which physically cross Sweden's borders, in either direction, which will be monitored. The concern is to preserve the jurisdictional distinction between the surveillance operations of the FRA and those of the Swedish police.

44. As established above, the privileged nature of communications between lawyers and their clients is integral to the services of legal advice and legal representation. As an essential component of a service the free provision and receipt of which are guaranteed under Community law, Member States are logically under an obligation not to impede the ability of lawyers or clients in other Member States from benefiting from privileged communications for the simple reason that these communications pass an internal border.

45. The Swedish legislation as it will be after 1 January 2009 subjects the communications between lawyers established in other Member States and clients resident or established in Sweden, as well as lawyers established in Sweden and clients resident or established in other Member States to automatic monitoring. At the same time, communications between lawyers established in Sweden and clients resident or established in Sweden continue to benefit from full privilege. The effect is to render it practically impossible to provide trans-border services of legal advice and representation where either the service provider or the recipient of the service is physically situated in Sweden in conditions required under general principles of EU law and the ECHR, both guaranteed in EU law by virtue of Article 6 EU.

46. The Swedish government would no doubt argue that the legislation does not prevent privileged communications between lawyers and their clients as long as all parties to the communication are in Sweden (and use means of communication which are guaranteed not to be relayed by servers abroad). Whether this argument would pass muster before the ECtHR will be left to one side. As far as the EU order is concerned, it is integral to the EU legal order that benefits extended to service providers and recipients physically present on the territory of one Member State be extended also to service providers and recipients established or resident in the other Member States. The new legislative framework reserves the "benefit" (*sic!*) of the enjoyment of rights guaranteed by the ECHR to service providers and recipients established or resident in Sweden. That constitutes a clear discrimination contrary not only to the spirit of the

internal market and the freedom to provide services, but also to the letter of Articles 12 and 49(1) EC.

47. It is obvious that the certainty that communications will be monitored and the risk that communications will be read by members of the intelligence services of a Member State will be a decisive factor in the choice of a provider of legal advice and/or representation. This is clearly the case in civil and commercial matters which, in addition, not infrequently involve companies where governments have a stake. Increasingly, however, the cross-border provision of the services of legal advice and representation relates also to the even more sensitive area of criminal justice.

48. Following the development of the Area of Freedom, Security and Justice it has not only become possible, but also highly likely that during crucial periods of criminal proceedings the lawyers who will eventually represent an accused individual are established in a different Member State to the one in which the accused is detained. The obvious example where the new Swedish legislative framework would have an impact is the case of a suspect detained in Sweden on the basis of a European Arrest Warrant, awaiting surrender to another Member State. It is to be encouraged that the lawyers who will deal with the substantive case in the issuing Member State make contact with their client as soon as possible to start preparing the defence. The new legislative framework would clearly have a "chilling" impact on such communications, something which the ECtHR has found is sufficient to constitute a violation of Article 6 ECHR. This is even more so if the individual detained in Sweden is accused of terrorism offences. In that situation, not only is it likely that the information at the root of the accusation originates with the very intelligence services monitoring communications, but also that the very nature of the accusation will oblige the lawyers and clients to use terminology very likely to be caught in the automatic filtering mechanisms and thus scrutinised in depth.

49. A third situation where the internal market in the services of legal advice and representation will be distorted is where an individual wishes to bring a direct action against a decision by the Community institutions. The obvious example in this regard is where an individual has been listed in Annex I of Regulation 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.[36] Again the information at the root of the listing is likely to have originated with the very intelligence services monitoring communications, and, again, the very nature of the case will oblige the lawyers and clients to use terminology likely to be caught in the automatic filtering mechanism and thus scrutinised in depth. This is likely to prevent potential clients in Sweden from engaging lawyers established in other Member States, and clients resident or established in other Member States or indeed the rest of the world, from engaging lawyers established in Sweden.

[36] OJ L 139, 29.5.2002, p. 9–22.

VI. There are no justifications either under Article 46(1) EC or under the case law on 'imperative requirements'

50. There are two provisions which allow for derogations to the freedom to provide services enjoyed in the territory of a Member State by service providers established in the EU. The first is Article 46(1) EC and the second is the ECJ's case law on 'imperative requirements.'

51. As far as Article 46(1) EC is concerned, it is difficult to see how Sweden could rely on it. Although the measures in question do aim to increase public security, they are general in nature and their very significant impact on the cross-border provision of the services of legal advice and representation is incidental with respect to the intentions behind the legislation. There is nothing in these services themselves which threaten public order, quite the contrary in fact. Therefore, it seems an obvious conclusion that Sweden cannot rely on Article 46(1) EC to justify the infringement of the freedom to provide services inflicted by the new Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework.

52. With respect to the ECJ's case law on 'imperative requirements', the ECJ has held as follows:

'*[T]he freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established [...]*'[37]

The ECJ continued: '*The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it [...]*'[38]

53. The availability of a justification of 'imperative requirements' thus presupposes the fulfilment of four conditions. The first is that the measure in question pursues a legitimate public interest, not incompatible with Community aims.[39] In this regard, it has to be conceded that the interest pursued by the Swedish legislation in question is both legitimate and not incompatible with Community aims.

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[37] See Joined Cases C-369/96 and C-376/96 *Arblade and Others*, judgment of , [1999] ECR I-8453, at para. 34.
[38] *Ibid.*, at para. 35. See also, e.g., Case C-76/90 *Säger*, judgment of 25 July 1991, [1991] ECR I-4221; and Case C-165/98 *Mazzoleni and ISA*, judgment of 15 March 2001, [2001] ECR I-2189.
[39] See, e.g., Case C-49/98 *Finalarte*, judgment of 25 October 2001, [2001] ECR I-7831.

54. The second condition is that the measure must be equally applicable to persons established within the state, i.e. it must be non-discriminatory.[40] In this respect it has to be accepted that the Swedish legislation in question is unequivocally and blatantly discriminatory against providers of the services of legal advice and representation established in other Member States as well as against recipients of such services resident or established in other Member States.

55. The third condition is that the measure must be proportionate to the legitimate aim pursued.[41] In view of the conclusion in relation to the second condition, no in-depth investigation of the proportionality of the Swedish legislation in question will be proceeded with. It will merely be mentioned that the Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework were criticised by the Swedish domestic security service (*SÄPO*)[42] as well as Sweden's most prominent terrorism researcher[43] precisely on the grounds that the violation of personal integrity resulting from the new legislation was out of all proportion to the, at best, rather limited and, at worst, non-existent, enhancement of national security it is hoped that it will bring.

56. The fourth condition has been thus formulated by the ECJ: '*Respect for human rights is [...] a condition of the lawfulness of community acts.*'[44] *A fortiori*, the same must apply for national legislation, administrative acts or practices which have an effect on the enjoyment of rights and freedoms under EU law. As we saw above, the Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework cannot be deemed to be in compliance with either Article 6 or Article 8 ECHR in respect of the protection of the essential privilege of lawyer-client communications.

57. It is clear that the Swedish legislation at issue cannot be justified either under Article 46(1) EC or under the 'imperative requirements'-case law.

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[40] See, e.g., Case C-353/89 *Commission v. the Netherlands*, judgment of 25 July 1991, [1991] ECR I-4069.
[41] See, e.g., Case 279/80 *Webb*, judgment of 17 December 1981, [1981] ECR 3305.
[42] See *SÄPO*'s response to the original inquiry: *Promemorian En anpassad försvarsunderrättelseverksamhet* (Ds 2005:30), 2 November 2005 (available at http://www.sakerhetspolisen.se/download/18.7671d7bb110e3dcb1fd80008998/Remissvar051102.pdf).
[43] See interview with Magnus Norell, '*Systemet kommer inte fånga några terrorister*' [The system will not catch any terrorists], published by *Dagens Nyheter* on 17 June 2008 (See http://www.dn.se/DNet/jsp/polopoly.jsp?a=794784).
[44] Opinion 2/94 *EU Accession to the ECHR*, opinion of 28 March 1996, [1996] ECR I-1759.

VII. Conclusion: Swedish law infringes Articles 12 and 49(1) EC, read in conjunction with Article 6 EU

58. By instituting a systematic violation of Articles 6 and 8 ECHR in relation to the cross-border provision of the services of legal advice and representation where either the service provider or the recipient of the service is established or resident in Sweden, while at the same time purporting to guarantee those rights if the service provider and the recipient are both established or resident in Sweden, the Signal Surveillance Act in Defence Intelligence Activities and the accompanying legislative framework institute a discriminating legislative framework violating all EU citizen's freedom to provide and to receive services guaranteed by Articles 12 and 49(1) EC, in conditions respecting their human rights as guaranteed by Article 6 EU.

59. I therefore request that the European Commission commence infringement proceedings against the Kingdom of Sweden under Article 226 EC for violation of its obligations under the Treaties.