

European Court of Human Rights admits RSF complaint against the BND's mass surveillance

The European Court of Human Rights (ECtHR) in Strasbourg has admitted for decision a complaint lodged by Reporters Without Borders against the mass surveillance practices of Germany's foreign intelligence service BND. The court announced its decision to admit the complaint on Monday (11 January). Reporters Without Borders (RSF) Germany accuses the BND of having used its strategic telecommunications surveillance to spy on the organisation's email traffic with foreign partners, journalists and other persons, thus violating the human rights of those affected.

The admission of the complaint is a stage victory for RSF in a high-profile case against the BND's mass surveillance. Only two percent of all complaints submitted to the ECtHR are admitted for decision, after which the opposing party is invited to submit observations on the matter in dispute.

"The BND's untargeted mass surveillance is neither compatible with the human right to privacy nor with freedom of the press. If this principle applies to the surveillance of non-Germans outside Germany, as recognised by Germany's Federal Constitutional Court, it must also protect the digital communications of German citizens," said RSF Germany's Executive Director Christian Mihr. "German courts have so far dismissed lawsuits against the BND's mass surveillance on the absurd grounds that the complainants had failed to prove that they were directly affected by the surveillance. The proceedings at the ECtHR offer the chance to finally put an end to this constitutionally untenable state of affairs."

Privacy of correspondence, freedom of expression and freedom of information violated

The [complaint](#) was submitted to the ECtHR in 2017. RSF Germany, represented by the Berlin-based lawyer Niko Härtling, who is also acting in his own name, asserts that its rights to respect for the privacy of correspondence as well as to freedom of expression and information under Articles 8 and 10 of the European Convention on Human Rights (ECHR) are being violated. It argues that the BND's measures amount to disproportionate, unwarranted mass surveillance because the intelligence service has virtually unlimited access to digital communications data, which it sifts through using ever-expanding search criteria. The resulting encroachments on fundamental rights are so far-reaching that the alleged purpose of the surveillance, the early detection of threats, in no way justifies these measures.

RSF Germany also alleges that its right to an effective remedy (under Article 13 of the ECHR) has been violated, since the vast majority of those affected by such surveillance measures are not informed even after the fact that their emails have been intercepted and searched. Despite this, German courts only admit lawsuits or constitutional complaints against surveillance if the complainant can prove that he or she is directly affected. The questions of the intelligence service's obligation to notify those affected by its surveillance and the latter's right to appropriate legal remedies are therefore likely to play an important role in the proceedings.

Rulings on BND surveillance violate the right to effective remedy

A complaint filed by RSF Germany against the BND's strategic telecommunications surveillance was also [dismissed](#) by Germany's Federal Administrative Court in 2016.

RSF subsequently lodged a constitutional complaint against this decision with Germany's Federal Constitutional Court, but the court [refused to admit the complaint for decision](#) – once again on the grounds that RSF had failed to adequately demonstrate that the organisation was directly affected by the BND's surveillance activities.

RSF Germany had in fact explained in detail why it was highly likely that the organisation was affected by the mass surveillance. In light of what is already known about the scope of strategic surveillance of telecommunications between Germany and other countries, as well as about the search criteria used by the BND, RSF can only assume that a large number of the organisation's emails have been intercepted. Furthermore, RSF makes the case that this surveillance practice is disproportionate and is not covered by Germany's G10 Act, which sets out the exceptional cases in which restrictions to the fundamental right to protection of privacy of telecommunications (under Article 10 of the German constitution) may apply.

RSF is an important point of contact for many journalists from Germany and from authoritarian states such as Uzbekistan, Azerbaijan or China. They turn to it for support and advice and entrust it with confidential information. If the possibility exists that the BND is spying on these communications in the course of its mass surveillance operations, these media professionals can no longer rely on their requests and information remaining confidential.

Different legal aspects of the mass surveillance

Both the current proceedings before the ECtHR and the [constitutional complaint lodged by RSF Germany](#) and the Society for Civil Rights (GFF), on which the German Federal Constitutional Court delivered judgment on 19 May 2020, deal with the BND's strategic surveillance of telecommunications. However, the two lawsuits focus on different legal aspects of the surveillance: whereas the Federal Constitutional Court case dealt with "foreign-foreign telecommunications surveillance", or the surveillance of non-Germans located outside Germany under the Federal Intelligence Service Act (BND Act), the ECtHR is now called on to rule on issues regarding telecommunications between Germany and other countries under the G10 Act.

- Click the following link for the full text of the complaint: [Written complaint filed by RSF with the ECtHR \(PDF\)](#)