

Questions and Answers regarding RSF's complaint before the European Court of Human Rights

What is RSF Germany's complaint directed against?

Reporters Without Borders (RSF) Germany accuses the BND of having spied on the organisation's email traffic with foreign partners, journalists and other persons in the course of its strategic telecommunications surveillance. In RSF's view, the German foreign intelligence agency has thus violated several fundamental and human rights protected under the [European Convention on Human Rights \(ECHR\)](#) in the case of those affected by the measures. More specifically, RSF accuses the BND of violating Article 8 (the right to respect for a person's private and family life, home and correspondence), Article 10 (the right to freedom of expression) and Article 13 (the right to an effective remedy) of the ECHR.

A key issue in the proceedings is the alleged violation of the right to an effective remedy. In 2016, Germany's Federal Administrative Court rejected a complaint filed by RSF [against the BND's mass surveillance](#), and in 2017 the Federal Constitutional Court rejected a constitutional complaint [against the Federal Administrative Court's rejection of the lawsuit](#), in both cases on the grounds that RSF had failed to provide sufficient evidence that the organisation itself was directly affected by the BND's surveillance activities. In their complaint before the European Court of Human Rights (ECtHR), RSF and its legal representative argue that it was not possible for them to provide such evidence because the strategic surveillance takes place covertly and the BND rarely informs those affected, even after the fact. As a result, RSF asserts that it is being deprived of the opportunity to secure effective legal protection.

What is strategic surveillance?

"Strategic telecommunications surveillance" is very different from targeted surveillance measures against individuals, such as those the BND may use against terrorist suspects outside Germany. In the course of its strategic surveillance, the BND searches through vast quantities of digital communications data, which it has the telecommunications companies divert to it at internet exchange points. In this way, the intelligence agency sifts through hundreds of millions of emails using search terms such as mail addresses or content keywords, looking for "intelligence-relevant" information.

As a foreign intelligence service, the BND is not allowed to access email traffic within Germany, and these communications are filtered out automatically – to the extent that the technology makes this possible. On the other hand, the BND is allowed to filter and monitor communications *between German citizens located in Germany and foreigners outside Germany*. The requirements for this are set out in Section 5 of the G10 Act.

The complaint lodged with the ECtHR is directed against this strategic surveillance practice of the BND. In RSF's view, this is disproportionate, unwarranted mass surveillance, because the intelligence service's technical access capabilities and increasingly broad search criteria are not subject to any effective control mechanisms or restrictions, even though the communications of media professionals and persons belonging to other professional groups such as doctors, lawyers, and pastors are supposed to enjoy special protection from surveillance in Germany, and this is reflected in the corresponding restrictions in the G10 Act.

Why does RSF believe it is affected by the surveillance measures?

The organisation holds that this strategic telecommunications surveillance violates the confidentiality of its communications with foreign media professionals and partners such as human rights activists and non-governmental organisations, who research information that is very likely to be of interest to the BND, often at great personal risk. These partners exchange information about their work with RSF because they are being harassed or persecuted in their home country due to their investigative activities.

The BND frequently focuses on regions such as Central Asia and the Middle East, and among other things on the activities of the armed forces and intelligence services in these regions. Consequently, when investigative journalists from countries like Syria, Iran or Azerbaijan seek help from RSF because they are being persecuted or harassed by their government for conducting research on sensitive topics, their communications fit perfectly in the BND's search criteria grid.

What evidence does RSF provide to substantiate its allegations?

The figures for 2013 cited in RSF's complaint clearly illustrate the disproportionality between the dimensions of the BND's surveillance and the results it yielded for the intelligence service: on the basis of the annual report of the Parliamentary Oversight Panel, which is responsible for oversight of the intelligence services, it can be deduced that in 2013 the BND searched at least 15 million emails. It is very likely that the real figure was much higher and amounted to hundreds of millions of mails. In the year in question, the BND searched these communications using 12,523 search terms, and selected 15,401 emails for manual examination. Of these 15,401 emails, the intelligence service ultimately classified only 118 as "relevant for intelligence purposes". RSF Germany sent or received around 280,000 international emails in that year. In view of these figures, the organisation considers it highly probable that communications from its email traffic were included in the manual examination.

In what way do these proceedings differ from the RSF complaint against the BND Act, on which the Federal Constitutional Court delivered judgment in May 2020?

RSF was [successful with its complaint before the German Federal Constitutional Court](#) against the strategic surveillance of communications between *non-nationals located outside Germany*. Since 2017 – following a comprehensive reform triggered by the revelations of NSA whistleblower Edward Snowden – the Federal Intelligence Service Act (also known as the BND Act) has regulated this type of surveillance. Several journalists and lawyers were co-complainants in this lawsuit. The Society for Civil Rights (GFF) and several journalist organisations also supported the constitutional complaint.

In its judgment of 19 May 2020, the Federal Constitutional Court ordered the German government to reform the legal framework for the BND's foreign-foreign telecommunications surveillance by the end of 2021. In early December the German government presented a draft for a new reform of the BND Act. RSF, however, sees the need for [considerable improvements](#) to the draft.

The proceedings before the European Court of Human Rights in Strasbourg, by contrast, revolve around the provisions contained in the G10 Act, which regulates

exceptions to the fundamental right to protection of the privacy of telecommunications enshrined in Article 10 of the German constitution, the Basic Law.

What comes next in the proceedings?

The European Court of Human Rights only admits about two percent of the complaints it receives. Only in these few cases is the other party called on to submit its observations on the matter in dispute, after which the court passes judgment. The ECtHR communicated the complaint to the German government on 9 December 2020. The customary period for the parties to reach an amicable settlement in ECtHR proceedings ends on 4 March 2020. After that, the German government has twelve weeks to respond to the complaint. The court will decide at a later stage in the proceedings whether to schedule an oral hearing before issuing its ruling. Now that the ECtHR has admitted the complaint for decision, however, it will pass judgment on it in any case.