

Analysis of the new ruling on mass surveillance issued by Germany's Federal Constitutional Court: a milestone for the protection of press freedom

The ruling issued by the Federal Constitutional Court today on mass surveillance conducted by Germany's Federal Intelligence Service (Bundesnachrichtendienst – BND) is a milestone in the protection of press freedom. This is the conclusion of a flash analysis of the verdict by Reporters Without Borders (RSF). For the first time, Germany's Federal Government will be legally obliged to protect the confidential communications of journalists from mass surveillance. The BND will no longer be able to monitor foreign media workers at will. Tough criteria will also be set for the transfer of data to foreign intelligence services.

"We demand that the protection of journalistic communication be enshrined in the BND law in the now necessary reform. Karlsruhe has made this clear - and we expect the Federal Government to incorporate these high standards into law," said Christian Mihr, Executive Director of RSF Germany. "The ruling opens the way for rethinking the protection of sources in the digital age. Reporters Without Borders will play a constructive role in this discussion and expects the Federal Government to seek to engage in an exchange with civil society.

Court updates law to adapt to the digital transformation

The ruling represents a paradigm shift in the “strategic surveillance of telecommunications” conducted by the Federal Intelligence Service. Under the current provisions, the German foreign intelligence agency can filter up to 1.2 trillion connections (<https://www.tagesschau.de/investigativ/br-recherche/bnd-urteil-101.html>) per day at an internet node in Frankfurt on the basis of search terms such as e-mail addresses or telephone numbers. At the time of the last decision made by the Court on such matters, in 1999, the protection of journalistic communications from mass surveillance did not yet play such a key role, which is why the government has not provided for any protective rights for journalists in Germany's secret service laws to date. Reporters Without Borders has now successfully closed this legal gap with its constitutional complaint.

The judges corrected their previous ruling by taking account of the digital transformation of the past decades (paragraph 150-151). Whereas in 1999, "strategic surveillance" was strictly limited to telephone conversations, mass surveillance is now all encompassing due to the omnipresence of the internet. Because nowadays everything is connected to the internet, mass surveillance of the internet amounts to a qualitatively new form of surveillance. An individual's every action can be monitored, which is particularly problematic for the confidentiality of communications between journalists and their sources. Consequently, the court has now concluded that strategic telecommunications surveillance encroaches on press freedom, and has developed guidelines for its protection.

Freedom of the press is a fundamental and human right

The judgement thus clarifies a fundamental issue that will be of great importance for the international protection of human rights. The first key statement of the ruling holds that the Federal Government's obligation to respect the fundamental rights of the Basic Law is not restricted to the German territory. As a result, Article 10 (secrecy of telecommunications) and Article 5 (freedom of the press) of the Basic Law also afford the right of protection to foreigners in other countries.

In short, the BND can no longer spy on foreign journalists without any restrictions, but must apply additional safeguards regarding the protection of their communications. In addition, foreign journalists must be able to defend themselves against surveillance, for example in court proceedings. The court's guiding principles should be read as a mandate to the Federal Government to finally set limits on mass surveillance, in accordance with the rule of law.

"Special requirements for the protection of confidentiality relationships"

The passages of the ruling that are most relevant for journalists are to be found in paragraphs 193 to 198, where the judges call for "special requirements (...) for the protection of confidentiality relationships" in cases of mass surveillance. "Journalistic activity does not justify exposing individuals to a higher risk of surveillance (...) and making them, because of their contacts and research, the targets of information extraction for the pursuit of security interests."

Instead, the court calls for "qualified intervention thresholds" for monitoring the press, which can only be justified in individual cases in the investigation of particularly serious crimes. Although the judges do not make any concrete proposals, in their formulations they allude to legal protection rights which have so far only applied to the targeted monitoring of journalists. Explicit reference is made to Paragraph 160a of the Code of Criminal Procedure, which regulates the conditions under which investigations may be conducted against media professionals. In future, the BND would have to weigh up, on a case by case basis, whether Germany's security interests or the public interest in the confidentiality of journalists' communications should be given higher priority. The court demands that: "in any case, their protection is to be ensured in principle by a court-like ex ante oversight. Here, the Federal Government will have to develop new standards for the oversight of the BND's activities in order to adequately implement the protection of press freedom.

No more blind forwarding without oversight

Until now, the BND has participated in a global system in which intelligence services monitor specific parts of the world in a de facto partnership and exchange the data they gather. Here too, journalists are to be better protected in future (paragraph 240-241). The BND may now only share data if the foreign intelligence service in question offers a level of protection comparable to that provided by the Basic Law. On this point the judgement is more specific: "Ensuring that the required level of protection is maintained is a decision that cannot be subject to free political disposition. It must be based on substantial, realistic and up-to-date information. It must be documented and accessible to independent oversight."

In a welcome addition, the judges in Karlsruhe also explicitly named "dissidents under pressure of persecution or so-called whistleblowers" in this context. Data about the aforementioned would also have to be afforded special protection against transfer to foreign intelligence services – the first requirement of this kind in German legal history.

The crux: Who is considered a journalist?

The Federal Constitutional Court has called on the Federal Government to revise the BND Act and to implement the requirements for the protection of the press by the end of 2021. The court has given the government leeway on two points: on the one hand, it could restrict protection to persons "who merit protection, whose activities are thus characterised by the freedom and independence that justify the special fundamental rights protection of these

institutions". This raises the question of who is considered a journalist. Reporters Without Borders will contribute to this debate and develop proposals for a workable definition of the term.

On the other hand, the court gives the BND the opportunity to completely waive the special protection of journalists if surveillance "is exclusively intended and designed to serve the political information of the Federal Government and a transmission of the findings to other agencies is excluded in principle". Elsewhere (paragraph no. 177), the judges link this option to strict conditions that are intended to prevent journalists from being repressed in their home countries due to information passed on by the BND. Here, the reform calls on the government to use this option only in exceptional cases and not to undermine the confidentiality of journalistic communication.

Court rules in favour of RSF alliance

The Federal Constitutional Court ruled on Tuesday that the current version of the BND law was unconstitutional. Reporters Without Borders welcomed the decision in its first assessment of the ruling. A group of plaintiffs including Khadija Ismayilova, winner of the Alternative Nobel Prize, and the international human rights organization Reporters Without Borders (RSF) brought the complaint against the BND law. Prof. Dr. Matthias Bäcker, the renowned Mainz-based constitutional lawyer, presented the case; RSF was also represented by Dr. Bijan Moini. The lawsuit was coordinated by the Society for Civil Liberties (GFF) together with Reporters without Borders, the German Association of Journalists, the German Journalists Union dju in ver.di, the research network n-ost and netzwerk recherche. Further information, including the complete text of the constitutional complaint, is available at:

<https://notrustnonews.org>