[DE] Federal Constitutional Court upholds journalists' complaint: foreign surveillance by Federal Intelligence Service infringes fundamental rights

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In a judgment of 19 May 2020 (1 BvR 2835/17), the German *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) decided that, in its current form, the surveillance of foreigners' telecommunications abroad by the *Bundesnachrichtendienst* (Federal Intelligence Service – BND) violated the privacy of telecommunications (Article 10(1) of the *Grundgesetz* (Basic Law – GG)) and the freedom of the press (Article 5(1)(2) GG). It also ruled that the processing and transmission of the data obtained through this practice and cooperation with foreign intelligence services were unlawful.

A number of journalists, most of whom were foreigners reporting abroad on human rights breaches in crisis regions or authoritarian countries, had filed a complaint about the *Gesetz über den Bundesnachrichtendienst* (Federal Intelligence Service Act – BNDG), which has provided the legal basis for the aforementioned foreign telecommunications surveillance activities since 2016. The journalists feared that their basic rights would be infringed by the rule under which the BND could access telecommunications channels or networks in order to analyse telecommunications data by searching for keywords and using other analytical tools as part of a manual evaluation process, and filter out any data that was significant from an intelligence point of view. According to the BNDG, the capture and analysis of such data is not limited to specific investigations, but can be part of general intelligence-gathering activities. Traffic data can also be stored for six months and analysed independently of keywords.

The BVerfG held that these provisions of the Act, which merely laid down in law the BND's existing practice, breached fundamental rights. It found, in particular, that the German state's obligation to respect fundamental rights was not limited to German national territory, at least in relation to the privacy of telecommunications and the freedom of the press. It therefore criticised the formal legality of the BNDG on the grounds that the German legislator had assumed that fundamental rights did not apply in relation to events that took place exclusively abroad and had therefore taken insufficient account of such rights. However, there were also material shortcomings in the Act. In particular, no limits were laid down in terms of the purpose of surveillance and there were insufficient protection mechanisms for journalists in relation to both information-

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gathering and cooperation with other intelligence services. As regards the freedom of the press, the BVerfG emphasised that deliberate intrusion into confidential communications that were worthy of special protection, such as those of journalists, was only admissible if a qualified interference threshold was in place and that, if the sensitive nature of information was only noticed when it was analysed, a weighing-up process should be conducted to determine whether or not the communication could be analysed and used. Such surveillance authorisation also required independent, continuous monitoring under objective law, which was not provided for under the Act.

However, the BVerfG did not rule that strategic foreign telecommunications surveillance was incompatible with fundamental rights per se. Rather, it should, "as a power that is not tied to a specific occasion but that is essentially used only as a last resort and in a limited way […], remain an exceptional power limited to foreign intelligence-gathering by an authority that has no operational powers of its own and is only justified by its specific remit." The disputed provisions will continue to apply until the end of 2021 so that the legislator can devise a new set of rules that take fundamental rights into account.

Urteil des Bundesverfassungsgerichts vom 19. Mai 2020 (1 BvR 2835/17)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1bvr283517.html

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