

## Strategic foreign surveillance by the BND - rejection of the current practice

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Today's decision by the Federal Constitutional Court represents a landmark ruling on the future foreign reconnaissance of the Federal Intelligence Service (BND).

With Edward Snowden's revelations in 2013 about government programs of mass surveillance, particularly by the NSA and GCHQ, the global extent of foreign communications intelligence by intelligence and intelligence services has become public knowledge. Telecommunications data is collected without cause for intelligence monitoring and evaluated using special search terms, so-called selectors, and exchanged comprehensively between the secret services of different countries. The constitutional criticism of this mass evaluation of telecommunications data from foreigners abroad by the so-called strategic foreign-to-foreign telecommunications surveillance subsequently triggered an intensive discussion about the involvement of the Federal Intelligence Service in this practice.

The BND law amended in 2016, which in the meantime had put strategic telecommunications surveillance on a legal basis and against which a constitutional complaint was lodged, was today declared unconstitutional in essential points by the Federal Constitutional Court. However, there is a deadline of December 31, 2021, during which the court will allow the regulations to continue to apply in order to ensure the political ability to act.

In today's judgment, the Federal Constitutional Court rejects the widespread view in practice that fundamental rights are not applicable in the field of intelligence from one country to another. Insofar as the German state authority extends to persons who do not have German citizenship and who are also located outside the national territory, this is required to observe the fundamental rights as individual rights guarantees, in particular Article 10 Paragraph 1 of the Basic Law, also in strategic telecommunications reconnaissance .

In addition to the formal violation of the so-called citation requirement due to non-naming of the provisions of the BND law restricting the fundamental right of telecommunications secrecy, the regulations on telecommunications information also violate the constitutional principles of certainty and proportionality in terms of content. This applies accordingly to cooperation with other secret services and the practice of data transmission to them. The Federal Constitutional Court makes it clear that strategic foreign reconnaissance can certainly be compatible with the Basic Law. However, the current design of the norms, which enables a blanket and geographically unlimited surveillance of individual communications, is not permissible. Rather,

lawful foreign intelligence requires clear and specific requirements from the legislature. The purposes of data collection for monitoring must be specified with sufficient precision. Among other things, the data must be evaluated immediately and limiting criteria must be defined for the selection of search terms and the evaluation. Clear obligations to erase and strict inspection obligations are to be provided for. In the future, data transmission from strategic monitoring must be limited with event-related intervention thresholds. The previous blanket “ring exchange” of data with other secret services will no longer be permitted in this way in the future. When transferring data to other foreign bodies, an adequacy check must ensure that data is handled in accordance with the rule of law and that human rights are observed on the recipient side. Finally, there must be an independent control of the strategic foreign surveillance, which compensates for the individual legal protection deficit against intelligence services and has court-like powers to intervene in surveillance measures.

Johannes Caspar, the Hamburg Commissioner for Data Protection and Freedom of Information: "Today's judgment of the Federal Constitutional Court is a late response to Edward Snowden's revelations. Sometimes the rule of law needs staying power. The judgment is a future benchmark and orientation framework for the intelligence services in the constitutional structure. It extends a limited state-oriented perspective in dealing with fundamental rights to the universal protective dimension of human rights. In particular, the exchange of communication data of foreign citizens between different intelligence services will no longer be possible in the future. Everything now depends on how the new regulations on foreign intelligence will implement the many provisions of the Constitutional Court."

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