Statement from DE-CIX Management GmbH on the verdict of German Constitutional Court

19 May 2020 – BND Act

- It is with great interest that we note today’s verdict by the first senate of the German Constitutional Court regarding the constitutional complaint of a range of journalistic organizations – such as Reporter without Borders (RSF), the Gesellschaft für Freiheitsrechte (GFF – Society for Civil Rights) and the German Federation of Journalists (DJV) – against the BND Act, which came into effect in 2017.
- The new regulation of the BND Act, which came into effect in 2017, was highly controversial from the very outset and there were considerable doubts as to its constitutionality.
- With today’s verdict, the German Constitutional Court has taken the opportunity through a landmark decision of setting clear limits to the surveillance powers of intelligence services and providing the German federal government with guidelines for a constitutionally compliant design.
- The legislator is now called upon to rectify the BND Act by the end of 2021 and undertake the corrections required by the court in accordance with constitutional law.
- In its decision, the German Constitutional Court confirmed that the BND Act is, in multiple regards and in particular in all central paragraphs, unconstitutional.
- On the key question of the territorial scope and extra-territorial protective function of the Secrecy of Telecommunications (Art. 10 of the German Constitution), it concluded in its verdict that this applies in principle also for non-German nationals and outside of Germany.
- In this way, the Secrecy of Telecommunications has been considerably strengthened in the age of digital communication and extended to the requirements of cyber space.
- DE-CIX therefore sees its decision to lodge a complaint back in 2018 against official orders received by us on the basis of the BND Act as vindicated.
- In this landmark decision by the German Constitutional Court, the majority of our own objections have now been decided on in the spirit of our own lawsuit.
What can already be seen is that, on the part of the German Constitutional Court, a considerably more comprehensive, independent, and above all prior scrutiny of the surveillance measures of the service is required. This requirement is also consistent with the deficiencies in practice that were identified on the part of DE-CIX.

We look forward with great interest to the further progress of our own proceedings before the German Constitutional Court in Leipzig.

A complete analysis of the verdict of the German Constitutional Court and its consequences for future legislation, which will again affect, will only be possible for us after a detailed review of the complete written explanatory memorandum. The implementation of the comprehensive instructions will in no way be simple.

**DE-CIX operates more than 20 Internet Exchanges worldwide in key markets such as Europe, North America, India, the Middle East, and South-East Asia. DE-CIX in Frankfurt is the largest Internet Exchange in the world, with a data throughput of more than 9 Terabits per second (Tbps).**

**Background to the DE-CIX lawsuits against the BND:**

- DE-CIX Management GmbH is a recipient of official orders from the BND (as the issuing authority for the Federal Ministry of the Interior, Building and Community and representing the Federal Republic of Germany), with these orders based in alternation on the G10 Act – the so-called “Strategic Signals Intelligence” – and the BND Act – the so-called “International-International Signals Intelligence”.

- These official orders authorize the BND to access data to a significant extent at the Internet Exchange DE-CIX in Frankfurt am Main.

- In mid-September 2016, DE-CIX Management GmbH filed a lawsuit against the Federal Republic of Germany, represented by the Federal Ministry of the Interior, against the G10 Act orders and in March 2018 against the BND Act orders with the Federal Administrative Court of Germany (BVerwG) in Leipzig.

- The lawsuit regarding the G10 Act was rejected after an oral proceedings on 30 May 2018 by the Federal Administrative Court in Leipzig and in this process the content of the lawsuit was to a large extent not handled. The explanatory memorandum for the
The lawsuit regarding the BND Act and the handling of its content was suspended on 22 November 2019.

- Subsequently, in autumn 2018, DE-CIX filed a constitutional appeal in Karlsruhe. The constitutional appeal with the Federal Constitutional Court Karlsruhe under the reference number 1 BvR 1865/18 is pending.