

In a Nutshell: Draft Law on Preventing International Terrorist Threats through the Federal Criminal Police Office (BKAG-E)

I. Content of the Draft Law

As part of Germany's reform of its federal structure, the Federal Government has been assigned exclusive legislative competence to task the Federal Criminal Police Office with preventing international terrorist threats. The present draft includes all the required additions to the BKA Act enabling the Federal Criminal Police Office to fulfil its new tasks successfully, such as a provision on the BKA's specific tasks (Section 4a of the BKAG) and provisions defining the necessary powers to prevent international terrorist threats.

1. Provision on the BKA's Specific Tasks

The provision on the BKA's specific tasks (Section 4a of the BKAG-E) allows the Federal Criminal Police Office (BKA) to take action to prevent specific terrorist offences. Depending on how far the BKA interferes with fundamental rights, the individual provisions on powers include stricter requirements (concrete threat, current threat, higher requirements on the protected interests at risk etc.).

In accordance with Section 4a of the BKAG-E the BKA's responsibilities are exclusively restricted to cases of terrorist threats. Additionally, these threats must involve several federal *Länder*, or an individual *Land* police authority is not competent to deal with the case concerned, or the supreme *Land* authority asks the BKA to take over the case.

The powers of the *Länder* remain unaffected by the tasks fulfilled by the BKA. In order to coordinate the measures to be taken, the BKA must inform the competent *Länder* and federal authorities immediately and fulfil its tasks in consultation with all parties involved.

2. Individual Powers

The BKA will be assigned special powers to be able to fulfil its tasks efficiently. These powers are modelled on the powers to prevent risks assigned to the Federal Police and the *Länder* police forces. In addition to a general clause and the standard police powers this includes in particular provisions on the surveillance of private homes and telecommunications as well as remote searches of computer hard drives. So far, only the provisions on remote searches of computer hard drives (Section 20k of the BKAG-E) and on the telecommunications interception at the source are not included in *Länder* police laws.

The fact that the Federal Criminal Police Office will take action only in order to prevent international terrorist threats ensures that these powers are used in only a small number of cases. Furthermore there are additional thresholds to interventions depending on how far the BKA interferes with fundamental rights.

a. Remote Searches of Computer Hard Drives (Section 20k BKAG-E)

The power to conduct remote searches will be used only in few individual cases. It is necessary, however, if other police measures against terrorist cells linked by modern means of communication and the Internet are no longer effective. This was explicitly recognized in a ruling by the Federal Constitutional Court. The present draft was drawn up in close consultations between the Federal Ministry of the Interior and the Federal Ministry of Justice. It corresponds with the Federal Constitutional Court's ruling on remote searches.

b. Telecommunications interception at the source (Section 20l (2) of the BKAG-E)

In contrast to *Länder* provisions on the surveillance of telecommunications, the provision of the BKAG-E explicitly allows telecommunications interception at the source. Since measures concerning the telecommunications interception at the source have always been based on relevant provisions of *Länder* laws or the Code of Criminal Procedure, this provision is mainly intended as a clarification.

Measures concerning telecommunications interception at the source allow the surveillance of telecommunications which is conducted in encrypted form with the help of Voice over IP or other Internet tools either prior to

encryption or at the recipient's computer after decryption. This measure has become imperative given the increasing use of such forms of communication.

c. Surveillance of Private Homes (Section 20h of the BKAG-E)

The power of the acoustic and visual surveillance of private homes is also modelled on existing law. Similar provisions can be found in all but Bremen's *Länder* police laws (cf., for example, Section 29 of the PolG RP, Section 17 of the SOG LSA, Section 185 of the LVwG SH, Section 17 of the PolG NRW, Section 35a of the Nds. SOG, Section 15 of the HSOG, Section 10 of the PolDVG HH, Section 33a of the BbgPolG, Art. 34 of the PAG BY and Section 9 (2) first sentence of the BVerfSchG). The constitutional reservations expressed with regard to Section 20h of the BKAG are unfounded. Art. 13 (3) of the Basic Law, which permits only the acoustic surveillance of private homes, solely refers to the punitive area. Art. 13 (4) of the Basic Law does not include any restrictions concerning prevention, since the legislator amending the constitution considered prevention of greater importance than punishment. This is generally accepted by scholars and the judiciary. The requirements of Art. 13 (4) of the Basic Law have been fulfilled in Section 20h of the BKAG-E. For this reason, the visual surveillance of private homes for preventive purposes provides no grounds for constitutional objections.

The measure is only used to prevent an imminent threat to specific protected interests of major importance and only permitted if any other form of prevention is useless or extremely difficult (specific clause on proportionality).

A judicial order is generally required (exception: imminent danger, also governed in Art. 13 (4) of the Basic Law).

The protection of the inviolable core of a person's private sphere (Section 20h (5)) is clearly ensured from a constitutional point of view. Furthermore, Section 20u of the BKAG-E ensures the protection of persons who are entitled to refuse to give evidence.

Just as in the *Länder* police laws, Section 20h of the BKAG specifies that the measure must generally be taken against the relevant suspect at his/her home. Section 20h (2) of the BKAG-E also allows the surveillance of the home of a non-responsible third party as a means of last resort. However, in this case there must be specific reason to assume that the suspect is present at these premises and that the measure taken at his/her home would not prevent the threat. This provision has been modelled on Section 100 c 3) of the Code of Criminal Procedure. The previous provision governing the same subject-matter (Section 100 (2) fifth sentence of the Code of Criminal Procedure of 22 December 2003) was the issue at stake in the Federal Constitutional Court ruling on acoustic surveillance in private homes and was explicitly declared constitutional (BVerfGE Neue Juristische Wochenschrift 2004, p. 999, 1013). Similar provisions are also included in the *Länder* police laws (e.g. Art. 34 (3) of the PAG Bay; Section 35 a (1) second sentence No. 2 of the Nds. SOG, Section 34 b (1) second sentence of the SOG M.-V)

3. General Rules Protecting the Fundamental Rights of Persons Concerned

The draft finally takes all constitutional requirements developed by the Federal Constitutional Court's rulings into account. For this reason, provisions on the protection of an individual's private sphere, on the notification of persons concerned and on the identification, use and deletion of data collected have been envisaged (Section 20v of the BKAG-E). The protection of persons who are entitled to refuse to give evidence is in line with the relevant provision of the Code of Criminal Procedure (Section 20u of the BKAG-E).
