

POLICE

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1. POLICE FORCES IN THE FEDERAL REPUBLIC OF GERMANY – STRUCTURAL ISSUES

1.1 Federalism

In the Federal Republic of Germany, the competence on legislation in the field of Police is attributed by Article 30 of the constitution, the Basic Law, to the sixteen constituent States, the Laender, each of them having its own Police forces under its own police law. It is one of the most important competences of a Land to decide on the organisation, the tasks and the powers of the Police forces. The competences of the Federation are limited to special fields of Police work by specific provisions of the constitution. However, the federal competences and especially the role of the federal Police Forces are growing. In the field of security, a process of centralisation takes place.

1.2 Separation between Police forces and secret services

As in Germany secret services ought to be strictly separated from Police forces on the organisational level and on behalf of their (limited) executive powers, the law on secret services is a specific area of interest. After the Second World War, the three Western Allied States, France, the United Kingdom and the United States of America, insisted on the rebuilding of Police forces in the Federal Republic of Germany which had to be independent from secret services. This principle of separation is not explicitly laid down in the Basic Law but it can be derived from the constitutional system.

However, recent developments in law and practice having their origins in the fight against terrorism and the use of information and communication technology touch the principle of separation. Police forces gain more powers to act in a secret way, especially in the area of telecommunication interception meaning not only telephone tapping but also

similar measures relating to Internet communication. This kind of powers and measures come fairly close to powers of the secret services. On the organisational level, new forms of cooperation have been developed between Police forces and secret services with the goal to optimise the exchange of information on terrorism and organised crime. Integrated data files are fed with data stemming from the files of Police forces and the files of secret services. The statute on the anti-terror data files provides for the cooperation of law enforcement authorities including prosecuting authorities and secret services in order to fight terrorism. This statute is the best example for cooperation which can be seen positive in the perspective of guaranteeing security but critical in the perspective of the principle of separation between Police forces and secret services.

2. FEDERAL POLICE FORCES

On the federal level, the Federal Criminal Police Office (Bundeskriminalamt, BKA) and the Federal Police (Bundespolizei) are doing police work in different fields of activity. Federal customs authorities have their own police forces dealing with violations of customs law. In 2010, a commission was established by the Federal Ministry of Interior to analyse and improve Police work on the federal level. It submitted a report and suggested a fusion of Federal Criminal Police Office and Federal Police. However, the political discussions led to the result that most of the suggestions of the commission will not be realised and the two most important Federal Police institutions may intensify their cooperation but keep their autonomy and tasks.

2.1 The Federal Criminal Police Office

The German Constitution grants the Federation the power to set up central agencies at federal level for police information and communications as well as for criminal police work. Based on these provisions, Article 73 Nr. 10 and Article 87 of the Basic Law, the Law on the Federal Criminal Police Office attributes to the BKA the task to act as

central contact agency for Police cooperation in Germany. It was founded in 1951, so the BKA celebrates its 60th birthday in 2011.

The Federal Criminal Police Office fulfils the task of maintaining a great number of databases and information networks on the federal level working in cooperation with the Police forces of the federal states (Laender) which deliver most of the data to the BKA. The BKA supports the Police forces of the Laender in law enforcement by processing data and providing information which is its primary function. The international cooperation with Europol or Interpol is as well realized by the BKA as most of the contacts and cooperation within the Police cooperation of the European Union. The BKA serves as national contact point, e.g. for the search of persons or objects under the regime of the Schengen Implementation Agreement and the Schengen Information System. However, the BKA's main task on the international basis is the provision of information and the cooperation with the contact points of other Member States, exchanging data and providing access on the national level for the Police forces of the Laender.

In principle the Federal Criminal Police Office does not have executive powers on its own. Official acts in the course of criminal prosecution must be carried out in close collaboration with officers of the Laender. Only in a few areas of operations the BKA has distinct powers, especially in the fight against terrorism and international organised crime. Inter alia the BKA is capable to obtain information by means of the contentious 'online search' which allows the covert intrusion in information technology and communication systems under strict requirements in the field of the fight against terrorism. Thus the interference with civil rights mostly occurs in the field of personal data.

2.2 The Federal Police

The Federal Police is subordinate to the Federal Ministry of the Interior. Originally it was charged with the border control as the 'Federal Border Police'. Nowadays it carries out extensive and multifarious police tasks. These tasks are laid down not only in the Federal Police Act but also in other legal provisions such as the Residence Act, the Asylum

Procedure Act and the Aviation Security Act. In its role as border police the Federal Police can take action on the European and international level, especially while being part of missions of the European Union.

3. LEGISLATION ON POLICE ON THE LEVEL OF THE LAENDER

As policing is a core competence of the Laender, an ongoing process of legislation in this field in all of the sixteen Laender can be observed. Every Land has to react on the actual challenges for police work in general and on specific regional challenges. Recently, the following Laender have considerably modified their law on Police:

- Nordrhein-Westfalen, GVBl. 2011, p. 132 ,
- Hessen, GVBl. 2011 I, p. 635,
- Rheinland-Pfalz, GVBl. 2011, p. 26,
- Mecklenburg-Vorpommern, GVOBl. M-V 2011, p. 246

Outlining the common aspects of this legislation in a nutshell, some main topics can be identified. The amendments concern the organisation of police authorities and introduce new provisions related to the management of information and the collection and processing of personal data. These issues are closely related to the jurisdiction of the Federal Constitutional Court, which has edicted several rulings on the powers of police and security authorities to take measures in the field of telecommunication.

4. JURISDICTION OF THE FEDERAL CONSTITUTIONAL COURT ON MATTERES RELATED TO POLICE

The Federal Constitutional Court (Bundesverfassungsgericht) has decided on several questions related to Police within the last years. The most recent leading case is the decision on the retention of personal data (BVerfGE 125, 260 - 1 BvR 256/08, 2 March 2010, accessible by www.bundesverfassungsgericht.de). The Court declared the data retention unconstitutional in the form it has found under the Telecommunications Act (Article 113a and 113b) and the Code of Criminal Procedure (Article 100g). According to those provisions, the providers of publicly accessible telecommunications services had a duty to store virtually all traffic data of telephone, email and Internet services for six months. The law enforcement authorities were granted the power to accede to this data under certain conditions. Such provisions of accession were created not only on the Federal level in the above mentioned Code of Criminal Procedure but also on the level of the Police Forces of some Laender.

The constitutional complaints have challenged the provisions on data retention with respect to the secrecy of telecommunications guaranteed by Article 10 of the Basic Law. In its judgment, the Federal Constitutional Court does not exclude the legal possibility to implement a system of data retention without occasion, but it has found the concrete system in the challenged legal acts unconstitutional. A future legislative formulation of the provisions has to satisfy particular constitutional requiremens which have been worked out in an in-depth-analysis by the Court based on the principle of proportionality. Core aspects are the demands of data security, the use of the data only for paramount tasks of the protection of legal interests, the transparency of data transmission and the guarantee of legal protection.

Nowadays, Police work concerns in various fields and contexts the storage, transmission and use of personal data. Therefore, the decision on data retention is a benchmark decision summing up the jurisdiction of the Federal Constitutional Court and laying down general principles on the management of data for security purposes by law enforcement authorities. Still, the legislative bodies are discussing on a future law on data

retention. This process is linked to the law of the European Union. The directive 2006/78/EC on data retention was implemented in Germany by the provisions violating the fundamental rights of the Basic Law. In the moment, there is no implementation and the European Commission urges the German legislative bodies to enact the necessary laws. On the other hand, the directive itself is to be reformed, respecting the different experiences in the Member States, the technical developments and taking into account doubts that some provisions of the directive may not be compatible with the European Charter of Fundamental Rights.

Highly debated is the question of preventive detention being imposed retrospectively, as the European Court of Human Rights decided that the German law of the time violated the right to liberty under Article 5 and 7 of the European Convention of Human Rights (no 19359/04, 17 December 2009). The Federal Constitutional Court had to deal with constitutional complaints against this German legislation and declared the provisions on preventive detention unconstitutional (2 BvR 2365/09, 4 May 2011, accessible under www.bundesverfassungsgericht.de). However, the Court ordered the continued applicability of those provisions for a transitional period, at the latest until 31 May 2013. The Court found violations of the right to liberty of the detainee and the rule-of-law precept (Article 2.2 sentence 2, Article 104.1 and Article 20.3 of the Basic Law).

5. WEB SITES

www.bka.de (parts in English)

www.bundespolizei.de (parts in English)

www.bundesverfassungsgericht.de (press releases in English)