

MEASURES OF INVESTIGATIONS IN CASES OF ORGANIZED CRIME IN THE CRIMINAL PROCESS OF GERMANY

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I. INTRODUCTION

The aim of my paper is to give you some information on measures of investigation in the criminal process of Germany, which can be used for the persecution of cases of organized crime. I shall explain, in critical terms as well, the most important measures for which provision has been made in the Criminal Procedure Code (StPO). In conclusion I shall indicate which of the demands addressed to Parliament have not been taken up, and I shall also indicate the areas where -perhaps- is a need for further action.

II. CURRENT POSITION

A. Analysis

Organized crime has also become a challenge to state and society in Germany. Because of its legal system, of its prospering economy and its stable currency, its infrastructure and its geographical position, the Federal Republic of Germany faces special danger from organized crime. This type of crime is concentrated in certain offence spheres guaranteeing high criminal profits where, at the same time, the risk of detection is reduced because there are either no immediate victims or the victims are not willing to lay a criminal charge and to make a statement to the prosecuting authorities.

In the first place, the development of organized crime over the past years was marked by an alarming increase in drug trafficking offences. Internationally

organized drug syndicates brought drugs into the Federal Republic of Germany by means of couriers, builded up marketing organisations and took steps to launder and recycle the money earned from drug trafficking. Money earned from illegal drug trafficking was quite often transferred to other lines of criminal activity yielding particularly high profits, for instance in the field of money and cheque forgery or as regards the 'red-light' crime which is largely impermeable (pimp rings, operation of illegal gambling casinos).

Drug crime is only one part of organized crime - even if this part is particularly important and must be combated with special urgency. Also, in other spheres of crime we can see the development of a substantive qualitative change: the increasingly organized mode of commission. To a growing extent, criminal organisations are coming to the fore in special spheres of crime such as counterfeiting money, gang theft and theft by burglary, with handling rings waiting in the background, and particularly as regards removal of high grade assets to foreign countries, illegal arms trafficking, 'red-light' crime connected with prostitution and 'night business', and extorting protection money. As far as possible, the activities of such organisations are arranged so that the main figures do not stand out conspicuously. It is usually only the crimes of peripheral figures that can be cleared up with traditional means of investigation, i.e. - of figures lacking insight into the structure and composition of the organisation as a whole. These peripheral

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offenders are interchangeable and replaceable at will, with the result that their arrest does not really disturb the criminal activities of the organisation. Persons who inevitably know of the crimes committed are restrained from making statements by hush money, by orders not to talk, by threats and by intimidation. Where a lone offender is caught, the organisation quite often renders material support to the members of that person's family and assures responsibility for defence costs so as to obtain compliance and to prevent disclosure of information concerning the organisation. Altogether, the crimes committed show that criminal offenders - who are usually interconnected on the international level - exploit personal and business connections with enormous criminal energy and financial strength in order to make large illegal profits. Conspiratorial preparation and execution of criminal offences make the fight against crime more difficult. Its success depends on the extent to which the people acting behind the scenes and the organisers concerned are convicted of committing criminal offences and are deprived of the financial resources for committing further crimes.

B. Consequences

Therefore traditional methods of investigation are often inadequate because of the special structures found in Organized Crime and in the light of the progressive professionalism of the offenders operating in this sphere. Necessary are instruments of investigation which are adequate to the structure and the methods of organized crime and which enable the prosecuting authorities to penetrate the core of criminal organisations. Furthermore, provision must be made for regulations and measures for a better guarantee of the safety of informers, particularly witnesses. Only when the safety of imperilled informers is effectively ensured will it be

possible to expect statements from them, with the aid of which those operating behind the scenes and pulling the strings in criminal organisations can be brought to trial and convicted.

III. THE MEANS OF THE GERMAN CRIMINAL PROCEDURE CODE

A. General Principles

The German Parliament has taken appropriate action in the last years and it has brought in the provisions of the necessary measures. While the bill was being discussed before Parliament individual proposals in the bills were the subject of fierce controversy. There was less doubt about the fundamental need for legislative measures. However, individual proposals were criticised for being constitutionally objectionable, not necessary or - on the contrary - inadequate. At least the proposals of the provisions of the necessary measures of investigation became law. Demands for more far-reaching measures are now being discussed rarely.

B. General Conditions

In selecting and structuring the statutory provisions desirable for combating Organized Crime Parliament does not have unrestricted freedom of manoeuvre. First of all, the constitution sets limits. Provisions allowing substantive or procedural encroachment, under the criminal law, on basic rights protected by the constitution¹ are only admissible if, and to the extent that, a restriction of basic rights protection is permissible under the constitution in

¹ See eg. Article (Art.) 1 (protection of human dignity), 2 (safeguarding the general right of personality), 10 (protection of the privacy of telecommunications), 13 (inviolability of the home) 14 (guaranteeing property) Grundgesetz/GG (Basic Law).

Germany, the Basic Law, thus making encroaching provisions possible; moreover, such provisions are only admissible to the extent that they are absolutely necessary in the preponderant state interest. Finally, the general principle of proportionality must also be complied with.

In addition, any provisions being planned must fit into existing criminal and procedural law without there being inconsistency. In particular, the pre-existing standard and system of regulation of the original legislation already in force must be adhered to.

These conditions made the legislative work much harder. Provisions demanded from the police point of view for criminal prosecution measures were not feasible, or not as comprehensively as called for. Complicated and detailed wording had to be found for some of the provisions, the content and consequences of which are now only comprehensible to, and capable of interpretation by, specialists.

C. Definition of Organized Crime

The Criminal Procedure Code does not actually define what Organized Crime is. Also, it does not make the admissibility of its measures depend on this definition. The reason for this is that no-one has managed to develop a formula of words (definition) that is sufficiently accurate, precisely circumscribed, and yet short enough to be fit for a statutory definition. This will become apparent from the following. A working party comprising representatives from the police and the judicial- system worked out in 1990 the following description of organized crime after intensive discussions: ²

“The planned commission of criminal offences, inspired by the pursuit of profit

or power, constitutes organized crime where such offences are of substantial importance either individually or as a whole and if more than two participants collaborate within a division of labour over a longer or indefinite period of time:

- (a) by using commercial or business-type structures;
- (b) by using force or other means suited to intimidate; or
- (c) by exerting influence on politics, the media, public administration, the justice system or the economy.

This definition does not include criminal offences of terrorism.

The working party then went on to state that:

“The manifestations of Organized Crime are multifarious. Besides structured, hierarchically developed forms of organisation (often also underpinned by ethnic solidarity, language, customs, social and family background), there are links - based on a system of criminally exploitable personal and business connections - between criminal offenders with varying degrees of commitment among themselves, whereby it is the particular criminal interests concerned that determine the actual moulding of such links.”

Organized crime is predominantly observed in the following spheres of crime:

- (i) drug trafficking and smuggling
- (ii) arms trafficking and smuggling
- (iii) crimes linked with night life (above all procuring, prostitution, slave trafficking, illegal gambling and cheating)
- (iv) extorting protection money
- (v) illegal smuggling of aliens into the country
- (vi) smuggling
- (vii) forgery and misuse of means of

² For details see BT - Dr 13/4942.

- non-cash payment
- (viii) manufacturing and disseminating counterfeit money
- (ix) illicit removal particularly of high-quality motorcars, and of lorry, container and ship's freight .

In addition to these spheres of crime there are also signs of organized crime in the area of illegal waste management and of illegal technology transfer. This all goes to show : the phenomenon of organized crime cannot be defined in such a way that the definition itself would be suitable for inclusion in a statute.

The criminal procedure law therefore links its provisions to particular groups of offences and offence spheres where experience has shown them to be preferred fields of activity for organized crime.³ Furthermore, it falls back on certain types and forms of commission that have long since been formulated in criminal and in criminal procedure law and which are taken to be typical manifestations of organized crime⁴.

D. The most important measures of investigation in the Criminal Procedure Code

- (i) electronic data matching
- (ii) telephone tapping
- (iii) longer-term observation
- (iv) use of technical aids for surveillance purposes
- (v) undercover investigators
- (vi) notification for police surveillance

In the discussions of the parliament the difficulties referred to in the section on

³ Apart from drug crime, particular account must be taken here of counterfeiting money, theft and handling stolen property, illicit gambling, extortion, slave trafficking and illegal arms trafficking.

⁴ Particularly commission on a gang and on a business basis.

“General conditions” were especially encountered in this sphere of regulation. Understandable demands for practice-oriented provisions and corresponding solutions for increasing the effectiveness of criminal-prosecution must be balanced against the demand and need for the lowest possible degree of basic right limitation, particularly as regards the protection of personality and of data, and against the demand for far-reaching measures to safeguard criminal proceedings and the demand that defence effectiveness should by no means be impaired.

How often, in which cases, with which results these measures are used by prosecutor and police - we don't know exactly in Germany; for we have no or no detailed statistics for the most of the measures⁵.

1. Search by Screening

98a and 98b StPO are the special statutory basis for so-called screening searches . It is an automated (machine) comparison (matching) of personal data collected for purposes other than prosecuting purposes and in data files kept by agencies other than the prosecuting authorities. Matching occurs by using criminalistic (offender type) checking criteria specific to the case concerned (screening).

A screening search is only admissible in regard to serious criminal offences set out in a generalising catalogue (section.98a.I 1) (Such offences are, for instance, criminal offences of substantial importance in the sphere of illicit trafficking in drugs or in arms, or against life or limb, or committed by the member of a gang). For a screening order it will suffice if there is an initial suspicion (section 152 II) that such an offence has been committed. The

⁵ See BT-Dr 13/4437.

automated matching of data⁶ is permissible as regards persons who fulfil checking criteria that - depending on the stage investigations have reached in the case - are likely to apply to the offender. The aim is to filter out, from this mass of non participants in the offence, those persons who largely have the “suspect profile” in the case - which may be founded on criminalistic experience or on the outcome of preceding investigations. The method is to eliminate persons who, although fulfilling criteria applying to the offender, cannot be considered as possible offenders (negative screening search) in the light of their other data, or to filter out those persons in respect of whom criteria typically applying to the offender are to be found cumulatively (positive screening search).⁷

All private or public agency storing the data needed for matching, which typifies screening searches, are under a duty to filter these data out of its inventory and transmit them for screening to the prosecuting authorities.

The admissibility of the measure is limited by a subsidiarity clause. According to this clause a prognosis has to be made in terms of success and difficulty in clearing up the case. If this prognosis shows that full clarification of the criminal case by using other investigatory measures could nowhere near be achieved with the same measure of success as would seem possible with a screening search, the latter may be undertaken.

Section 98b contains procedural provisions relating to screening searches. In principle, matching and data

⁶ Name, address, other personal criteria specific to the individual case, eg. ownership of a particular vehicle, modes of conduct, eg. that payments are made in cash.

transmission are the subject of a judicial order. Knowledge based on a screening search can be used for the purposes of criminal prosecution to a limited extent only, ie. as evidence in the prosecution of another criminal offence only when such offence is likewise a catalogue offence under section 98a. In practice today this measure is used rarely.

2. Telephone Surveillance

It has been permissible since as long ago as 1968 to monitor telephone calls in the detection of serious criminal offences (section 100 a). This measure is only permissible in the case of a restricted list of serious criminal offences (e.g. in cases of trafficking in human beings, counterfeiting money, murder, gang theft, robbery, holding to ransom, handling stolen property on a commercial basis, money laundering, criminal offences in accordance with the Firearms Act [Waffengesetz] or the Narcotics Act [Betäubungsmittelgesetz]). Furthermore, it is only allowed in subsidiary terms when it would be

⁷ Example : if it is suspected that a criminal offender was driving a red Toyota motor car, built in 1985, model X, while escaping after committing the offence and that the car may have been from the town Y because the official registration number of the vehicle began - according to the observations of witnesses - with the letters of the town Y, it will be possible, with the aid of the motor vehicle licensing authority's data files, to find out which persons in Y are the owners of such a vehicle. If, moreover, it is known (eg. by observations of witnesses) that the offender pays his bills using a certain credit-card, the data of these vehicle owners (name, address, etc) can be compared by machine with the customer data of the credit card company, thus “screening out” that only very few of the owners concerned are the same time holders of this credit card. Traditional criminal procedure methods can then be used for further investigation of the latter persons to see whether they come into question as possible offenders.

impossible or much more difficult to ascertain the facts or to locate the accused by other means, in other words using only other measures. Monitoring concerns the accused and/or so-called messengers, i.e. individuals who accept telephone messages for the accused, pass on his/her messages by telephone or individuals whose telephone connection the accused uses.

As a rule, the measure must be ordered by a judge. Information which could also be significant for another set of criminal proceedings may only be used in this other set of proceedings for evidentiary purposes if it is also concerned with the detection of a listed offence. Finally, the documents are to be destroyed when they are no longer required for criminal prosecution.

Telephone surveillance has been the subject of constant criticism for years, in particular in the sphere of legal policy and by data protection specialists. Whilst not denying the need for such measures, they do allege that it is being used too frequently. Indeed, the number of surveillance orders has grown to more than 8,000 per year over the past few years.⁸ This does not mean, however, that more than 8,000 were sets of criminal proceedings or that more than 8,000 were accused persons. There is also no information as to how many sets of proceedings related to the criminal offences of organized crime.

3. Longer-term Observation

Section 163 f permits longer-term observation of accused persons and contact persons. Longer-term observation is observation planned to last more than 24 consecutive hours or to take place on more than two days. The measure, which is in fact a standard investigatory procedure in cases of serious crime, is permissible in respect of all criminal offences of

considerable significance, but only if other measures which would encroach less on the person concerned are much less promising or would lead to a considerable hindrance. As a rule, the measure is ordered by the public prosecutor and is then limited in duration to a maximum of one month. An extension may only be ordered by a judge.

4. Use of Technical Means of Surveillance

These provisions (section 100c) were the subject of great controversy among politicians, legal scientists and the public both before and during the parliamentary discussions. The main reason for this was the fact that such measures may constitute a deep invasion of the personal sphere, particularly the intimate sphere, of those affected. The latter may not only be the accused themselves but also others who may be affected by such a measure (contact persons or those affected by chance).

These provisions⁹ regulate the following:

- (i) production of photographs and visual recordings during surveillance ,
- (ii) use of other technical devices for surveillance purposes, and
- (iii) technical monitoring and recording, outside and /or inside a dwelling, of words not spoken in public.

Section 100c regulates which technical means may be used, against whom they may be used and under what conditions.

- (i) *Photographs and Visual*

⁹ The use of mere visual aids like binoculars, the recording of words spoken in public and the mere monitoring of words not spoken in public, do not fall under these limiting provisions since they are permissible without restriction pursuant to §§ 161,163. Also preserving traces of an offence does not fall within the sphere of § 100 c.

⁸ See BT- Dr 14/1522.

Recordings (section 100c I no. 1a StPO)

Such pictures may be taken of the accused outside a dwelling without his knowledge. This applies to criminal offences of all kinds, and also always to the police without prior-permission from the public prosecution office being needed. The precondition for taking such pictures is that any other way of trying to find out the facts or where the offender is would be less likely to succeed or more difficult to achieve. Practically speaking, this means general admissibility, limited only by the general principle of proportionality. As regards persons other than the accused, admissibility is limited only by a strict subsidiarity clause (much less likely to succeed or much more difficult to achieve)(section 100c II 2).

(ii) *Other Technical Means Specially Intended for Surveillance Purposes (section 100c I no.1b StPO)*

They may be used for trying to find out the facts or where the offender is when a criminal offense of substantial importance is the subject of the investigation. Such means are homing devices, mobile alarm units, motion detectors, the use of the "Global Positioning System"¹⁰ etc.- in other words, devices that do not record conversations.

The use of such means is likewise linked to a subsidiarity clause with a low threshold, namely that finding out the facts or where the offender is residing would be less likely to succeed or more difficult to achieve if some other means were used.

Linking the use of these special surveillance devices to a "criminal offence

of material importance" gives those involved in practice the indispensable flexibility needed for an effective criminal prosecution even if certain difficulties do not seem to be excluded because of this concept being really indefinite. It would not be proper to link use to a catalogue of particular crimes because the use of such means must be possible - with a view to practical prosecution needs - in a large variety of offences. Apart from this aspect, the concept has become established in legislation on police matters; otherwise, there is no alternative of a form of general clause - with no alternative. It is made amply clear that the use of such technical means, in a manner consistent with the principle of proportionality, should only be allowed in relation to offences above the threshold of petty crime. In each case an individual assessment will be necessary taking into account the general principle of proportionality.

As for third persons, the measure is only admissible if it is to be assumed that the former are connected with the offender or that such a connection is being set up (contact persons), that the measure will lead to finding out the facts or where the offender is residing, and that using some other means would be futile or be much more difficult (section 100c II 3)

(iii) *Monitoring and Recording of Words Spoken outside a Dwelling, but not Spoken in Public, by Technical Means (section 100c I no. 2)*

This provision on the monitoring and recording of the spoken word is much more restrictive, and it is modelled in large measure on the provisions on telephone tapping (section 100a, 100b). The monitoring and recording, outside a dwelling, of words spoken by the accused, but not in public, is admissible with

¹⁰ OLG Düsseldorf JR 1999, 255.

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technical means (eg. using directional microphones), but only when certain facts establish a suspicion that one of the serious offences (eg. murder, kidnapping, hostage-taking, extortion, robbery, gang theft, arms or drug trafficking), listed in the catalogue of criminal offences in section IOOa (telephone tapping), has been committed. A further requirement is that any other means of finding out the facts or where the offender is residing would be futile or be much more difficult. Hence, this provision closely follows section IOOa. In practice the identical subsidiarity clauses might lead to difficulties if for instance, telephone tapping is being planned but it cannot be established that clarification by some other means would be futile because monitoring itself might not be entirely unsuccessful. But usually in such cases it can be said that clarification would be much more difficult without the simultaneous use of both measures, for if only one of the two measures were used clarification would probably take much longer.

Monitoring the words spoken outside a dwelling by a third person who is not the accused and who is not speaking in public, is only admissible, under even stricter conditions, in respect of contact persons from whose surveillance important indications are (or may be) expected for the purpose of clarification. Monitoring may be ordered in respect of nonaccused persons only if it is to be assumed on the basis of certain facts that they are connected with the offender or that such a connection is being set up, that the measure will lead to finding out the facts or where the offender is residing, and that using some other means would be futile or be much more difficult (section IOOc II 3). These three requirements are cumulative. The higher threshold of action and the subsidiarity clause correspond to the provision made in section IOOa (telephone tapping). The wording is intended to make it clear that

the mere possibility of contact, or of the establishment of contact, and of successful clarification will not be enough; rather, certain facts must indicate a higher likelihood of there actually being a connection between the offender and the contact person, or of such a connection existing in future, and that successful clarification is not only seen to be a possibility but is to be expected in all probability.

Section IOOc III makes it clear that these measures may also be applied when third persons are inevitably going to be affected by them. Here it is ensured that there is no need for such measures to be dispensed with when a person who is not actually the target of the measure but only the partner of a target person or a non-participant affected by chance is included in pictures or films or when conversations are being monitored.

Section IOOd deals with important parts of the proceedings. Monitoring and sound recording equipment can only be used if a judge so orders, or where danger is imminent the order may be given by a public prosecutor or by his auxiliary officials. In the event of an order by way of emergency power, an application for judicial confirmation must be made without delay. If confirmation is not forthcoming within three days the order ceases to have effect. The order must be made in writing, must contain the name and address of the person against whom the order is directed and it must also state the nature, extent and duration of the measure. The order shall be limited to three months at the most, and an extension may be obtained for not more than three months at a time so far as the conditions for an order, as set out in section IOOc I no.2 , are fulfilled. If these conditions are no longer fulfilled, the measures must be stopped immediately. The judge must be

informed of this termination. Documents acquired by virtue of the measure are to be destroyed without delay under the supervision of the public prosecution office if they are no longer needed for the purpose of public prosecution ; a record must be made of the destruction in question.

Subsection 2 provides - just as in the case of a search by screening - that knowledge got by monitoring measures may be used in other criminal cases to a limited degree only¹¹.

The measure was used until now only very seldom.¹²

- (iv) *Surveillance and Recording with Technical means of the Spoken Word not Spoken Publicly within Dwellings (section 100 c I no. 3)*

Of particular significance, indeed controversy, at least in discussions on legal policy, and for those affected by such a measure, is the surveillance and recording with technical means of the spoken word not spoken publicly within dwellings (e.g. using directional microphones or so-called "bugs"). This measure differs from telephone surveillance in qualitative terms because it is not a telephone call which is monitored, which leaves the dwelling by telephony, but a conversation carried out within a dwelling and intended to remain there, in other words one which is intended only for those in the dwelling. Here, those speaking may well trust in the English saying: "my home is my castle". For this reason, particularly strict restrictions apply here. It is only permissible to monitor a conversation taking place in a dwelling, but not to take pictures or make

a video of what is happening in the dwelling.

So-called acoustic monitoring of dwellings is permissible only if specific facts give rise to a suspicion of particularly serious criminal offences. Such criminal offences include, for instance, grievous trafficking in human beings, criminal offences against personal freedom, crimes committed on a gang basis, handling stolen property on a commercial basis, money laundering, accepting and offering bribes, crimes in accordance with the Firearms Act and the Foreign Trade and Payments Act (Außenwirtschaftsgesetz), criminal offences in accordance with the Narcotics Act and the criminal offence of forming a criminal or terrorist association.

This measure may only be carried out if ascertaining the facts by other means would be disproportionately difficult or impossible. It is to be limited in duration to a maximum period of four weeks, and on principle is only permissible in the dwelling of the accused. It is only permissible to monitor the dwellings of other persons if it can be presumed on the basis of specific facts that the accused is in these dwellings, that the measure in the dwelling of the accused by itself is insufficient to research the facts or to locate the offender, and that this would be made disproportionately difficult or impossible by other means.

The order must be issued by three judges of a national security panel at the Regional Court and confirmed by the presiding judge of this panel in the event of an urgent decision.

All individuals concerned by acoustic monitoring must on principle be informed of the measure (as soon as this is possible without endangering the purpose of the investigation, for instance).

¹¹ In § 101 there is regulation of the cases where and when affected persons have to be informed of the measures.

¹² See BT -Dr 14/1522.

The protection of the confidential conversations of an accused person with a person entitled to refuse to give evidence is provided for in particular. There is an express prohibition to take evidence in relation to confidential conversations between an accused person and a clergyman, Member of Parliament, his/her defence counsel and, for instance, with lawyers, tax advisors, doctors or journalists who are entitled to refuse to give evidence. Knowledge gained from monitored conversations with relatives who are entitled to refuse to give evidence may only be used as evidence if, taking account of the significance of the basic relationship of trust, this is not disproportionate to the interest in ascertaining the facts. If, in other respects, it is to be expected that all knowledge obtainable from the measure is subjected to a prohibition to use the information, monitoring is not permissible from the outset, i.e. it is prohibited to take evidence in such cases.

In addition, the statute governs the permissibility of using the information gained by virtue of monitoring in other sets of proceedings, such as the usability of information gained by coincidence in other sets of criminal proceedings.

Finally, the accused or the owner of the dwelling may apply for a court to examine the lawfulness of the order and the nature of its execution once the measure has been carried out.

In the political debate, amongst other things the accusation has been made that this statutory regulation constitutes a major step towards the 'big brother state'. Against this, it should be stated that Parliament has done its utmost in legally permitting this monitoring tool, which is necessary to suppress organized crime, but admittedly highly problematic, while

contriving also to protect the freedom of the citizen from the state, without placing either interest in jeopardy. The measure has also only been ordered very rarely, in only nine sets of criminal proceedings in 1998.¹³

Finally, it is important to note that the Federal Government is obliged by law to inform Parliament, i.e. the Deutscher Bundestag, every year of incidences where acoustic monitoring of dwellings was carried out.

5. Use of Undercover Investigators

Sections 110a to 110e StPO regulate the use of undercover investigators. In a fundamental sense there is no constitutional objection. This measure is not often¹⁴ used. Its implementation is accompanied by considerable difficulties. But it is indispensable in the sphere of Organized Crime. The provisions are largely oriented towards current operational practice¹⁵.

Undercover investigators (legal definition in section 110a II 1 StPO) are investigating police officers who have a new and lasting identity conferred on them (a "legend", in particular with a new name, a new address and a new occupation/profession). In other words, they investigate using a false name without disclosing their status as police officers or the fact that they are investigating. Relevant documents can be drawn up, altered and used for the purpose of building up and maintaining the legend (section 110a III). Undercover investigators are allowed to take part in legal transactions using their legend (section 110a II 2), eg.

¹³ See BT- Dr 14/2452.

¹⁴ See BT - Dr 12/1255 ; BT - Dr 14/1522.

¹⁵ The statutory provisions are supplemented by guidelines of the Ministers of Justice and Ministers of the Interior.

they may also enter into contracts and found undertakings. Using their legend they may also enter dwellings when allowed to do so by the person with a right of entry (section 110c); but any pretence of a right of entry going beyond this is inadmissible. In certain circumstances the identity of an undercover investigator can also be kept secret in the relevant criminal proceedings (section 110b III, section 110d II). Acting as an undercover investigator is not a ground justifying their commission of criminal offences oneself.

Pursuant to section 110a I StPO the use of undercover investigators is already admissible where there is an initial suspicion (section 152 II StPO), but only in respect of certain criminal offences in a general catalogue. These are offences of substantial weight in the sphere of drug or arms trafficking, of forging money or trade marks, of state security, or those offences that have been committed on a business or habitual basis, by the member of a gang or in some other organized way, as well as those offences where there is a definite risk of repetition. Here the subsidiarity clause applies, ie. that trying to find out the facts using some other means would be futile or be much more difficult. In the case of serious crimes committed without risk of repetition, being crimes that are not part of the general catalogue, the use of undercover investigators is admissible where the offence is of great significance and other investigatory measures would be futile. All in all, the catalogue of offences in respect of which this measure is admissible is not fully identical to the catalogue of other measures.

The use of undercover investigators is also admissible in a search for a person accused of a catalogue offence. Further, it is admissible for an undercover investigator to carry out several mandates at once, eg. in several criminal cases, or

repressive mandates in addition to preventive ones in each case the relevant requirements for applying the measure must be fulfilled, and in the case last mentioned the restrictive provisions of the StPO must be complied with also when they are stricter than police law. The carrying out of a mandate is not to suffer on account of such multifunctional activity.

During operative action the undercover investigator has all powers generally at the disposal of police officers under the StPO or other statutes¹⁶. In practice the use of undercover investigators is increasingly running into difficulties. Groups of criminals into which undercover investigators are supposed to be infiltrated are increasingly cutting themselves off from "strangers" (as new members). Moreover new members of the group have to undergo unlawful "tests of innocence". Undercover investigators then fail the test because as a matter of principle they are not allowed to commit any criminal offences.

Section 110a III provides that documents may be drawn up, altered and used for an undercover investigator's operational activities if this is indispensable for building up or maintaining his legend (eg. passports, driving licence, school certificates, etc.). This authorisation to draw up the necessary documents does not, however, mean that changes can be made in public books and registers.

Section 110b I, II deals with questions of competence in respect of operations. On principle, an operation is only admissible with the consent of the public prosecution office. Only where there is imminent danger and the public prosecutor's decision

¹⁶ Knowledge acquired by an undercover invest. may be used in other criminal proceedings to a limited degree only- § 110e.

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cannot be obtained in time may the operation be ordered by the police. The public prosecutor's consent then has to be obtained without delay. The operation is to be stopped if the public prosecution office does not give its consent within three days.

Pursuant to section 110b II a judge's consent will be required if the undercover investigator is not only on the "scene" to clear up the circumstances of an offence or to get information on an offender whose identity is still unknown but is also deliberately operating against a specific accused person- whether by finding out the facts or where he is residing; the same applies if, during an operation, the undercover investigator enters a dwelling to which there is no general access. Only where there is imminent danger will the public prosecutor's consent suffice. If the latter's consent cannot be obtained in time, the police may approve the operation although they have to obtain the public prosecutor's consent without delay. Furthermore, the public prosecutor has to obtain the judge's consent, and if he does not give his consent within three days, the measure has to be stopped.

Consent by the public prosecutor and the judge must be given in writing and for a limited period. No provision has been made for a maximum period. The period will be governed by the circumstances of the individual case. An extension is possible so long as there is fulfilment of the preconditions for the operation.

Section 110b III deals with individual questions concerning the secrecy of an undercover investigator's identity, particularly in criminal proceedings. The principle that applies is that the undercover investigator's identity can be kept secret after the operation has been stopped. What is meant here is true identity, ie. his real name and other

personal particulars, including the fact that he was (is) an undercover investigator. He can continue to act in legal transactions using his legend. The decision on secrecy is at the discretion of the police. The public prosecutor and the judge who are responsible for the decision on consent to the operation may, however, demand that the undercover investigator's true identity be disclosed to them. Moreover, in a criminal case, ie. in an operation or in other criminal proceedings where the undercover investigator is due to appear - eg. as a witness, his true identity must on principle be disclosed at the main court hearing. Keeping a true identity secret is only possible in accordance with section 96 StPO, ie. when it is to be feared that disclosure would threaten life, limb or liberty of the undercover investigator or some other person, or that it would jeopardise continued use of the undercover investigator. The decision on secrecy is taken by the highest service authority having due regard to all the circumstances of the individual case. Sweeping general secrecy is not allowed since every instance of secret identity and its relevant treatment in the files might reduce the legal protection of the person affected. When the decision is being made the legal interests at variance must be carefully weighed and the facts of the case assessed as a whole. Where facts requiring secrecy so permit, the criminal court shall be informed at the time the prohibition is declared - for the court must be able to examine the lawfulness of the prohibition at least as regards manifest errors. Reasons for the prohibition must be explained to the court so that it can work actively to eliminate any barriers and provide the best evidence possible.

If the true identity of the undercover investigator is not protected, pursuant to section 96 StPO, by a decision of the highest service authority, the undercover

investigator must, on principle, testify as a witness in criminal proceedings using his real name. If necessary, he can be afforded protection by the provisions on the general protection of witnesses. If his true identity is kept secret during the criminal proceedings, the undercover investigator will generally testify as a witness using his legend. If this is not enough to eliminate danger, the undercover investigator can be prohibited from taking part altogether by analogy to section 96 StPO.

6. Police Surveillance

Finally, section 163e regulates police surveillance for the inconspicuous ascertainment and collection of facts for the purpose of drawing up a (selective) picture of movements on the part of the person, being kept under surveillance. As a rule, the object is to identify connections and cross links within a group of criminals.

This measure is applied as follows : the personal particulars of persons under surveillance are noted during police checks that have already been ordered and are in force for other reasons and where the checking of personal particulars is permitted (eg. border or airport controls). The data thus collected are then evaluated, giving a picture of place-to-place movements by the person under surveillance, particularly as regards the journeys undertaken by that person.

Surveillance of an accused person is admissible in respect of all criminal offences of material importance where finding out the facts using some other means would be much less likely to succeed or be much more difficult. By virtue of the same subsidiarity clause other persons may also be covered if it is to be assumed that they are linked with the offender or are setting up such a link and that police surveillance would also be qualified by success. Vehicle registration plates may

also be covered for surveillance purposes. The data of accompanying persons may also be reported (section 163e III). The judge is responsible for making the order, and in emergency cases the public prosecutor; in the latter case, the order will cease to have effect if not confirmed by a judge within three days.

IV. FURTHER DEMANDS ADDRESSED TO PARLIAMENT; FURTHER NEED FOR ACTION

A. Conduct Appropriate to the Milieu

In the last years there were also calls for a statutory provision allowing undercover investigators to commit criminal offences where this is indispensable in connection with their operations. Here consideration was given to the possibility of, for instance, allowing them to take part in illicit games of chance or to commit other criminal offences not encroaching on the protected legal interests of other persons.

This demand was not followed up. An important argument here was that a state based on the Rule of Law should not descend to the level of crime not even for the sake of fighting Organized Crime. In any case, a provision of this kind would not have solved the problems concerned for genuine 'tests of innocence' with the object of testing whether a new gang member is an undercover investigator (eg. by demanding that he commit a rape or inflict bodily harm on persons who are not involved) would not be hindered by this.

B. Informers

There was also discussion whether - as in the similar case of undercover investigators - a statutory provision might also be necessary to allow the use of informers to help clear up serious criminal cases. Informers are persons who are not

on the staff of a prosecuting authority but who are nonetheless willing to assist the prosecuting authorities, on a confidential basis and for sometime in clearing up criminal cases; their identity should generally be kept secret.

The Procedure Code has no statutory provisions on this. This is - so I believe - not necessary, and indeed it would be wrong. Informers are simply normal witnesses no more and no less. They have no special powers. What they know has to be used by the prosecuting authorities just like the knowledge of other witnesses. Special protection is possible for informers in terms of the provisions relating to the protection of witnesses.

C. Precursory Investigations

Sometimes there is a discussion of the question whether clearing up cases of Organized Crime might be intensified by so-called precursory investigations. According to section 152 II StPO criminal investigations begin only when there is an initial suspicion, ie. when there are sufficient factual indications. The latter will be given if, on the strength of concrete factual circumstances, there is a certain probability, being at least a slight probability, that a criminal offence might have been committed. This probability must go beyond the general theoretical possibility of crimes having being committed.

And this is the very point where the call for admissible precursory investigations crystallises. This demand is aimed at "acquiring" suspicion, ie. at first establishing an initial suspicion. Here one has terrain in mind where, on past experience, the commission of crimes or the detection of an initial suspicion is to be expected, eg. in big insurance companies where indications of insurance fraud might be found through examining a large

number of files, or in large industrial enterprises where cases of criminal breach of trust might come to light when a large number of files are studied; for want of relevant experience or of the necessary expertise, the undertakings in question would not have discovered these cases at all.

I have fundamental legal policy misgivings about a statutory provision permitting such precursory investigations below the threshold of an initial suspicion, for the limiting function of an initial suspicion in terms of section 152 II StPO is of material importance in a state based on the Rule of Law. It protects an individual against being made the object of exploratory enquiry for no reason. Investigations below the threshold of an initial suspicion would derogate from the citizen's rights of personal liberty. Furthermore, regulation, under criminal procedure, of precursory investigations would entail numerous problems of detail requiring solution in the Criminal Procedure Code.

D. International Co-operation

International co-operation is just as important. It cannot be confined to mutual (bilateral) legal assistance between states. What is important is that there should be a multilateral exchange of experience and data, and especially that common strategies should be evolved to fight Organized Crime.

INTERPOL and EUROPOL could be helpful here. Very important is especially the international co-ordination of transfrontier suppression. Numerous problems emerge in this connection problems concerning data protection, difficulties over sovereign rights, problems resulting from differences of system as well as from differences in the legal standard found in the various countries. But I am

confident that these problems may be solved.

V. FINAL REMARKS

I would like to conclude by proposing several ideas for discussion:

- (i) In the suppression of organized crime, Parliament is faced with a tension - ultimately irresolvable - between two opposing interests, typified by the classical wording of the Federal Court of Justice: "It is not a principle of the Code of Criminal Procedure that the truth must be found at any price" on the one hand, and on the other, by the accurate claim that a state governed by the rule of law is obliged to protect its citizens against wrongdoing.
- (ii) It is a part of the essence of criminal and criminal procedure law that criminal prosecution is thereby set limits as a kind of "Criminal's Magna Charta". This is a restriction placed on the state powers of punishment. It is essential to an open, pluralistic society that there should be a debate on where these restrictions should be drawn. It is just as frequent for their inviolability to be rashly claimed as the contrary.
- (iii) Organized crime is not merely a phantom, it is a socially-damaging manifestation of crime which must be taken seriously. The extent of the threat that it poses is evaluated differently in the legal and criminal policy discussions, as is the priority given to the preventive measures. There is, and can be, no doubting that society must defend itself against organized crime by all appropriate means.
- (iv) To this extent, the repressive approach pursued by criminal and criminal procedure law must be supplemented by a preventive approach, to which the same priority must be attached, and the shortcomings in execution must be remedied.
- (v) Organized crime cannot be covered by elements of criminal offences, but only described from criminological and criminalistic points of view. Indications of specific shortcomings may result from such a description, in both criminal and criminal procedure law.
- (vi) The Federal Republic of Germany has already made available the necessary legal provisions, by virtue of the statutes already enacted, for those measures, which are needed to suppress organized crime in Germany. The concessionary nature - and in part also the complexity - of the regulations is also a consequence of the basically irresolvable tension between ensuring individual freedom and fighting crime effectively.
- (vii) In criminal procedure law, the increased permissibility of undercover investigation measures is directed against the conspiratory nature of organized crime. Witness protection, which gives the preventive component greater priority, is geared towards the aspect of threat and intimidation, which is inherent in organized crime.
- (viii) In an overall evaluation, the repressive concept developed by Parliament so far appears to be self-consistent. Its measures target the right problem areas. Whether or not it is sufficient in quantitative terms is the subject

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- of debate in terms of legal and social policy.
- (ix) Parliament has to date satisfactorily balanced the opposing interests of safeguarding freedom whilst at the same time fighting crime. The statutes have neither made of the criminal prosecution authorities a toothless tiger, nor has the rule of law protected itself to an excessive degree. This however does not rule out individual criticism, corrections or additions after a careful analysis has been carried out.
- (x) It is, however, difficult to discuss this issue predominantly from the point of view of mere effectiveness and with the dominance of the repressive approach to criminal and criminal procedure law.
- (xi) The danger ascribed to the ability of organized crime to destabilise the free social order is two-fold. It consists not merely of Mafia structures infiltrating society. It may also lie in the fact that an exaggerated set of defence tools calls into question our personal freedom.
- (xii) It is now a matter of intensifying the work of the criminal prosecution authorities on the basis of the clear preconditions for statutory permissibility, and of using all permissible tools to effectively suppress organized crime.
- (xiii) Time will tell whether further statutory regulations are necessary to facilitate additional measures. In order to evaluate this question, reports from the criminal prosecution authorities, describing successes and difficulties encountered in practice, are indispensable.
- Experience reports from foreign criminal prosecution authorities and knowledge based on legal comparisons should be included in the assessment wherever possible.
- (xiv) One should bear in mind in performing this assessment that the previous statutory provisions and the tools permissible in accordance with them do impose limits on what is possible and feasible in a state based on the rule of law. Effective criminal prosecution is also restrained by the rule of law. It is not enough to ensure criminal prosecution, no matter what the price, even when prosecuting organized crime. Human rights, freedom, general rights of privacy, including data protection and other basic civil rights, must be respected. These core rights may not be violated lightly. However, where Parliament may restrict these rights, such restrictions are also to be limited in scope to the degree indispensable for effective suppression of organized crime.
- (xv) It is now a priority to examine how and in which areas - taking account of the above idea - international cooperation to suppress organized crime can be expanded and intensified. Effective international cooperation is, ultimately, more important than respecting national sovereignty rights. Within the framework of international cooperation, one should strive to optimise the international coordination of cross-border suppression of organized crime. One should also strive - whilst respecting the above principles - towards a uniformity of procedures,

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standards and techniques to suppress organized crime. However, where the national legal standard is higher, it should not be significantly reduced through compromises in favour of international standardisation, cooperation and coordination.