

Germany's Interception of Telecommunications Law in force on January 29th 2002

Report by RA Jens Eckhardt

THE GERMAN GOVERNMENT passed its Interception of Telecommunications Ordinance (Telekommunikations-Überwachungsverordnung – TKÜV) on 24th October 2001. It was promulgated on January 28th, 2002 and entered into force the next day. The TKÜV drafts presented by the Federal Ministry of Economy and Technology had been subjected to harsh criticism in Germany.

The Ordinance is based on Section 88 of the Telecommunications Act (Telekommunikationsgesetz – TKG) and obliges private companies to install equipment and maintain resources to permit interception by public authorities.

The first TKÜV draft was rejected in 1998 due to massive pressure from the concerned business organisations. In 2001 three further drafts followed, also accompanied by massive criticism. In spite of the continuing criticism, the German government passed the fourth draft (dated 27th September). Section 88 of the TKG entitles the government to enact the TKÜV independent of any parliamentary decision.

Neither Section 88 of the TKG nor the TKÜV regulate the legal grounds for interception. The admissibility and extent of a lawful monitoring of telecommunication are strictly determined by three statutes – the Criminal Procedure Code (Strafprozessordnung - StPO), the Intelligence Services Interception Act (G10-Gesetz), and the Foreign Trade Act (Außenwirtschaftsgesetz – AWG). The TKÜV merely regulates the specifications of the technical and organisational measures.

In contrast to the UK's Regulation of

Investigatory Powers Act 2000 (RIPA), the TKÜV neither changes nor expands the interception power of the police or the security and intelligence services. However, the essential criticism remains regarding Internet surveillance and costs for installation and maintenance.

Section 88 of the TKG requires the affected private companies to bear the costs for installation and maintenance of the interception systems and devices, hence their concern. They argue that since any interception is carried out in the public interest, the State should bear the costs. The industry claims that requiring it to shoulder the entire cost is unacceptable, a violation of constitutional principles, and that the permitted exemptions are insufficient.

Without technical and juridical harmonisation at the European and international level, an expensive national solution is needed in Germany. However, the draft provides for standardisation at least within Germany. A significant development regarding the Internet is the TKÜV's establishment of a code to identify intercepted telecommunications. The identification code must be the telecommunications address of each Internet's communication desti-

nation or origin. Consequently, the TKÜV also gains importance for those Internet service providers that offer only Internet service, not Internet connection.

From a technical perspective, the second and the third draft drew particular criticism for not sufficiently considering that Internet and other net-based communication systems are based on package-based transmission of data. Thus it is impossible to simply apply the methods used for monitoring traditional telecommunications. There are also fears that crackers, hackers and other criminals might misuse the systems.

The government has announced its intention to reconsider the TKÜV if new insights are gained in this area.



*RA Jens Eckhardt can be contacted at Sozietät Wessing, Frankfurt am Main, Germany
Tel +49 (0)69 97130 190,
Fax +49 (0)69 97130 199
E-mail: j.eckhardt@wessing.com*