Money Laundering and Surveillance of Telecommunication – The Recent Decision of the *Bundesgerichtshof* (BGH – Federal Court of Justice)

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A. Introduction

The possibility of monitoring telecommunications pursuant to § 100a of the *Strafprozeßordnung* (StPO – Criminal Procedure Code) existed in Germany for the last 35 years. Nonetheless, the surveillance of telecommunications is still the subject of controversy and dispute; not only in connection with new forms of communications[1] but also with regard to the extent and grounds of application in "normal" cases of telephone surveillance.[2]

In 1998, via the *Gesetz zur Verbesserung der Bekämpfung der organisierten Kriminalität* (Act for the Improvement of the Fight Against Organized Crime),[3] the offence of money laundering was incorporated into the "*Katalogtaten*"[4] of § 100 StPO. This incorporation proved to be quite problematic because the very same law renders the perpetrator of the "*Vortat*"[5] of § 261 of the *Strafgesetzbuch* (StGB – Criminal

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[1] *See, BGH*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1934 (1997), with notes by Kudlich *in* JURISTISCHE SCHULUNG (JuS) 209 (1998) (Access to data contained in a mailbox). *See also*, *BGH,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1587 (2001), with notes by Bernsmann, in NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 103 (2002), as well as Kudlich, in JURISTISCHE SCHULUNG (JuS) 1165 (2001) (Notification of the positioning signal of a mobile telephone).

[2] *See* Backes/Gusy, WER KONTROLLIERT DIE TELEFONÜBERWACHUNG (2003), as well as Albrecht/Dorsch/Krüpe, RECHTSWIRKLICHKEIT UND EFFEKTIVITÄT DER ÜBERWACHUNG DER TELEKOMMUNIKATION NACH DEN §§ 100a, 100b STPO UND ANDERE VERDECKTE ERMITTLUNGSMAßNAHMEN (2003).

[3] BGBl. 1998 I, p. 845.

[4] Catalogue of prior offences triggering the application of § 100a StPO.

[5] List of prior offences whose profits are subject to money laundering.

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Code) a possible qualified perpetrator of the offence of money laundering. It is almost undeniable that in the majority of cases of crimes against property there is also an additional suspicion of money laundering, at least at the stage of preliminary investigations.[6]

Having this development in mind it is of most interest that the Fifth Criminal Senate of the *Bundesgerichtshof* (BGH – Federal Supreme Court) recently declared surveillance measures in connection to certain cases based on § 261 StGB to be unlawful.[7] The practical relevance of this judgment cannot be exaggerated. Nonetheless, the possibility of successful remedial action against a concrete order of surveillance is limited due to the fact that in the same judgment the BGH allows for generous substitution of one catalogue crime for another, providing another basis for the application of § 100a StPO.[8]

B. The Judgment of the BGH

The decision of the BGH was based on the following facts. The accused were members of an organization of smugglers.[9] In the *Landgericht* (Regional Court) the accused were convicted, primarily on the basis of the results of telecommunications surveillance, which was ordered pursuant to § 100a StPO.[10] The surveillance order had been based on suspicion of money laundering.[11] Two of the accused appealed, challenging the utilization of the transcripts of the telecommunications intercept at the trial.[12] They argued in their objection that their conviction would breach the so-called *Nachrangklausel* (subsidiary clause) in § 261 IX S. 2 StGB. According to § 261 IX S. 2 StGB a conviction of money laundering is excluded in the event that the perpetrator's act also falls under the catalogue of *Vortaten* listed in § 261 I S. 2 StGB and provided he or she can be convicted of such a *Vortat*. In the case at hand the accused were guilty of smuggling pursuant to §§ 373, 374 AO, a crime listed in § 261 I S. 2 StGB, in which case the subsidiary clause in § 261 IX S. 2 StGB applies and they could only be convicted of having violated §§ 373, 374 AO. The accused

[6] *See e.g.;* fraud (§ 263 StGB), theft (§ 242 StGB), misappropriation (§ 246 StGB), breach of trust (§ 266 StGB) committed in a professional manner or as member of a gang.

[7] *See* BGH 5 StR 423/02 = BGHSt 48, 240 = *BGH*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1880 (2003).

[8] *BGH*, NJW 1883 (2003).

[9] *See BGH*, NJW 1880 (2003); §§ 373, 374 of the *Abgabenordnung* (AO – Tax Code).

[10] *See BGH*, NJW 1880 (2003).

[11] *See BGH*, NJW 1880 (2003).

[12] *See BGH*, NJW 1880 (2003).

argued that, in light of the fact that the crimes of §§ 373, 374 AO were not listed in the catalogue of crimes permitting the surveillance of telecommunications pursuant to § 100a StPO, the surveillance was unlawful and the results of such surveillance could not be used against the accused in court.[13] The BGH rejected the appeal for particular reasons based in procedural law for appeals and declared the appeal to be inadmissible and unfounded.[14] Nevertheless, in an *obiter dictum* the BGH reviewed the relevance of § 261 StGB, in particular the relevance of § 261 IX S. 2 StGB to ordering telecommunications surveillance.

I. The Limitation of the Surveillance of Telecommunication in the Case of Suspicion of Money Laundering Imposed by the BGH

The BGH based its *obiter dictum,* that the surveillance of telecommunications in the case at hand was unlawful, on a number of reasons.

1.

The BGH centered its reasoning around the concern that there was an unacceptable inconsistency in judgment in the case of unlimited surveillance for the suspicion of intended money laundering.[15] This inconsistency indeed seems, at first sight, to be caused by the divergence between the catalogue of offences together with the trigger factors of § 100a StPO and § 261 StGB. The scope of the possible *Vortaten* triggering § 261 StGB is much broader and comprises an array of offences, which, on the other hand would not independently permit surveillance measures pursuant to § 100a StPO. The pure text of the statute could lead to the assumption that cover-up and utilization acts, often attending and following property crimes, would lead to the application of § 261 StGB, especially as they fulfill elements of the crime of money laundering. However, the perpetrator could not be convicted of money laundering as the participation in the prior offence would exclude her or him from punishment according to § 261 XI S. 2 StGB. Nevertheless, his or her acts could be subjected to surveillance measures pursuant to § 100a StPO. In short, in a multitude of moderate offences against property, the acts of the perpetrator following the offence would indirectly fall under the scope of § 100a StPO. The possibility of surveillance opens up even though the perpetrator is not criminally liable for his or her actions under the substantive criminal law of § 261 IX S. 2 StGB.

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[13] *See BGH*, NJW 1880 (2003).

[14] *See BGH*, NJW 1881 (2003), II. 1, 2; *See*, § 344 II S. 2 StPO.

[15] *See BGH*, NJW 1881 (2003), II. 2. a) aa).

2.

Moreover, the BGH supports its position with the legal nature of the so-called *Nachrangklausel* (subsidiary clause) of § 261 IX S. 2 StGB and demonstrates exactly what the parliament did *not* want to achieve with the norm: the individual grounds for exemption of punishment pursuant to § 261 IX S. 2 StGB was in reality a norm dealing with jurisdictional conflict that was intended to hinder double punishment in the case the perpetrator of the prior crime also commits an act of money laundering.[16]

3.

In systematic respect, the BGH uses § 257 II StGB as an basis for its ruling.[17] According to this norm the punishment for being an accessory after the fact cannot be more severe than the punishment of the *Vortat.* Having in mind the structural similarity between accessory after the fact and money laundering, the BGH concluded that the reasoning of § 257 II StGB should also be applied to sanctioning money laundering[18] as well as the procedural power of intervention. Therefore, the order of telecommunications surveillance is quite problematic in the case of money laundering when such an order would not legally be possible with the commitment of the *Vortat* of money laundering.

4.

Finally, the BGH referred to constitutional law and stressed that § 100a StPO should be interpreted restrictively since the norm provides for an infringement of the sensitive constitutional secrecy of telecommunications provided by Art. 10 of the Grundgesetz (GG – Basic Law).[19] Here there should generally be a consensus, as the constitution is particularly strict in its interpretation of material and procedural norms of criminal law.[20] In spite of the fact that the BGH has recently been interpreting the authority of telecommunications surveillance pursuant to § 100 StPO in a rather broad manner,[21] the constitutional argument of the BGH does

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[16] *See* BT-Drs. 13/8651, p. 11. *BGH*, NJW 1881 seq. (2003), II. 2. a) bb).

[17] *See BGH*, NJW 1882 (2003), II. 2. a) cc).

[18] *See BGH,* NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 654 (2000).

[19] *See BGH*, NJW 1882 (2003), II. 2. a) dd).

[20] *See* Kudlich, JURISTENZEITUNG (JZ) 127 (2003).

[21] *See* supra note 1.

not, of course, exclude the Court from a closer reasoning and balancing of affected interests. In this respect the Court has limited itself mainly to the justifictions first mentioned, eliminating the necessity that it further discuss this reasoning.

II. Critical Analysis of the Reasoning of the BGH

Despite the extensive reasoning of the BGH (and in spite of the political sympathy which one may have for such a result) it is questionable whether the decision of the Court is convincing *de lege lata* or whether the judges put their viewpoint as regards criminal policy over that of the parliament.

1.

With respect to the *non-tolerable* gap in consistency, it could indeed be admitted that at first sight it may be surprising to note that, if not for the *Vortat* itself, telecommunications surveillance can be ordered for the subsequent crime of money laundering committed by the perpetrator. Yet the parliament seems to assume that acts of money laundering occupy a particularly higher *Unrechtsmehrwert* (degree of criminality).

The parliament sought, in the Act for the Improvement of the Fight Against Organized Crime, which provides for the incorporation of § 261 StGB in the catalogue of offences eligible for § 100a StPO surveillance, "to enhance the criminal combat of organized crime, in particular in connection with the preliminary investigations and conviction of the main perpetrators, the organisers, the financiers and wire pullers."[22] According to the law the "punishability of the money laundering actions" is of particular importance "in the interest of effectively combating organized crime."[23] This leaves the impression that particular emphasis is placed on the significance of prosecuting money laundering acts.

Furthermore, the aim of the law "to verify the link between the perpetrator of the *Vortat* and the perpetrator of money laundering"[24] rather leads to an unlimited application of § 100a StPO in the case of § 261 StGB. As with such *Katalogtaten* that are already part of the catalogue of § 100a StPO eligible crimes, such verification can often be obtained through the surveillance of the prior offender's telephone connection.

[22] *See* BT-Drs. 13/8651, p. 9 (translation by the authors).

[23] *See* BT-Drs. 13/8651, p. 9 (translation by the authors).

[24] *See* BT-Drs. 13/8651, p. 13 (translation by the authors).

Moreover, the catalogue of § 100a StPO is obviously not consistent with regard to the *Unrechtsgehalt* of the respective acts: on the one hand, quite a few crimes are excluded from the § 100a StPO catalogue; on the other hand, offences like gang theft, the professional receipt of stolen goods, and indeed, money laundering are incorporated into the statute.[25] This demonstrates that the parliament was not only guided by the gravity of the crimes. It also took certain social sectors into consideration – particularly those significant to the effort to combat organized crime. This focus on organized crime in the establishment of *Katalogtaten* was, of course, the foremost justification for the enactment of § 261 StGB in the catalogue of § 100a StPO. Therefore, the argumentation that the parliament intended to incorporate acts of money laundering independently of the *Vortat* under the scope of § 100a StPO carries some weight.

Finally, an even larger gap in the consistency of the judgement emerges if one limits the scope of § 100a StPO based on the subsidiary clause of § 261 IX S. 2 StGB. Allowing the decision to be governed by the question of whether or not money laundering acts are subsidiary pursuant to § 261 IX S. 2 StGB leads to the unacceptable result that the perpetrator meeting the requirements of the elements of the *Vortat* and of money laundering cannot be intercepted according to § 100a StPO; while a person not involved in the *Vortat* but solely aiding (as a minor figure) the cover-up of the perpetrator's actions would fall within the scope of § 100a StPO.[26] This would be a much graver inconsistency in judgement and should definitely not be the result of such a limiting interpretation.

2.

Even the Court's emphasis that, according to the will of the parliament, § 261 IX S. 2 StGB should hinder double punishment, does not change the gap in consistency. Section 261 IX S. 2 StGB in particular prevents such a threat of double criminal liability. Independent of the progress of an investigation the perpetrator would only be convicted of one crime, be it either of § 261 StGB or, due to § 261 IX S. 2 StGB, of the *Vortat.* A "double investigation ban" (even extending the double criminal liability ban) cannot be read into § 261 IX S. 2 StGB, as the nature of preliminary investigations inherently dictates that a more or less secure prognosis of criminal liability can only be ascertained through commitment and provability of single elements of the crime throughout the investigation.

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[25] *See* § 100a no. 2 StPO.

[26] *See* Mahnkopf, NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 329 (2003).

3.

In the end the comparison with § 257 II StGB does not really help much. As shown above, the catalogue of § 100a StPO is not solely based on (and is not consistant with) the concern for the gravity of crimes. Even assuming the reasoning of the BGH regarding the validity of § 257 II StGB in the case of money laundering, and thus with regard to the sanctioning, is correct, one cannot conclude that the principles of sanctioning, which are based on the degree of guilt,[27] allow for the admissibility of procedural measures of compulsion (surveillance measures according to § 100a StPO). Moreover, according to the will of the parliament, the *Schutzzweck* (purpose of protection) enshrined in § 261 StGB reaches beyond that of § 257 StGB, as not only the interest to restore the legal condition is protected[28] but also "the unscathed economic circulation and hence also legally protected interests other than those which are generally violated by the prior offence."[29]

III. Elimination of the Consistency Gap by way of Extensive Restrictions to § 100a StPO?

Probably the most significant objection to the solution of the BGH, as shown above, is the great inconsistency in the judgment created by the fact that the offender of the *Vortat*, being the main actor, could not be monitored pursuant to § 100a StPO but an aider and abettor, acting at the later date in a cover-up situation, could be monitored. This inconsistency could be solved by giving less stress to the subsidiary clause under § 261 IX S. 2 StGB and declaring an order of telecommunications surveillance to always be illegal when the *Vortat* supporting the relevance of § 261 StGB is not listed in the catalogue of § 100a StPO. Unfortunately, the BGH is not quiet clear on whether it would like to restrict the application of § 100a StPO that far. Few passages of the decision tend in that direction. In the more central parts of the judgment, however, the Court explicitly uses the subsidiary clause of § 261 IX S. 2 StGB as an element of its reasoning.[30]

However, it seems one cannot follow this course, either. Limiting the consistency-gap by a consequent follow-up of the reasoning of the BGH does not neutralize the objections against the Court's reasoning. This is particularly true for the

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[27] § 46 I S.1 StGB.

[28] *See* Lackner/Kühl, STGB COMMENTARY, § 257 note 1 (24th ed., 2001); Geppert, JURISTISCHE AUSBILDUNG (Jura) 269, 270 (1980).

[29] *See* BT-Drs. 13/8651, p. 11.

[30] *See BGH*, NJW 1880 seq. (2003), II. 2. a), II. 2. a) dd).

parliament's purpose of § 261 StGB, namely combatting organized crime[31] and the usage of § 261 StGB as a link for the ordering of surveillance measures. It is also questionable whether this further-restricting result would be compatible with the wording of § 100a StPO. The "small solution," being that the direction of surveillance measures pursuant to § 100a StPO should only be illegal when the criminal liability for money laundering is shadowed by that of a *Vortat* not included in the list of § 100a StPO, can be attacked and nonetheless also leads to a gap in consistency. This gap could, however, be filled with the wording of § 261 StGB and § 100a StPO. It is true – at least with regard to the subsidiary clause of money laundering pursuant to § 261 IX S. 2 StGB – that this clause cannot exempt the suspicion of money laundering from the application of § 100a StPO, but that the *ratio legis* of § 100a StPO could only allow for surveillance measures when the act in question can also be punished. A general exclusion of surveillance measures in the case where money laundering is not auxiliary to a catalogue offence pursuant to § 100a StPO seems to exceed the borders of legal interpretation *secundum legem*. The unlimited reference to "money laundering, a cover-up of illegally obtained wealth according to § 261 I, II or IV StGB" pursuant to § 100a Nr.2 StPO, is even an example of a relatively clear regulation. That is to say, in cases of money laundering under § 261 I, II or IV StGB the surveillance of telecommunications is legal – that is the statement of the relevant passage in § 100a Nr.2 StPO in its entirety.

IV. Practical Consequences of the Adjudication of the BGH

If one does not let oneself be put off by the critique mentioned here and were to ask what practical consequences result from the restrictive interpretation of the BGH, one needs to consider the following: with regard to the criminal liability of money laundering as such there will be no difference, as even the successful investigation of the crime with the help of telecommunications surveillance will not lead to a conviction due to § 261 IX S. 2 StGB.

It is a different case where the *Vortat* overrides due to § 261 IX S. 2 StGB money laundering or in the case where other *Zufallsfunde* (windfall discoveries) are found, as the adjudication (based on legal material[32]) deems that the results of telecommunications surveillance can also be used for the successful investigation of non-catalogue crimes provided the outcome demonstrates a connection to the catalogue crime.[33] In this respect it is true that the existing path taken by the Fifth

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[31] *See*, *e.g.*, Tröndle/Fischer, STGB COMMENTARY, § 261 note 3a (51st ed., 2003).

[32] *See* BT-Drs. 12/989, p. 38 (translation by the authors).

[33] *See BGHSt* 26, 298; 30, 317, 320; Nack, *in* KARLSRUHER KOMMENTAR, § 100a note 46 (4th ed., 1999). *See also*, Lemke, *in* HEIDELBERGER KOMMENTAR ZUR STPO § 100a note 16 (2001). *Contra*, Rudolphi, *in* SYSTE-

Senate, making the use of the product of surveillance more difficult, makes sense with respect to criminal policy. The use of the results of surveillance was most likely to be in the interest of the parliament when it incorporated § 261 StGB into the catalogue of § 100a StPO. In particular, the crime of money laundering with its broad definition and multitude of overlapping acts which can constitute it, may be seen as a link into the web of organized crime, for the very suspicion thereof opens the door to a plethora of further investigations.

V. Post-order substitution of a catalogue offence

If one does not share the doubts expressed here about the BGH's derivation from the text of the law and from the will of the parliament, one might see a victory for the rule of law gained by the limitation of the surveillance of telecommunications; an investigation measure in a field which is sensitive and relevant to the constitution. However, this gain is immediately put at risk again by the next step in the decision of the Court. Based on the accepted outset that the original, ill-ordered surveillance of telecommunications generally leads to a *Verwertungsverbot* (non-admissibility of the evidence gathered)[34]stemming from such unlawful interception, the Fifth Senate makes an about-turn. It substitutes (even as a court of last resort) the – according to the Court – non-relevant norm of § 261 StGB with the one of § 129 StGB, which sanctions the creation of a criminal organization.[35] In which manner this substitution is seen to be dogmatically correct is not exactly expounded by the Court. One probably needs to understand the BGH in such a way that the question, whether there is a ban on utilization of evidence gained, is not so much a question of "the hypothetical course of the investigation" but more one of "the post-order lawfulness" of the measures taken. This bares the consequence that accidental findings, discovered during the initially unlawful surveillance, can be used at trial within the limits of, and in accordance with, § 100b StPO.

One might initially have some doubts, whether such a rationalization in the appellate process should be admitted in the case of an infringement of constitutional freedoms on account of § 100a StPO; even more so, if transformed into categories of administrative law, the ordering of telecommunications

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MATISCHER KOMMENTAR ZUR STPO § 100a note 25 (2003). For a more cautious and generally reserved utilization in borderline cases, *see*, Prittwitz, STRAFVERTEIDIGER (StV) 302 (1984).

[34] *See* the recent and comprehensive publication by Jäger, BEWEISVERWERTUNG UND BEWEISVERWERTUNGSVERBOTE IM STRAFPROZESS (2003).

[35] *See BGH*, NJW 1883 (2003), II. 2. c).

surveillance would be a question of discretion ("…could be directed…").[36] Admittedly, this is an action, which, according to the prevailing view,[37] would also be legally permitted in administrative law[38] in the case of the infringement of civil rights. In addition, the requirements the BGH makes (i.e., same facts of the case, no totally different character of the former existing investigations, suspicion of the other catalogue offence already at the time of ordering telecommunication surveillance) are in no way inferior to the requirements set out in administrative law in terms of their strictness or clarity.

In the case at hand the action seems to be questionable, as surveillance of telecommunication should be based on the suspicion of creating a criminal organization. As the decision does not name any crime other than smuggling according to §§ 373, 374 AO, towards which the purpose or activity of the organization is directed, it is not clear wherein the difference in comparison to § 261 StGB lies. Assuming the legal nature of the *Vortat* is of importance to ordering surveillance in the case of money laundering, this should be even more valid for the crime of § 129 StGB pertaining to the legal nature of the offence, for which the organization was founded, as § 129 StGB in this concrete case of smuggling arrives at a lesser degree of quality of injustice than the commitment of the elements of crimes of § 261 StGB.

C. Conclusion

With the limitation of § 261 StGB as a possible catalogue offence of § 100a StPO the Fifth Senate paved a way by which good policy-reasoning can be found. Whether this conforms to the considerations in criminal policy of the parliament is nonetheless doubtful. Not only for that reason, the Fifth Senate possibly exceeded the scope of interpretation, which the parliament granted the judiciary for interpreting § 100a StPO. Perhaps here it should be suggested that "persons, who criticize the Court for policy matters, have to be content with less, namely, the incessant castigating of the (dogmatically unavoidable) consequences" which arise

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[36] In any case, for the assumption of a scope of interpretation pertaining to the elements of crime, *see*, *BGH*, NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 510 (1995), with critical notes in Bernsmann; Lemke, *in* HEIDELBERGER KOMMENTAR ZUR STPO § 100a note 10 (2001).

[37] *See* Hufen, VERWALTUNGSPROZESSRECHT, § 24 note 20 (5th ed., 2003); Schenke, VERWALTUNGSPROZESSRECHT, note 811 (8th ed., 2002).

[38] *See* Krey, *in* BLAU-FESTSCHRIFT 123, 124 (1985); Kudlich, STRAFPROZESS UND ALLGEMEINES MISSBRAUCHSVERBOT 145 (1998).

out of the disappointing legislative conditions, because they are unchallengeable by the *Rechtsanwender* (applier of the law).[39]

[39] *See* Hefendehl, *in* ROXIN-FESTSCHRIFT,145, 169 (2001).