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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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SIXTH EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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Sixth Edition

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# EDITOR'S PREFACE

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This fully updated sixth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs relevant to both existing service providers and start-ups in 29 jurisdictions around the world. It is intended as a business-focused framework for beginning to examine evolving law and policy in the rapidly changing TMT sector.

The burgeoning demand for broadband service, and for radio spectrum-based communications in particular, continues to drive law and policy in the TMT sector. The disruptive effect of these new ways of communicating creates similar challenges around the world:

- a* the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens;
- b* the reality that access to the global capital market is essential to finance that infrastructure;
- c* the need to use the limited radio spectrum more efficiently than before;
- d* the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and
- e* the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

A global focus exists on making radio spectrum available for a host of new demands, such as the developing 'Internet of Things,' broadband service to aeroplanes and vessels, and the as yet undefined, next-generation wireless technology referred to as '5G'. This process involves 'refarming' existing bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs. In many cases, an important first step will occur at the World Radiocommunication Conference in November 2015, in Geneva, Switzerland, where countries from around the world will participate in a process that sets the stage for these new applications. No doubt, this conference will lead to changes in long-standing radio

spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Many telecommunications networks once designed primarily for voice are now antiquated and not suitable for the interactive broadband applications that can extend economic benefits, educational opportunities and medical services throughout a nation. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Governments are also re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation are also leading to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector.

Changes in the TMT ecosystem, including the increased reliance by content providers on broadband for video distribution, have also led to a policy focus on 'network neutrality' – the goal of providing some type of stability for the provision of important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented can have profound effects on the balance of power in the sector, and raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers.

These continuing developments around the world are described in the following chapters, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

**John P Janka**

Latham & Watkins LLP

Washington, DC

October 2015

# LIST OF ABBREVIATIONS

3G	Third-generation (mobile wireless technology)
4G	Fourth-generation (mobile wireless technology)
5G	Fifth-generation (mobile wireless technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services

*List of Abbreviations*

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FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node
FTT <sub>x</sub>	Fibre to the <i>x</i>
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling—public call offices
UAS	Unified access services

*List of Abbreviations*

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UASL	Unified access services licence
UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access



## Chapter 8

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# GERMANY

*Gabriele Wunsch*<sup>1</sup>

### I OVERVIEW

ICT contributes more to wealth creation in Germany than the traditional technologies of automotive and mechanical engineering. With an annual business volume of approximately €228 billion in 2014, the ICT sector is one of the largest economic sectors in Germany. Constantly growing, it already employs more than 900,000 people in Germany.<sup>2</sup>

ICT has become a driving force in Germany's economy, contributing to 4.7 per cent of the national gross value added in 2013.<sup>3</sup> Naturally, the legislator has to adjust the legal framework accordingly.

By focusing on key issues such as convergence, mobility, data protection and internet security, the government has tried to advance the information society through targeted policies to modernise legal and technical frameworks and to promote research and market-oriented development over the past decade. As part of this overall effort, the federal government adopted specific programmes and strategies tailored to the needs of the ICT sector. On 20 August 2014, it concluded the Digital Agenda 2014–2017,

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1 Gabriele Wunsch is an associate at Latham & Watkins LLP. Previous versions of this chapter were co-authored with Latham & Watkins associate Laura Johanna Reinlein and authored by Zahra Rahvar. The author would like to acknowledge the contribution of Miriam Borggreffe and Franziska Strobel, legal trainees at Latham & Watkins LLP, for their assistance in updating this chapter.

2 [www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html](http://www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html); the German ICT industry has a market share in Europe of 18.9 per cent, and thus is Europe's largest ICT market and the fourth-largest worldwide.

3 [www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html](http://www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197728.html); [www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html](http://www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html).

focusing on a strategy for the digital future of Germany,<sup>4</sup> and also planning to ensure nationwide broadband access with transmission rates of at least 50Mbit/s in rural areas until 2018 with the Netalliance Digital Germany initiative.<sup>5</sup> The Digital Agenda further includes themes such as digital security and the Strengthening Industry 4.0 initiative. In addition, data protection and liability within networks are issues in both policy and court decisions.

The question as to whether media convergence as a technological phenomenon will inevitably lead to a convergence in media and telecommunications law is still the subject of much lively debate in the political and academic fields.

## II REGULATION

### i The regulators

Due to the federal policy of considering media as a ‘fourth division’ of power and a tendency to deregulate and decentralise, there is no single media authority in Germany. All television and radio broadcasters are subject to state control. Public service broadcasters are supervised by internal committees: content-related supervision is carried out by the respective broadcasting council. The respective administrative board, which is appointed by the broadcasting council, supervises all management decisions made by the director.

Private broadcasters, in contrast, are subject to external supervision. The competent authority is the respective state media authority of each German state,<sup>6</sup> whose responsibilities – apart from supervision – include granting authorisations and assigning transmission capacities.

The state media authorities are responsible for the allocation of the available transfer capacities.<sup>7</sup> They also have a wide range of powers to supervise broadcasters with, such as warnings, prohibitions, or withdrawals and revocations of licences.<sup>8</sup>

The state media authorities work together in a committee (ALM) in respect of licensing and supervision as well as in the development of private broadcasting in fundamental questions, primarily with a view to the equal treatment of private TV and radio broadcasters. The goals of this cooperation are laid down in the ‘Basic Principles for the Collaboration of the Association of State Media Authorities in the Federal Republic of Germany’ of 17 June 2011. The focus is on promoting programming diversity and

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4 [www.bundesregierung.de/Content/DE/\\_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?\\_\\_blob=publicationFile&v=6](http://www.bundesregierung.de/Content/DE/_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?__blob=publicationFile&v=6).

5 The Netalliance platform for innovation and investment is formed by the government and ICT companies. It commenced work in 2014 under the guidance of Alexander Dobrindt, the German Minister for Transport and Digital Infrastructure ([www.bmvi.de/SharedDocs/DE/Artikel/DG/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html?nn=72886](http://www.bmvi.de/SharedDocs/DE/Artikel/DG/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html?nn=72886)).

6 Several states have joint media authorities, such as Berlin and Brandenburg as well as Hamburg and Schleswig-Holstein.

7 Section 50ff of the Inter-State Broadcasting Treaty (RStV).

8 Section 38(2) of the RStV.

thus freedom of information and opinion in private television and radio. This involves, in addition to controlling media power by means of licensing limitations and licence monitoring, the promotion of media literacy among viewers and listeners.

The state media authorities are also responsible for the compliance of private TV and radio broadcasts with basic programming principles. They supervise the observance of regulations on advertising limitations, the protection of minors and the protection of pluralism. Their tasks are carried out by several committees.

The main regulator in the area of telecommunications is the federal legislator due to his competence regarding the postal system and telecommunications. Important federal laws in the field of telecommunications are the German Telecommunications Act (TKG) and, for telemedia services, the German Telemedia Act (TMG). The national legislator is strongly influenced by directives of the European Union. Furthermore, EU regulations, as well as decisions of the European Court of Justice (CJEU) and the Federal Court of Justice (BGH), have a strong impact on the law in the ICT sector.

The compliance of telecommunications companies with the Telecommunications Act is monitored by the Federal Network Agency (BNetzA). The Agency ensures the liberalisation and deregulation of the telecommunications, postal and energy markets through non-discriminatory access and efficient use-of-system charges. It is responsible, *inter alia*, for securing the efficient and interference-free use of frequencies and protecting public safety interests. Apart from regulation, the BNetzA performs a number of other tasks related to the telecommunications market such as administering frequencies and telephone numbers, detecting radio interference, and offering advice to citizens on new regulations and their implications.

## ii Regulated activities

Private and public television broadcasting in Germany is governed by the Interstate Broadcasting Treaty (RStV), which outlines the side-by-side existence of public and private broadcasting. The provisions of the RStV have been modified 16 times since it came into force in 1987. The 16th amendment to the RStV came into effect on 1 April 2015.<sup>9</sup> Further legal sources, at federal level, are various other interstate treaties, such as the Interstate Treaty on the Protection of Minors in Broadcasting and in Telemedia (JMStV), and at state level, individual state media laws.

All private broadcasters require a licence for the purpose of providing broadcasting services (Section 20(1) RStV). According to Section 20(2) of the RStV, the provider of an electronic information and communications service – if it is categorised as a broadcast – requires a licence as well. If the competent state media authority determines that this is the case, the provider, after being notified of this classification, must at his or her choice either submit a licence application within three months or change the service in a way that it is no longer qualified as a broadcast. If in doubt about the classification of its service, a provider may request a certificate of non-objection stating that the service does not qualify as a broadcast.

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9 See [www.lfk.de/fileadmin/media/recht/2013/16-RStV-April2015.pdf](http://www.lfk.de/fileadmin/media/recht/2013/16-RStV-April2015.pdf).

When providing telecommunication or network services, the operators have to adhere to the German Telecommunications Act (TKG). The law has developed in accordance with European regulations and was implemented in 2004. Since then, further changes have been made (e.g., on data retention). The last amendment was made with the Law of 17 July 2015 on the Security of IT Systems.<sup>10</sup>

German telecommunications law does not generally oblige telecommunications services or network providers to apply for a licence; however, in accordance with the Access Directive (2002/19/EC), it requires certain providers such as public telecommunications network providers or providers of public telecommunications services to notify the BNetzA when they start to provide the services or the network.<sup>11</sup> A notification is not necessary for non-public telecommunications networks or services. It is, however, not unequivocal in each case which services are exempt from a notification. Operators of certain WLAN hotspots are arguably not under a duty to notify.<sup>12</sup>

### iii Ownership and market access restrictions

Generally, German law makes no distinction between Germans and foreign nationals regarding investments or the establishment of companies. However, it provides for certain restrictions on foreign capital and investments. The German Federal Ministry of Economics and Technology (BMWi) may prohibit certain acts that might interfere with German or foreign interests. *Inter alia*, these interests include the fundamental security of Germany or the prevention of the acquisition of a company or parts of a company that are vital to the security of Germany according to Section 4 of the Foreign Trade Law (AWG).<sup>13</sup>

Due to the security-related aspects of telecommunications services, the TKG imposes certain obligations on telecommunications service providers and network operators. Agreements relating to telecommunications services and network access can be negotiated freely (e.g., access, payment terms, currency and billing) with providers and operators, unless one party has significant market power (in which case, price terms and access obligations are regulated by the TKG; a provider with significant market power is not able to choose its customers freely).<sup>14</sup>

The RStV contains special ownership control provisions<sup>15</sup> that are designed to achieve media-plurality objectives. These rules apply in addition to the general merger

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10 [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl115s1324.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl115s1324.pdf).

11 Section 6 of the TKG.

12 [www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen\\_Institutionen/Anbieterpflichten/Meldepflicht/Amtsblattmitteilung\\_Nr149\\_2015.pdf?\\_\\_blob=publicationFile&v=1](http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Anbieterpflichten/Meldepflicht/Amtsblattmitteilung_Nr149_2015.pdf?__blob=publicationFile&v=1); also see Sassenberg/Mantz, MMR 2015, 428ff.

13 The AWG was last modified and thereby fully modernised in June 2013 to increase its comprehensibility.

14 See Sections 21 and 28 of the TKG.

15 Section 25ff of the RStV.

control regime under German and European competition law and are administered by the Commission on Concentration in the Media.

#### iv Transfers of control and assignments

The German merger control provisions are enforced by the Federal Cartel Office (BKartA) in Bonn. The current legislation can be found in Chapter VII of the Act Against Restraints of Competition (GWB), which deals with the control of concentrations affecting the German market. In addition, Section 101ff of the Treaty on the Functioning of the EU and the EC Merger Regulation<sup>16</sup> apply.

The filing of merger notifications in Germany is mandatory if the turnover thresholds according to Section 35(1) of the GWB are met and none of the *de minimis* exemptions<sup>17</sup> applies. The minimum content of information regarding the transaction to be given in the notification is listed in Section 39 of the GWB. If the statutory conditions for prohibition are fulfilled, the BKartA will prohibit the merger. It also has the power to order the divestment or the disposal of certain assets where a merger has already been completed.

Mergers that are subject to merger control may not be completed before either the BKartA has cleared the transaction or the relevant waiting periods of one month (first phase) or four months (first and second phases together) after submission of a complete notification have expired without the BKartA having prohibited the transaction.

There are no legal deadlines for a notification of a concentration, but notifiable concentrations must not be completed before clearance. Therefore, it is advisable to submit a notification well before the envisaged completion date. It is possible to file a pre-merger notification even prior to the signing of the transactional documents. Furthermore, parties should not forget to submit the mandatory post-completion notice to the BKartA, which needs to be filed without 'undue delay' following completion of the transaction.<sup>18</sup> In principle, all parties involved in a merger are responsible for filing. In the case of an acquisition of shares or assets, the vendor must make a notification as well.

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16 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

17 Two *de minimis* exemptions apply under the following conditions:

- a one party to the merger achieved less than €10 million turnover during the preceding fiscal year (in the case of the target including the seller and all its affiliates, provided that the seller controls the target and, in the case of the acquirer, including all its affiliates) (Section 35, Paragraph 2); or
- b the relevant market (which must have been in existence for at least five years) had a total annual value of less than €15 million in the last calendar year (*de minimis* market clause, Section 36, Paragraph 1).

18 See *Getting the Deal Through – Merger Control 2014*, <http://gettingthedealthrough.com/books/20/jurisdictions/11/germany>.

Submission of an incorrect or incomplete filing, failure to submit a post-merger completion notice, or cases of incomplete, incorrect or late notices constitute administrative offences and can lead to a fine of up to €100,000.

### III TELECOMMUNICATIONS AND INTERNET ACCESS

#### i Internet and internet protocol regulation

All IP-based services are regulated under the TMG, adopted on 18 January 2007 and last amended on 17 July 2015. Commercial rules for telemedia are covered in the TMG, while aspects relating to journalistic content are regulated in a specific section of the RStV<sup>19</sup> and the JMStV. Telemedia services are permission-free and generally do not need to be registered.

Telecommunications services and telemedia services are mutually exclusive; therefore, telecommunications are excluded from the scope of the TMG. In practice, the distinction is often difficult to make. Moreover, the regulatory structure of telemedia services oscillates somewhere between the unregulated press and the framed supervision the television and radio broadcasters are under. The state media authorities are also regulators of telemedia services.

#### ii Universal service

Germany has good broadband penetration that compares well against international levels. Based on the currently accepted broadband definition of at least 1Mbit/s, penetration amounts to approximately 99.9 per cent of German households. About 66 per cent of German households currently have broadband access with transmission rates of at least 50Mbit/s. While the development of LTE (3.9G, often referred to as 4G) only began in 2010, 92.1 per cent of German households already had LTE access in 2014.<sup>20</sup> In November 2014, the first mobile provider supplied LTE Advanced (4G, up to 300 Mbit/s) in a few areas, followed by another provider in the second quarter of 2015.<sup>21</sup>

The federal government intends to give a further boost to the development of the broadband network by, for example, capitalising on synergies in the construction of infrastructure, using the ‘digital dividend’<sup>22</sup> and formulating regulations that foster investments. Various initiatives exist at the federal, state and local level: especially worth mentioning are the Digital Agenda 2014–2017, the National IT Summit,<sup>23</sup> the German

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19 Section 54ff of the RStV.

20 TÜV Rheinland, Bericht zum Breitbandatlas Ende 2014 im Auftrag des BMVI, [www.zukunft-breitband.de/SharedDocs/DE/Anlage/Digitales/bericht-zum-breitbandatlas-ende-2014-ergebnisse.pdf?blob=publicationFile](http://www.zukunft-breitband.de/SharedDocs/DE/Anlage/Digitales/bericht-zum-breitbandatlas-ende-2014-ergebnisse.pdf?blob=publicationFile), p. 4.

21 [www.lte-anbieter.info/lte-advanced/verfuegbarkeit.php](http://www.lte-anbieter.info/lte-advanced/verfuegbarkeit.php).

22 That is, digitisation ending up in freeing up spectrum and usually resulting in its reallocation.

23 The next National IT Summit will take place in Berlin in November 2015: see [www.bmwi.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html](http://www.bmwi.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html). In 2014, it was announced that the IT Summit will be realigned to discuss the subjects of the Digital Agenda:

Broadband Initiative<sup>24</sup> and the Netalliance Digital Germany initiative, whose objective is to ensure nationwide broadband access with transmission rates of at least 50Mbit/s until 2018.<sup>25</sup>

Moreover, the federal government encourages projects to pursue industry solutions. For example, small and medium-sized telecommunications companies can borrow funds on privileged terms and with adequate risk pricing through the corporate financing programme of Germany's state-owned development bank.<sup>26</sup>

In any event, the existing federal and state loan guarantee scheme is generally available to companies in the telecommunications sector to prevent economically desirable broadband projects from failing due to a lack of suitable finance. With these programmes, the federal government and federal states assume up to 90 per cent of the risk of default for project financing.<sup>27</sup>

'White areas' (i.e., those rural areas in Germany that still lack high-speed internet connections) are shrinking rapidly, partly due to ongoing investment by the network operators. The reduction has also largely been achieved thanks to the hosting of action programmes offered by the federal states, local authority broadband initiatives in those areas, and the nationwide activities of associations such as the German Association of Internet Enterprises ([www.eco.de](http://www.eco.de)), the Association of the Providers of Telecommunications and Value-Added Services ([www.vatm.de](http://www.vatm.de)) and the Association of Towns and Municipalities ([www.dstgb.de](http://www.dstgb.de)).

Furthermore, the TKG amendment of 3 May 2012 contained special provisions to foster the extension of broadband networks.<sup>28</sup> The use of mobile networks is boosted by digitisation in other areas such as TV and radio. As regards TV, digital satellite reception and cable continue to expand, while analogue transmission is no longer possible. The digitisation of radio is planned, and the digitisation of fixed telephone services is currently being realised.

The government's policy is to actively encourage people to use the internet and to help them acquire skills in the areas of new media by, *inter alia*, providing governmental services such as e-government and e-justice electronically, and implementing the De-Mail

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[www.bmwi.de/BMWi/Redaktion/PDF/1/infopapier-neuausrichtung-it-gipfel-digitale-agenda,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf](http://www.bmwi.de/BMWi/Redaktion/PDF/1/infopapier-neuausrichtung-it-gipfel-digitale-agenda,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf)

24 [www.breitbandinitiative.de](http://www.breitbandinitiative.de).

25 The Netalliance Digital Germany initiative started on 7 March 2014: [www.bmvi.de/DE/DigitalesUndRaumentwicklung/DigitaleInfrastrukturen/Netzallianz/netzallianz\\_node.html](http://www.bmvi.de/DE/DigitalesUndRaumentwicklung/DigitaleInfrastrukturen/Netzallianz/netzallianz_node.html); [www.bmvi.de/SharedDocs/DE/Artikel/DG/breitbandstrategie.html](http://www.bmvi.de/SharedDocs/DE/Artikel/DG/breitbandstrategie.html). The Federal Ministry for Transport and Digital Infrastructure will further develop its broadband portal, [www.zukunft-breitband.de](http://www.zukunft-breitband.de). Apart from the annual Broadband Atlas and best-practice examples, this portal also includes checklists for local authorities and information on financial support.

26 [www.kfw.de/inlandsfoerderung/Unternehmen/Erweitern-Festigen/Breitbandnetze-finanzieren](http://www.kfw.de/inlandsfoerderung/Unternehmen/Erweitern-Festigen/Breitbandnetze-finanzieren).

27 [www.zukunft-breitband.de/SharedDocs/DE/Anlage/ZukunftBreitband/moeglichkeiten-der-breitbandfoerderung.pdf?blob=publicationFile](http://www.zukunft-breitband.de/SharedDocs/DE/Anlage/ZukunftBreitband/moeglichkeiten-der-breitbandfoerderung.pdf?blob=publicationFile).

28 Section 2(3) No. 4 of the TKG.

Act in 2011.<sup>29</sup> Developments are also made with respect to transport and health-care telematics and the digitisation of cultural assets.

### iii Restrictions on the provision of service

The BNetzA is responsible for ensuring broadband network owners comply with the TKG.<sup>30</sup> Whereas, until recently, the subject of net neutrality appeared to be of no major concern to the German and the European legislators – the German legislator in particular trusted that existing competition would ensure neutral data transmission on the internet and other new media – the subject has now gained considerable attention. The amendment of 3 May 2012 of the TKG introduced the concept of net neutrality.<sup>31</sup> The federal government is authorised to draft a regulation that sets out the requirements for non-discriminatory data transmissions and non-discriminatory access to contents and applications in order to preclude an arbitrary deterioration of services and an unjustified deceleration of data traffic.<sup>32</sup> Two draft regulations proposed by the BMWi have not yet been passed. On a European level, the European Commission published its legislative plans for net neutrality on 12 September 2013 (Connected Continent legislative package).<sup>33</sup> Under the Connected Continent legislative package, companies would, however, be allowed to differentiate their offers (e.g., by speed) and compete on enhanced quality of service. The proposal states that ‘there is nothing unusual about this – since postal services (express mail) and airlines (economy/business class) have done this likewise for decades’. While the European Parliament has made efforts to establish strict rules guaranteeing net neutrality, the European Council’s position tends to be more open to exempt ‘special services’ (i.e., services that require big data volumes, for example, in the fields of automatic driving and internet TV) from net neutrality. In a trilogue between the European Commission, Council and Parliament, the parties found a compromise on 30 June 2015 that, however, still must be approved by Parliament and Council before it can be transposed into a directive.<sup>34</sup> The BMWi and the European Commission both see the need for rules regarding net neutrality.<sup>35</sup> The Commission further states that special services claiming big data volume may be provided as long as they do not harm open internet access. Zero rating (i.e., services that do not count towards an agreed data

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29 The Parliament passed an ‘e-government statute’, which came into effect on 1 August 2013: see [www.bmi.bund.de/DE/Themen/IT-Netzpolitik/E-Government/E-Government-Gesetz/e-government-gesetz\\_node.html](http://www.bmi.bund.de/DE/Themen/IT-Netzpolitik/E-Government/E-Government-Gesetz/e-government-gesetz_node.html). This statute facilitates electronic communication with administrative authorities. Furthermore, the German legislator adopted an ‘e-justice statute’ that will enable electronic communication with all courts in Germany from 2020 onwards. As of 2022, it will be mandatory for lawyers to communicate with the court by certain electronic means: see [dipbt.bundestag.de/dip21.web/bt](http://dipbt.bundestag.de/dip21.web/bt).

30 See Section 126ff of the TKG.

31 Sections 2(2) and 41a of the TKG.

32 Section 41a(1) of the TKG.

33 <https://ec.europa.eu/digital-agenda/en/connected-continent-legislative-package>.

34 [data.consilium.europa.eu/doc/document/ST-10409-2015-REV-1/en/pdf](http://data.consilium.europa.eu/doc/document/ST-10409-2015-REV-1/en/pdf).

35 [www.bmw.de/DE/Presse/pressemitteilungen,did=717942.html](http://www.bmw.de/DE/Presse/pressemitteilungen,did=717942.html) and [www.europa.eu/rapid/press-release\\_MEMO-15-5275\\_de.htm](http://www.europa.eu/rapid/press-release_MEMO-15-5275_de.htm).



volume) is not mentioned explicitly, but will be allowed and monitored by national regulatory authorities.

Following the EU Directive concerning Unfair Business-to-Consumer Commercial Practices,<sup>36</sup> the legislator enacted extensive provisions regarding unsolicited calls, emails and text messages in the Act against Unfair Competition (UWG). Making first contact with consumers by such measures requires the explicit approval of the consumer. Fines can be as high as €300,000.<sup>37</sup>

#### iv Security

On 12 June 2015, the Parliament passed the IT Security Act (BSIG),<sup>38</sup> which came into force on 25 July 2015. It is the first legal act to govern cybersecurity in Germany.<sup>39</sup> Parts of the Act strengthen the position of the Federal Office for Information Security (BSI) as described below, while other sections impose obligations on private entities maintaining critical infrastructure that are relevant for common welfare.

The BSI is a superior federal authority overseen by the Federal Ministry of the Interior with wide-ranging tasks of threat prevention in IT systems. According to Section 3 of the Act, its tasks include developing criteria, procedures and tools to test and evaluate the security of information technology systems and components. The BSI investigates security risks associated with the use of IT and develops preventive security measures. Therefore, the BSI is the central reporting office for disruptions and attacks on IT systems in private enterprises, using the information submitted by private entities to evaluate them and summarising them in reports that are then provided to the enterprises. The work further includes IT security testing and assessment of IT systems, including their development, in cooperation with the industry. The BSI now also functions as the central authority on IT issues in relation to foreign institutions.

The BSIG especially imposes obligations on private enterprises to safeguard IT security, such as the duty to report disturbances in IT systems to the BSI. Private enterprises that are subject to these obligations are, in particular, operators of critical infrastructures in the energy, IT, telecommunication, transport, health, water, nutrition, finance and securities sectors. Within two years of the BSIG coming into force, they must upgrade their IT systems to make them state-of-the-art, and from then on must prove their compliance with the above-mentioned obligations once every two years through security audits or certificates.<sup>40</sup> In the future, they will also have to establish a contact centre to exchange information with the BSI.<sup>41</sup> Operators of telecommunication services now have the duty to inform their customers of any IT security risk, and to provide information on the solution for these problems.<sup>42</sup> Telemedia services operators must now

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36 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market.

37 Section 20(1) and (2) UWG.

38 Law on the Federal Office for Information Security.

39 Schweda, ZD-Aktuell 2015, 04737 and Schütze, ZD-Aktuell 2015, 04755.

40 Section 8a of the BSIG.

41 Section 8b of the BSIG.

42 Section 109a(4) of the TKG.

ensure that their users are protected from attacks on IT security through state-of-the-art technical and organisational means.<sup>43</sup>

On the EU level, there is a proposal for a directive concerning measures to ensure a high common level of network and information security across the EU that is currently in the final stages of negotiations.<sup>44</sup> Moreover, the EU adopted the eIDAS Regulation in 2014.<sup>45</sup> It aims to consolidate and expand the already existing directive on online signatures, and supplements the uniform legal framework for electronic security services. The provisions will be valid as of 1 July 2016.

### *Privacy and consumer protection*

In order to better protect the privacy of individuals against intrusions of modern data processing, in a 1983 decision, the Federal Constitutional Court (BVerfG) developed the notion of an individual's right to decide how his or her data are to be used.<sup>46</sup> This right means that it is up to each individual to determine what and how much personal information he or she would like to reveal. This right to privacy is an element of the general right to free development of one's personality, which is protected under Article 2(1) in conjunction with Article 1(1) of the German Constitution. The collection, processing and use of personal data are governed by the German Federal Data Protection Act (BDSG) and state laws, supplemented by the TMG. The BDSG applies to federal public authorities and to non-public entities, such as corporations.

Every private organisation is generally required to ask a person's consent if it would like to collect, store or process personal data, unless such collection, storage or processing is permitted under a specific section of the BDSG or any other law. Such exception applies, for example, if the data subject is already aware of such collection or storage from other sources, if the data originate from publicly accessible sources, or if the data are necessary for the performance of a contract with the relevant person. If a body responsible for processing data harms a data subject by unlawfully or incorrectly collecting, processing or using such person's data, and in doing so failed to act with due care, that body is liable for damages.

Individuals may request information from public and private organisations about stored personal data and the reason for storing these data. They may also claim the deletion or blocking of data if unlawfully stored or no longer needed.

Data protection is supervised by BFDI, the Federal Data Protection Officer, whose position was strengthened by a Law of 25 February 2015 amending the BDSG.<sup>47</sup>

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43 Section 13(7) of the TMG.

44 [www.ec.europa.eu/digital-agenda/en/news/network-and-information-security-nis-directive](http://www.ec.europa.eu/digital-agenda/en/news/network-and-information-security-nis-directive).

45 [www.eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014R0910&from=DE](http://www.eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014R0910&from=DE).

46 Judgment of the BVerfG of 15 December 1983, 1 BvR 209/83 et al, BVerfG collection, 65,1(41).

47 [www.bfdi.bund.de/SharedDocs/Publikationen/GesetzeVerordnungen/Unabhaengigkeitgesetz.pdf?\\_\\_blob=publicationFile&cv=1](http://www.bfdi.bund.de/SharedDocs/Publikationen/GesetzeVerordnungen/Unabhaengigkeitgesetz.pdf?__blob=publicationFile&cv=1). The law will come into effect on 1 January 2016.

The European Commission plans to harmonise the rules on data protection in the EU.

A first draft of an EU Data Protection Regulation was published on 25 January 2012.<sup>48</sup> The European Council, Commission and Parliament are currently negotiating a final draft of the Regulation and aim to finalise the project by the end of 2015.<sup>49</sup> The project is supported by the European Network and Information Security Agency.

### *Data retention for the purpose of inner security*

Since the BVerfG rendered data retention as intended under the TKG of 2007 to be unlawful,<sup>50</sup> the question of whether and to what extent data retention is in line with national and European law has been discussed widely. The CJEU decided similarly that European Directive 2006/24/EC setting the framework for data retention is invalid.<sup>51</sup> After two drafts of a data retention act in 2011 and 2013 were not adopted, the German Federal Ministry of Justice presented a new draft on 27 May 2015 containing less extensive possibilities to save data for criminal investigations.<sup>52</sup> Contrary to media reports, the European Commission announced that it will not take any actions against Germany enacting such law.<sup>53</sup>

In this context, the BGH nevertheless held that service providers in Germany may store information on IP addresses used by their customers for a period of seven days in order to enable security measures against cybercrime.<sup>54</sup>

### *Protection of children*

Youth protection provisions applicable to the media can primarily be found in the Law for the Protection of the Youth (JuSchG) and the JMStV, a reform of which is planned.

The Federal Department for Media Harmful to Young Persons (BPjM) is the responsible authority for protecting children and adolescents in Germany from media that might contain harmful or dangerous contents under the JuSchG. The types of media monitored include, *inter alia*, videos, books, computer games and websites. The BPjM can act only at the request of other administrative institutions, and not on its own initiative. Once an official request has been filed, the BPjM is obliged to process the complaint. Possible measures in the event of a violation are a prohibition on publication, blocking the provider and fines up to €500,000.

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48 KOM (2012) 11.

49 [www.consilium.europa.eu/en/press/press-releases/2015/06/15-jha-data-protection](http://www.consilium.europa.eu/en/press/press-releases/2015/06/15-jha-data-protection).

50 Judgment of the BVerfG of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08, BeckRS 2010, 46771.

51 Judgment of the CJEU of 8 April 2014, C-293/12 and C/594/12, BeckEuRS 2014, 393023.

52 [www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE\\_Hoechstspeicherfrist.pdf;jsessionid=0DF4E719C52053037806B63820C853C0.1\\_cid297?\\_\\_blob=publicationFile](http://www.bmjv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RegE_Hoechstspeicherfrist.pdf;jsessionid=0DF4E719C52053037806B63820C853C0.1_cid297?__blob=publicationFile).

53 Becklink 2001085 of 16 September 2015.

54 Judgment of the BGH of 3 July 2014, III ZR 391/13, BeckRS 2014, 14643.

The JMStV forms the legal basis for assessing content distributed in broadcast or media services. The compliance of broadcast and media services with the JMStV is controlled by the Commission for the Protection of Minors in the Media (KJM). The JMStV distinguishes between illegal content and content that impairs the development of minors: illegal content must not be distributed via broadcasting or media services. Content that is rated as impairing the development of minors (e.g., a severe depiction of violence) is subject to access restrictions. In the event of a breach of the provisions of the JMStV, the KJM decides on the sanctions to be imposed against the respective media content provider. The measures depend on the severity of the breach, and can range from a complaint against the content provider to fines; the issue may even be handed over to the State Prosecutor.

As of 27 January 2015, new offences to prevent child pornography were implemented under the German Criminal Code (StGB). ‘Cyber-grooming’ (i.e., exerting influence over children via information or telecommunication technologies to prepare them for acts of sexual abuse) is now a criminal offence (Section 176 (4) StGB).

## IV SPECTRUM POLICY

### i Development

Originally, frequencies in Germany were used – with a few exceptions – by Germany’s federal mail service (Deutsche Bundespost). Since 1996, however, the markets for network and telephony have been fully liberalised.

Today’s development goes hand in hand with the population’s increasing demand for mobile communication services. Not least because of the new technical possibilities opened up by, *inter alia*, UMTS and LTE, demand for more bandwidth will continue to rise in line with increasing mobility. Growing demand and technological innovation both call for the availability of an adequate frequency spectrum. The development does not end here; the next generation of mobile network – 5G – is already being developed. In addition to the University of Technology Dresden working on a 5G project,<sup>55</sup> the government is also focusing on 5G as being part of the Digital Agenda, and is endeavouring to bring Industry 4.0 and the ‘Internet of Things’ (i.e., networks of physical objects with embedded computer technologies) to the next level.

Because of its type of use and the current state of technology, the frequency spectrum available is still considered a scarce resource. The BNetzA is the regulatory authority for the use of frequencies, the allocation of which requires forward-looking, non-discriminatory and proactive frequency regulation. ‘Digital dividend’ is the term frequently used whenever digitisation results in the freeing up of spectrum.

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55 [www.5glab.de/wp-content/uploads/Press\\_Release\\_TUD\\_Dresden5GLab\\_01\\_2014\\_opening.pdf](http://www.5glab.de/wp-content/uploads/Press_Release_TUD_Dresden5GLab_01_2014_opening.pdf).

## ii Flexible spectrum use

The use of a spectrum requires its prior allocation.<sup>56</sup> The TKG states that the allocation of spectra shall be regulated by a Spectrum Regulation, and requires the Federal Council's consent.<sup>57</sup> Based on the allocation of frequencies and the specifications set out in the Spectrum Regulation under Section 53 of the TKG, the BNetzA shall divide the spectrum ranges into spectrum uses and related terms of use.<sup>58</sup> Spectra for wireless access to telecommunication networks must be assigned in a technologically and service-neutral manner.<sup>59</sup>

The TKG provides the framework for a flexible use of allocated spectra. Owners of an allocated frequency have the possibility to trade their frequency, and to let third parties use their frequency, for example, by way of a lease, co-use or in the form of a joint use via 'spectrum pooling'. It is necessary, however, that the BNetzA releases such forms of use for flexible use and specifies the corresponding conditions.<sup>60</sup>

## iii Broadband expansion through spectrum auctions

A few rural areas in Germany still lack high-speed internet connections. The federal government plans to invest €2.7 billion into expanding broadband networks, of which €1.33 billion was earned through the last auction of mobile spectra.<sup>61</sup>

If the BNetzA finds that the number of available spectra is not sufficient for their allocation, it can order that the allocation of frequencies be preceded by a procurement procedure.<sup>62</sup> Often, the procurement is held in the form of a spectrum auction, which is organised by the BNetzA.<sup>63</sup>

On 19 June 2015, the latest auction of mobile broadband spectrum ended following 181 bidding rounds within 16 days. After the merger of Telefónica and E-Plus in the summer of 2014, only three operators (Telefónica, Telekom and Vodafone) were allowed to bid: no new entrants were admitted. The auction of frequencies in the fields of 700MHz, 900MHz, 1500MHz and 1800MHz aggregated a total amount of about €5 billion. The BNetzA imposed rather strict requirements on the auction. For example, the right to use frequency includes, *inter alia*, an obligation to provide internet access to 98 per cent of the population.<sup>64</sup>

The merger of Telefónica and E-Plus may have an impact on the further development of market shares in this field, as the Commission imposed certain restrictions

56 Section 55(1) of the TKG.

57 Section 53(1) of the TKG.

58 Section 54(1) of the TKG.

59 Section 54(2) of the TKG.

60 Section 62(1) and (2) of the TKG; also see Scherer/Heinickel, NVwZ 2012, 585 (591f).

61 [www.faz.net/agenturmeldungen/unternehmensnachrichten/roundup-bund-zahlt-die-haelfte-der-kosten-fuer-breitbandausbau-13771354.html](http://www.faz.net/agenturmeldungen/unternehmensnachrichten/roundup-bund-zahlt-die-haelfte-der-kosten-fuer-breitbandausbau-13771354.html).

62 Section 55(10) of the TKG.

63 Section 61 of the TKG.

64 [www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen\\_Institutionen/Frequenzen/Projekt2016\\_Frequenzauktion/projekt2016-node.html](http://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Frequenzen/Projekt2016_Frequenzauktion/projekt2016-node.html).

on the new company, such as releasing frequencies at 900MHz and 1800MHz until the end of 2015.<sup>65</sup>

## V THE YEAR IN REVIEW<sup>66</sup>

Regarding the ‘right to be forgotten’ (i.e., the right of individuals to have their data deleted from internet websites and search machines where they are no longer needed for legitimate purposes or where they violate personality rights), the supervision of internet companies such as Google or Facebook and the protection of personal data in online communication are subjects of lively debate among the German public and politicians. Since the CJEU judgment of 2014 in *Google v. Spain*,<sup>67</sup> individuals are entitled to apply for a deletion of personal search entries against Google if their individual interest in hiding information exceeds the public information interest. However, Google still refuses to delete search entries globally, and confines the deletion to its European websites such as google.de. Therefore, links that were requested to be deleted will remain accessible on google.com. This approach is subject to a proceeding by CNIL, the French Data Protection Authority.<sup>68</sup> Moreover, the BGH decided that – after being notified of a violation – Google is under an obligation to prevent violations of personality rights caused by the search machine’s auto-complete function.<sup>69</sup>

In the field of host provider liability, the BGH has confirmed its position that a host provider is under no general duty to proactively prevent violations of the intellectual property rights or personality rights of its users, and can only be forced to desist from publishing third-party content after it has been notified of the violation.<sup>70</sup> In addition, the German courts do not grant damages unless the violation has been provoked or appropriated by the host. The Grand Chamber of the European Court of Human Rights, however, upheld its 2014 decision in *Delfi v. Estonia* that a violation of basic personality rights leads to a liability of the forum operator for damages if it did not arrange for sufficient spot checks of the available content.<sup>71</sup>

In a decision involving the file-hosting service Rapidshare,<sup>72</sup> the BGH found that a file-hosting service is obliged to conduct a comprehensive periodic monitoring of collections of links that point to its service if the service encourages copyright infringements to a considerable extent through its business model. The liability of such file and share-hosting services could be further enhanced through a new draft bill of

65 [www.sueddeutsche.de/wirtschaft/mobilfunkmarkt-eu-erlaubt-o-die-uebernahme-von-e-plus-unter-auffagen-1.2027373](http://www.sueddeutsche.de/wirtschaft/mobilfunkmarkt-eu-erlaubt-o-die-uebernahme-von-e-plus-unter-auffagen-1.2027373).

66 For an overview of the developments in internet and multimedia law in 2014, see Hoeren/Thiesen, MMR-Beilage 2015, 1ff.

67 Judgment of the CJEU of 13 May 2014, C-131/12, BeckEuRS 2014, 395156.

68 Becklink 2000746 of 3 August 2015 and becklink 2000735 of 31 July 2015.

69 Judgment of the BGH of 14 May 2013, VI ZR 269/12, BeckRS 2013, 08626.

70 Judgment of the BGH of 5 February 2015, I ZR 240/12, GRUR 2015, 485ff.

71 Judgment of the CJEU of 16 June 2015, BeckRS 2015, 11533.

72 Judgment of the BGH of 15 August 2013, I ZR 80/12, GRUR 2013, 1030ff.

the federal government, which – since 15 June 2015 – has been involved in the EU notification procedure and intends to change some relevant sections of the TMG.<sup>73</sup> The draft contains a special provision concerning internet services that are prone to infringements of intellectual property rights, according to which those services are exempted from the existing liability privileges, and providers will therefore be liable even without actual knowledge that rights are infringed on their platform.

As far as streaming of content by private users is concerned, the CJEU held in its decision in the case of *Newspaper Licensing Agency v. Public Relations Consultants Association* that the caching of copyright content does not violate intellectual property rights (at least if its source is legal).<sup>74</sup> Thus, streaming of copyright-protected content – which had been a grey area from a legal point of view in Germany – can be assessed as lawful following the CJEU judgment.

Another widely discussed topic is the liability of access providers, particularly providers of WLAN hotspots. Under the existing laws, private and commercial access providers can be liable for infringements through their WLAN if they do not take measures to control their users in cases where there are clear indications of infringements.<sup>75</sup>

The new (revised) draft of the federal government of the TMG intends to strengthen the position of access providers so that they would not be liable if they provide ‘reasonable security measures’ and request that their users agree that they will not use the WLAN access to commit violations. This draft provision of the TMG aims to enhance the dissemination of public WLAN hotspots, which are still not very common in Germany.<sup>76</sup> However, the draft has been widely criticised by consumer associations, as certain provisions could possibly conflict with EU directives and fundamental freedoms.<sup>77</sup> Moreover, the liability of access providers is the subject of a highly anticipated proceeding submitted to the CJEU by the District Court of Munich in September 2014.<sup>78</sup> Moreover, in November 2015, the BGH will decide whether Deutsche Telekom as an internet service provider is obliged to block websites with illegal content.<sup>79</sup>

Over the past few years, IT contract law has been influenced in particular by the contractual framework conditions for cloud computing, especially regarding questions of data protection and copyright law. Although trust in cloud computing services has been shaken by data theft and hacking attacks, experts still predict high annual growth rates for this market. The federal government has recognised this potential and,

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73 [www.bmwi.de/BMWi/Redaktion/PDF/S-T/telemedienaenderungsgesetz-aenderung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf](http://www.bmwi.de/BMWi/Redaktion/PDF/S-T/telemedienaenderungsgesetz-aenderung,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf); MMR-Aktuell 2015, 369968.

74 Judgment of the CJEU of 5 June 2014, C-360/13, MMR 2014, 544f.

75 Judgment of the BGH of 8 January 2014 *Bearshare*, I ZR 169/12, NJW 2014, 2360ff.

76 [www.eco.de/wp-content/blogs.dir/eco-microresearch\\_verbreitung-und-nutzung-von-wlan.pdf](http://www.eco.de/wp-content/blogs.dir/eco-microresearch_verbreitung-und-nutzung-von-wlan.pdf).

77 MMR-Aktuell 2015, 370686.

78 Order of District Court of Munich of 18 September 2014, 7 O 14719/12, MMR 2014, 772ff.

79 [www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/IZR3142.html;jsessionid=C61A306DCDC54B0B17CB405390AD94EA.2\\_cid319?nn=6128288](http://www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/IZR3142.html;jsessionid=C61A306DCDC54B0B17CB405390AD94EA.2_cid319?nn=6128288).

after launching the ‘trusted clouds’ technology programme in cooperation with the private sector in 2011, has presented a study on standardisation in the fields of cloud computing.<sup>80</sup> The trusted clouds programme will conclude in 2015. Recently, the federal government has also outlined a pilot project on data privacy certification concerning contract data processing in clouds.<sup>81</sup> As in previous years, the contractual framework for IT outsourcing has also been an important subject.<sup>82</sup>

As previously mentioned in Sections I, III.ii and IV.i, *supra*, on 20 August 2014, the federal government adopted the Digital Agenda 2014–2017. The programme is conducted by three ministries, and intends to formulate guidelines for Germany’s digital policy, and to promote economic, legal, scientific and social aspects to ensure the future sustainability of Germany’s digital policy.<sup>83</sup> The National IT Summit has been realigned to pursue the issues of the Digital Agenda.<sup>84</sup> Eight platforms and two forums, each staffed with officials from the political and economic sectors, have been established to work on Digital Agenda topics, such as digital networks and mobility, digital administration, public IT and Industry 4.0 (which is especially strongly promoted by the government as a future project). To better coordinate Industry 4.0 developments, a special platform, called Platform Industry 4.0, was created.<sup>85</sup>

The acquisition of HERE, the Nokia map service, by the automobile manufacturers BMW, Audi and Mercedes in the summer of 2015 with the aim of using the HERE data for car assistance systems, show that the Internet of Things and machine-to-machine communications (i.e., technologies that allow systems to communicate with other devices) play an ever-increasing role in the German industry.<sup>86</sup>

A further boost for the economy is the availability of data on subjects such as geography, climate, environment, registries or law. Therefore, on 17 July 2015 a law changing the Federal Act on the Re-Use of Public Sector Information entered into force. This Act, which implements an EU directive, will oblige public authorities to grant use of their data as ‘open data’ to the public.<sup>87</sup>

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80 [www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Technologien/cloud-computing.html](http://www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Technologien/cloud-computing.html).

81 ZD-Aktuell 2015, 04629.

82 For an overview of the ongoing discussion about IT outsourcing, see Mann, MMR 2012, 499.

83 [www.bundesregierung.de/Content/DE/\\_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?\\_\\_blob=publicationFile&v=6](http://www.bundesregierung.de/Content/DE/_Anlagen/2014/08/2014-08-20-digitale-agenda.pdf?__blob=publicationFile&v=6).

84 [www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html](http://www.bmw.de/DE/Themen/Digitale-Welt/Digitale-Agenda/nationaler-it-gipfel.html).

85 [www.plattform-i40.de/hintergrund/visionen](http://www.plattform-i40.de/hintergrund/visionen).

86 [www.audi-mediacyber.com/de/pressemitteilungen/audi-ag-bmw-group-und-daimler-ag-einigen-sich-mit-nokia-corporation-ueber-gemeinsamen-kauf-des-digitalen-kartengeschaefts-here-4600](http://www.audi-mediacyber.com/de/pressemitteilungen/audi-ag-bmw-group-und-daimler-ag-einigen-sich-mit-nokia-corporation-ueber-gemeinsamen-kauf-des-digitalen-kartengeschaefts-here-4600).

87 [www.bmw.de/BMWi/Redaktion/PDF/II/informationsweiterverwendungsgesetz-iwg-entwurf,property=pdf,bereich=bmw2012,sprache=de,rwb=true.pdf](http://www.bmw.de/BMWi/Redaktion/PDF/II/informationsweiterverwendungsgesetz-iwg-entwurf,property=pdf,bereich=bmw2012,sprache=de,rwb=true.pdf).



On 12 August 2015, the federal government provided a legislative draft outlining changes to the TKG that will allow consumers to retain their routers when changing internet service providers.<sup>88</sup>

Parts of the German Civil Code (BGB) were revised in 2014 by the law implementing the EU Consumer Rights Directive<sup>89</sup> that especially impacts operators of online shops. The comprehensive changes include, *inter alia*, an interdiction to preset checkmarks for additional fee-based services, and a prohibition on claiming lump-sum fees that do not actually arise from the use of credit cards. Further, the charging of additional costs for service hotlines is prohibited. The former possibility of revoking a contract several years after its conclusion on the ground that the buyer had not been correctly instructed on the right of withdrawal – which, broadly speaking, is the right to revoke an online contract within 14 days after conclusion or delivery of the purchased good without cause – is not provided for in German law anymore. In contrast to the previous legal situation, the seller no longer has to bear the costs for the return of the purchased goods in cases of withdrawal; rather, these costs can be imposed on the consumer. In addition to several other modifications regarding the duty to instruct the consumer, these obligations have been facilitated regarding mobile commerce. In 2012, the ‘button law’ was implemented in the BGB to protect consumers from cost traps in electronic commerce. The consumer must be clearly informed by a separate button stating ‘fee-based order’ and confirm that he or she would like to place the order (Section 312j(3) BGB).

In a lawsuit against the state, the BGH issued an order that the highly disputed question of whether dynamic IP addresses can be qualified as ‘personal data’ within the meaning of the applicable data protection laws be referred to the CJEU.<sup>90</sup>

## VI CONCLUSIONS AND OUTLOOK

The ICT sector in Germany is highly important and fast-growing, entailing a fast-paced legal and policy environment.

Convergence presents an abundance of challenges for policymakers, industry and society. Cooperation on a European and global level is vital for most German ICT policy issues, including telecommunication and frequency policies, ICT research, anti-spam measures as well as consumer, copyright and youth protection in the context of new media.

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88 [www.bmwi.de/DE/Themen/Digitale-Welt/Netzpolitik/freie-routerwahl.html](http://www.bmwi.de/DE/Themen/Digitale-Welt/Netzpolitik/freie-routerwahl.html).

89 Tonner, VuR 2013, 443ff.

90 Order of the District Court of Munich of 28 October 2014, VI ZR 135/13, MMR 2015, 131ff.

## Appendix 1

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Mr Colahan is based in Latham & Watkins' London office and divides his time with the Brussels office. Prior to joining Latham & Watkins, Mr Colahan was the international antitrust counsel, based in London, for The Coca-Cola Company, where his responsibilities included advising all operating groups on strategic planning and implementation of a wide variety of international joint ventures and acquisitions as well as the conduct of international antitrust litigation and investigations. Mr Colahan has also served as a legal adviser on European law to the European secretariat of the UK Cabinet Office and has represented the UK in numerous cases.

He represents clients before the European Commission, national authorities in Europe and internationally, as well as conducting litigation in the European courts and numerous national courts. He has advised on a wide variety of international antitrust matters, including structuring and implementation of international mergers, acquisitions and joint ventures, cartel enforcement, single firm conduct and compliance counseling. Mr Colahan has worked in a broad range of sectors including fast-moving consumer goods, alcoholic and non-alcoholic beverages, retail, media and publishing, pharmaceuticals, aviation, manufacturing, agricultural, defence, bulk chemicals, maritime, energy, software, supply of professional services, telecommunications and finance.

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Mr Janka has served as a United States delegate to an ITU World Radio-communication Conference in Geneva, and as a law clerk to the Honorable Cynthia Holcomb Hall, United States Court of Appeals for the Ninth Circuit. Mr Janka holds a JD degree from the University of California at Los Angeles School of Law, where he graduated as a member of the Order of the Coif, and an AB degree from Duke University, where he graduated *magna cum laude*.

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Mr Lipsky is a partner in the Washington, DC office of Latham & Watkins. He is internationally recognised for his work on both US and non-US antitrust and competition law and policy, and has handled antitrust matters throughout the world. He served as Deputy Assistant Attorney General for Antitrust during the Reagan Administration. Having served as chief antitrust lawyer for The Coca-Cola Company from 1992 to 2002, Mr Lipsky has incomparable experience with antitrust in the US, EU, Canada, Japan and other established antitrust-law regimes, as well as in new and emerging antitrust-law regimes in scores of jurisdictions that adopted free-market policies following the 1991 collapse of the Soviet Union. He has been closely associated with efforts to streamline antitrust enforcement around the world, advocating the reduction of compliance burdens and the harmonisation of fundamental objectives of antitrust law.

Mr Lipsky was the first international officer of the American Bar Association Section of Antitrust Law. He served on the editorial board of *Competition Laws Outside the United States* (2001), the most ambitious annotated compilation of non-US competition laws yet produced. He has held a variety of senior positions among the officers and governing council of the Section of Antitrust Law and continues to serve as co-chair of its International Task Force. He is admitted to practise before the US Supreme Court and various federal appellate courts.

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Mr Powell is one of only a few solicitor-advocates in Hong Kong, giving him full rights of audience before all the Hong Kong civil courts (including the newly instituted Competition Tribunal, which has been set up as a part of the judiciary). He is also a fellow of the Chartered Institute of Arbitrators, and a CEDR accredited mediator. He sits on the Hong Kong Law Society's competition committee, which focuses on reviewing and commenting upon competition-related issues within Hong Kong.

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