

Germany

	2013	2014		
Internet Freedom Status	Free	Free	Population:	80 million
Obstacles to Access (0-25)	4	4	Internet Penetration 2013:	84 percent
Limits on Content (0-35)	4	4	Social Media/ICT Apps Blocked:	No
Violations of User Rights (0-40)	9	9	Political/Social Content Blocked:	No
TOTAL* (0-100)	17	17	Bloggers/ICT Users Arrested:	No
			Press Freedom 2014 Status:	Free

* 0=most free, 100=least free

Key Developments: May 2013 – May 2014

- Despite an endorsement by both the newly elected government and the European Parliament, the principle of net neutrality is still not entirely safeguarded (see **Limits on Content**).
- The newly enacted ancillary copyright law for press publishers raised concerns with regard to the right to freedom of communication and freedom of information on the internet (see **Limits on Content**).
- In August 2013, the Federal Court of Justice issued a ruling that further substantiated intermediary liability for content hosts whose business model facilitates copyright infringement (see **Limits on Content**).
- The disclosures by former NSA contractor Edward Snowden revealed the vast scale of internet surveillance in Germany by both foreign and German intelligence agencies. The federal government drew criticism for reacting too reluctantly to the revelations (see **Violations of User Rights**).

Introduction

The German federal elections on September 22, 2013 emphasized the fact that internet freedom issues are now a major topic on the political agenda in the country. The appointment of a minister for digital infrastructure and the establishment of a standing committee for the digital agenda within the federal parliament are a testament to this development. Additionally, the program for the current legislative session comprises policy items that range from an accelerated extension of high-speed web infrastructure, a strengthening of data protection, and civil rights on the internet.

Meanwhile, freedom of information and communication remains under pressure. Although the governing parties' coalition agreement endorses net neutrality and the European Parliament has voted in favor of the principle, it is still not entirely safeguarded in Germany's existing legal framework. Furthermore, the ancillary copyright law for press publishers that went into effect in August 2013 could potentially reduce the accessibility of news sources on the internet and diminish the diversity of the supply of information, though so far this legislation seems to have had minimal impact.

Like in many other countries, data protection and online privacy in Germany have become major topics of conversation due to the revelation of systematic, ongoing, and widespread online surveillance by international intelligence agencies. While the U.S. National Security Agency (NSA) and the British Government Communications Headquarters (GCHQ) are considered to be the agencies that bear the most responsibility for the intrusions into protected data and communications, reports disclosed that the German intelligence agency *Bundesnachrichtendienst* (BND) also carried out potentially unconstitutional surveillance against German citizens and residents. The federal government was criticized for its reluctant and apologist reaction to the scandal.

At the same time, the ongoing struggle against data retention may have gained a partial victory when, on April 8, 2014, the European Court of Justice declared the EU Data Retention Directive invalid due to disproportionate interference with the fundamental rights to respect for private life and to the protection of personal data. Despite previously stated plans to enact a national law with the goal of implementing data retention policies in Germany as a result of this decision, the federal government announced it will refrain from initiating a bill until the EU has decided on a new directive.

Obstacles to Access

Germany's network infrastructure for information and communication technologies is well-developed, with 77 percent of the population in Germany having private internet access. Together with the number of mobile-only internet users, this has resulted in an overall internet penetration rate of 88 percent, according to Eurostat findings, which is 9 percentage points above the European Union (EU) average (the International Telecommunication Union places the internet penetration rate for Germany at 84 percent).¹ However, growth in internet penetration is slowing, with an increase

1 Eurostat, "Broadband and Connectivity - Households", April 9, 2014, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_bde15b_h&lang=en. International Telecommunication Union, "Percentage of Individuals Using the Internet," 2013, <http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>.

of only 0.9 percentage points in the past year.² The number of individuals who plan on obtaining private access remains at an unchanged 3.1 percent.³

Internet connections in private homes are nearly universal, with 95 percent of households having a connection of at least 1 Mbps.⁴ The most widely used mode of access is still DSL (over 81 percent), but cable internet connections are becoming more widespread (at nearly 19 percent, compared to 11 percent in 2013).⁵ Connections with more than 50 Mbps are available for about 58 percent of households.⁶ In their coalition agreement after the 2013 federal election, the Christian Democratic Union, Christian Social Union, and Social Democratic Party declared that high-speed broadband supply should be available for every citizen by the year 2018,⁷ a goal that was criticized as both lacking proper funding and being insufficient for a modern industrialized country.⁸ Regarding the take-up of connections of at least 10 Mbps, Germany is lagging internationally, with only 31 percent of households having such connections, in comparison to the EU average of 48 percent.⁹

Mobile phone penetration in Germany is nearly universal, with a penetration rate of over 131 percent.¹⁰ In 2013, 41 percent of online users accessed the internet via mobile devices, compared to 23 percent a year earlier.¹¹ The number is on a par with the EU average.¹² According to the Federal Ministry of Economics and Technology, Germany is ranked 8th internationally in terms of mobile internet access.¹³ Of all German citizens from the age of 14, 40 percent own a smartphone.¹⁴ The

2 Birgit van Eimeren/Beate Frees, "Rasanter Anstieg des Internetkonsums – Onliner fast drei Stunden täglich im Netz. Ergebnisse der ARD/ZDF-Onlinestudie 2013" [Rapid growth of internet consumption – users online for almost three hours each day], *Media Perspektiven* 7-8/2013, p. 358-372, http://www.ard-zdf-onlinestudie.de/fileadmin/Onlinestudie/PDF/Eimeren_Frees.pdf; Another survey reports 76.5 percent.; Initiative D21, "(N)Onliner Atlas 2013. Basiszahlen für Deutschland" [Baseline numbers for Germany], 2013. <http://www.initiaved21.de/wp-content/uploads/2013/04/digitalindex.pdf>; a third survey counts 78 percent: Forschungsgruppe Wahlen, "Internet-Strukturdaten. Repräsentative Umfrage" [Structural internet data. representative survey], IV quarter of 2013, January 28, 2014, http://www.forschungsgruppe.de/Umfragen/Internet-Strukturdaten/web_IV_13.pdf.

3 Initiative D21, 2013, p. 10.

4 Statistisches Bundesamt [Federal Statistical Office], Sabine von Thenen/Petra Scheerbaum, "Mobile Internetnutzung in Deutschland und Europa 2012" [Usage of mobile internet access in Germany and Europe in 2012], February 6, 2014, https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Informationsgesellschaft/MobileInternetnutzung2012_012014.pdf.

5 Bundesnetzagentur, Jahresbericht 2013 (issued 2014), p. 73, <http://bit.ly/1uU1XNN>.

6 TÜV Rheinland Consulting, "Bericht zum Breitbandatlas Mitte 2013 im Auftrag des Bundesministeriums für Wirtschaft und Technologie (BMWi)" [Report of the Broadband Atlas mid-2013 on behalf of the Ministry of Economics and Technology], Teil 1: Ergebnisse, 2013, p. 5, <http://www.bmwi.de/DE/Mediathek/publikationen.did=601284.html>.

7 "Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD" [Shaping Germany's Future. Coalition Agreement between CDU, CSU, and SPD], December 14, 2013, p. 9, <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>.

8 Markus Beckedahl, "Netzallianz soll ambitioniertes Ziel von 50 Mbps schaffen – leider in der Zukunft, nicht gestern" [Internet alliance supposed to achieve ambitious goal of 50 Mbps – unfortunately in the future, not yesterday], *Netzpolitik.org*, March 2, 2014, <https://netzpolitik.org/2014/netzallianz-soll-ambitioniertes-ziel-von-50mbits-schaffen-leider-in-der-zukunft-nicht-gestern/>.

9 European Commission, Digital Agenda Scoreboard, <http://bit.ly/1gvj4fk>.

10 Bundesministerium für Wirtschaft und Technologie [Federal Ministry of Economics and Technology], "Monitoring-Report Digitale Wirtschaft 2013", December 2013, p. 54, <http://www.bmwi.de/DE/Mediathek/publikationen.did=625962.html>.

11 ARD/ZDF-Onlinestudie 2013, <http://www.ard-zdf-onlinestudie.de/index.php?id=426>; Eurostat however counts only 35 percent, http://www.bitkom.org/files/documents/Abb_20_und_21_Mobile_Internet-Nutzung.jpg; the Federal Ministry of Economics and Technology stipulates 43 percent, Monitoring-Report, p. 68.

12 Bitkom, Mobile Internetnutzung [mobile internet access], March 2014, http://www.bitkom.org/de/markt_statistik/64026_65235.aspx.

13 Monitoring-Report, p. 68.

14 Bitkom, "Auch Ältere steigen auf Smartphones um" [Older persons switch to smartphones, too], June 9, 2013, http://www.bitkom.org/de/markt_statistik/64046_76387.aspx.

availability of basic UMTS connections is good (85 percent of all German households), and the coverage of fast LTE technology has grown considerably in the past year, with 70 percent of all households being covered with at least 2 Mbps, and 44 percent at 6 Mbps and above.¹⁵

There is still a gender gap when it comes to accessing the internet in Germany (over 81 percent of men use the internet compared to under 72 percent of women), but the increase of female users compared to male users was again slightly higher in 2013, resulting in a decreasing gender-difference of about 10 percentage points compared to 11 percent in 2012 and 12 percent in 2011.¹⁶ Internet penetration is particularly high in the age group between 14 and 39 (over 96 percent) but, in comparison, relatively low in the age group 70 and above (about 30 percent), despite considerable and stable growth rates in the preceding years.¹⁷

Differences in internet usage depending on formal education have not significantly changed over the past few years: the discrepancy between people with low and high levels of formal education is still about 20 percent. This phenomenon is confirmed by a comparison of net household incomes. Households with less than EUR 1,000 (US\$1,283) net income per month have a 55 percent penetration rate, whereas those with more than EUR 3,000 (US\$3,848) net income have a penetration rate of 93 percent.¹⁸ Furthermore, slight differences in internet usage exist between Germany's western region (79 percent) and the eastern region that once constituted the communist German Democratic Republic (73 percent); however, this difference has been decreasing over the past few years.¹⁹ The gap between the urban states Hamburg, Berlin, and Bremen, and the rural states with the smallest internet penetration rate such as Saxony-Anhalt or Mecklenburg-Western Pomerania has again slightly decreased and is now at around 12 to 13 percent.²⁰ As this persisting imbalance is widely considered problematic, the elected coalition of CDU/CSU and SPD has made it a priority to increase broadband availability in rural areas.²¹

Prices for flat rate broadband internet have decreased in recent years and now range from EUR 16 to EUR 30 (US\$21 to US\$38) which is regarded as affordable compared to the average income per household of EUR 3,871 (US\$4,965), and ranks below average prices in OECD countries.²² Nevertheless, as the stark differences in internet usage in relation to income indicate, the price level constitutes a barrier for people with low incomes and the unemployed. Although the Federal Court of Justice ruled that access to the internet is fundamental for everyday life, costs for

15 TÜV Rheinland Consulting, mid-2013, p. 4. With the allocation of licenses for the next generation mobile standard LTE, the Bundesnetzagentur has obliged the network providers to build the new infrastructure in rural areas first before installing it cities.

16 Initiative D21, 2013, p. 22.

17 Initiative D21, 2013, p. 22.

18 Initiative D21, 2013, p. 23.

19 Forschungsgruppe Wahlen, "Internet-Strukturdaten. Repräsentative Umfrage" [Structural internet data. representative survey], IV quarter of 2012, http://www.forschungsgruppe.de/Umfragen/Internet-Strukturdaten/web_IV_12.pdf; and Forschungsgruppe Wahlen, 2013, cf. fn. 1.

20 Initiative D21, 2013, p. 20.

21 Coalition Agreement, p. 34-5.

22 Statistisches Bundesamt [Federal Statistical Office], "Wirtschaftsrechnungen 2011" [Budget Surveys 2011], Subject-matter series 15 series 1, 24 April 2013, p. 13, <http://bit.ly/1kWk97f>; OECD Broadband Portal, Broadband Prices, September 2012, <http://www.oecd.org/sti/broadband/oecd-broadband-portal.htm#prices>.

internet access are not adequately reflected in basic social benefits.²³ Telecommunication services have become slightly less expensive, decreasing by about 2 percent,²⁴ while the costs for mobile telecommunication services also decreased by about 2 percent between the third quarter of 2012 and the third quarter of 2013.²⁵

The telecommunications sector was privatized in the 1990s with the aim of fostering competition. The incumbent Deutsche Telekom's share of the broadband market is currently 43.1 percent, though it has been in slight decline in recent years as competition has grown. Other ISPs with significant market share include 1&1-United Internet with 12.5 percent, Vodafone (as Arcor) with 10.4 percent, O2-Telefónica with 7.9 percent, and cable companies Unity Media (9 percent) and Kabel Deutschland (7.3 percent).²⁶ While Deutsche Telekom's dominant position remains unchallenged for the time being, competition is expected to grow considerably after Vodafone's acquisition of Kabel Deutschland in October 2013.²⁷

There are four general carriers for mobile internet access: T-Mobile, Vodafone, E-Plus, and O2-Telefónica. In 2013, T-Mobile maintained its market leadership, having obtained a 33.5 percent market share compared to 32 percent a year earlier. Vodafone follows second with 28 percent, a decline by two percent since 2012. The rise of the two smaller providers, E-Plus and O2-Telefónica, has slowed: in 2013 the providers remained at a steady 21.6 and 16.8 percent, respectively.²⁸ However, while the mobile market had been considered one of the most competitive in the EU,²⁹ this fact might suffer a setback in view of the intended merger of O2-Telefónica and E-Plus,³⁰ which would position the new company as the market leader and reduce the market to three competitors.³¹

23 _Bundesgerichtshof [Federal Court of Justice], "Bundesgerichtshof erkennt Schadensersatz für den Ausfall eines Internetanschlusses zu" [Court awards damages for internet failures], press release 14/13, January 24, 2013, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0014/13. Hartz IV standard rate is € 391, <http://www.bundesregierung.de/ContentArchiv/DE/Archiv17/Artikel/2013/09/2013-09-04-grundsicherung-erhoehnung-regelbedarf-ab-2014.html>; € 2.28 of that sum are for Internet access, Cf. Deutscher Bundestag [German Bundestag], Drucksache 17/3404, p. 60, <http://dip21.bundestag.de/dip21/btd/17/034/1703404.pdf>.

24 Statistisches Bundesamt, "Statistisches Jahrbuch. Deutschland und Internationales" [Statistical Yearbook], 2013, p. 394, https://www.destatis.de/DE/Publikationen/StatistischesJahrbuch/StatistischesJahrbuch2013.pdf?__blob=publicationFile.

25 Statistisches Bundesamt [Federal Statistical Office], "Wirtschaft und Statistik" [Economy and statistics], January 2014, p. 70, https://www.destatis.de/DE/Publikationen/WirtschaftStatistik/Preise/PreiseJahr2013_12014.pdf?__blob=publicationFile.

26 DSLWEB, "Breitband Report Deutschland Q4 2013" [Broadband Report Germany], December 31, 2013, <http://www.dslweb.de/breitband-report-deutschland-q4-2013.php>.

27 Handelsblatt, "Übernahme von Kabel Deutschland durch Vodafone perfekt" [Acquisition of Kabel Deutschland by Vodafone finalized], October 14, 2013, <http://www.handelsblatt.com/unternehmen/it-medien/milliarden-deal-uebernahme-von-kabel-deutschland-durch-vodafone-perfekt/8929722.html>.

28 Bundesnetzagentur [Federal Network Agency], "Teilnehmerentwicklung im Mobilfunk" [Development of Mobile Subscriptions], March 18, 2014, <http://bit.ly/1eE50oF>.

29 European Commission, Digital Agenda for Europe – Scoreboard 2012, p.68. Cf. also the study by Haucaup et al. documenting a fairly competitive market: Haucaup/Heimeshoff/Stühmeier, 2010, "Wettbewerb im Deutschen Mobilfunkmarkt" [Competition in the German mobile market], Ordnungspolitische Perspektiven Nr. 4.

30 Wirtschaftswoche, "Droht Deutschland ein Fiasko à la Österreich?" [Could Germany suffer from a fiasco such as in Austria?], April 10, 2014, <http://www.wiwo.de/unternehmen/it/o2-und-e-plus-droht-deutschland-ein-fiasko-a-la-oesterreich-seite-all/9716148-all.html>.

31 Statista, "O2/E-Plus bald neue Nummer 1 in Deutschland?" [O2/E-Plus soon new number 1 in Germany?], April 6, 2014, <http://de.statista.com/infografik/1287/anzahl-der-mobilfunkanschluesse-in-deutschland/>.

Accordingly, the EU Commission is investigating the proposed deal.³² Competition of mobile services in downstream markets remains limited, since most German mobile providers contractually prohibit services such as Voice over Internet Protocol (VoIP).³³ The Body of European Regulators for Electronic Communications (BEREC) has started to investigate this widespread practice across Europe and is discussing possible regulatory interventions.³⁴ The issue was also part of the European Parliament's considerations that led to its decision on net neutrality in April 2014 (see "Limits on Content").³⁵

Internet access, both broadband and mobile, is regulated by the Federal Network Agency for Electricity, Gas, Telecommunications, Post, and Railway (*Bundesnetzagentur* or BNetzA), which has operated under the supervision of the Federal Ministry of Transport since early 2014.³⁶ The president and vice president of the agency are appointed for five-year terms by the German federal government, following recommendations from an advisory council consisting of 16 members from the German Bundestag and 16 representatives from the Bundesrat. The German Monopolies Commission and the European Commission (EC) have both criticized this highly political setting and the concentration of important regulatory decisions in the presidential chamber of the Federal Network Agency.³⁷ Similarly, the European Court of Justice (ECJ) and the EC noted that the regulation of data protection and privacy by agencies under state supervision does not comply with the EU Data Protection Directive 95/46/EC.³⁸

In addition to such institutional concerns, regulatory decisions by the BNetzA have been criticized for providing a competitive advantage to Deutsche Telekom, the former state-owned monopoly.³⁹ The most recent examples are the agency's decisions on April 10, 2013 to allow a slight increase

32 The EU approved the merger in July 2014, outside of this report's coverage period. European Commission, "Mergers: Commission continues investigation of Telefónica Deutschland / E-Plus merger without referral to Germany", press release, January 30, 2014, http://europa.eu/rapid/press-release_IP-14-95_en.htm; heise.de, "Brüssel formuliert Bedenken gegen Fusion von O2 und E-Plus" [Brussels issues concerns regarding merger of O2 and E-Plus], February 19, 2014, <http://www.heise.de/newsticker/meldung/Brussel-formuliert-Bedenken-gegen-Fusion-von-O2-und-E-Plus-2118328.html>.

33 Ekkehard Kern, "Die Tücken der Smartphone-Verträge" [The pitfalls of smartphone contracts], welt.de, April 8, 2013, <http://www.welt.de/finanzen/verbraucher/article115087088/Die-Tuecken-der-Smartphone-Vertraege.html>.

34 BEREC, "BEREC publishes net neutrality findings and new guidance for consultation", Press release, May 29, 2012, http://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/24-berec-publishes-net-neutrality-findings-and-new-guidance-for-consultation. According to this study, at least 20 percent of mobile internet users in Europe experience some form of restriction on their ability to access VoIP services.

35 European Parliament, "Net neutrality: Industry MEPs want stricter rules against blocking rival services", press release, March 18, 2014, <http://bit.ly/1kXklhp>; European Parliament, "Industry MEPs vote to protect net neutrality", press release, March 19, 2014, <http://bit.ly/1gyBEDj>.

36 Markus Beckedahl, "Verkehrsministerium gewinnt Fachaufsicht über Bundesnetzagentur" [Ministry of Transport gains supervision over Federal Network Agency], Netzpolitik.org, February 14, 2014, <https://netzpolitik.org/2014/verkehrsministerium-gewinnt-fachaufsicht-ueber-bundesnetzagentur/>.

37 Monopolkommission [Monopolies Commission], "Telekommunikation 2009: Klaren Wettbewerbskurs halten" [Telecommunication 2009: stay on target in competition], Sondergutachten 56, 2009, p. 75, http://www.monopolkommission.de/sg_56/s56_volltext.pdf; European Commission, "Progress Report on the Single European Electronic Communications Market (15th Report)", COM(2010) 253, p. 196, <http://ec.europa.eu/digital-agenda/en/news/progress-report-single-european-electronic-communications-market-2009-15th-report-sec2010630>.

38 European Commission, "Data Protection: European Commission requests Germany to ensure independence of data supervisory authority," Press Release, Brussels, April 6, 2011, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/407&format=HTML&aged=0&language=EN&guiLanguage=en>.

39 European Commission, Progress Report, p. 196. Since the Federal Republic still exercises its rights as a shareholder of Deutsche Telekom (circa 38 percent) through another public law entity, commentators see a potential conflict of interest; Christian Schmidt, "Von der RegTP zur Bundesnetzagentur. Der organisationsrechtliche Rahmen der neuen Regulierungsbehörde" [From RegTP to Federal Network Agency. The organizational framework of the new regulator], Die Öffentliche Verwaltung 58 (24), 2005, p. 1028.

in the price that Telekom charges competitors for the “last mile”⁴⁰ and to support controversial vectoring technology, which in turn manifests its dominant position regarding the last mile. Vectoring can boost the bandwidth of DSL connections on existing copper lines but requires one operator to manage the whole bundle, in effect limiting the unbundling of the local loop and thus privileging, under specific circumstances, the market leader.⁴¹ Despite the widespread concerns about a “re-monopolization” of the fixed-line network, the BNetzA announced its final decision on August 29, 2013, after making some adjustments in favor of Telekom competitors and subsequently obtaining the approval of the EU Commission.⁴²

Limits on Content

Government blocking of websites or internet content rarely takes place in Germany.⁴³ In 2013-2014, there were no publicly known incidents of censorship directly carried out by state actors. Since there is also no significant filtering of text messages or email communication, the overall scale and sophistication of censorship has remained stable and on an insignificant level. YouTube, Facebook, Twitter and international blog-hosting services are freely available.

Content blocking or filtering practices enforced by corporate actors have been discussed for some time. The ongoing dispute between YouTube and GEMA (German Society for Musical Performance and Mechanical Reproduction)⁴⁴ indicates that private entities substantially shape the availability of online content.⁴⁵ Since 2009, Google and GEMA have been unable to reach an agreement on the amount Google should pay for a license for copyright-protected music videos disseminated on YouTube. GEMA considers it a copyright violation when YouTube uses “the rights administered by GEMA without paying any compensation to the copyright owners,”⁴⁶ and consequently sues Google for damages.⁴⁷ As a result of this disagreement, YouTube blocks videos for users within Germany if the video might contain copyrighted music, instead showing an error message saying that the video

40 ZDNet, “Neuer Vorschlag der Bundesnetzagentur für TAL-Entgelte erntet Kritik” [Network Agency’s Plans for Local Loop Unbundling Charges is criticized strongly], March 28, 2013, <http://www.zdnet.de/88149343/neuer-vorschlag-der-bundesnetzagentur-fur-tal-entgelte-erntet-kritik/>.

41 Richard Sietmann, “Fiber to the Neverland. Die Telekom forciert VDSL-Vectoring statt Glasfaser” [Fiber to the Neverland. DT pushes VDSL-Vectoring instead of Fibre]. c’t 10/2013, April 29, 2013, pp. 18-21, <http://heise.de/-1847272>.

42 heise.de, “Bundesnetzagentur legt Streit um VDSL-Vectoring bei” [Federal Network Agency settles argument concerning VDSL vectoring], July 10, 2013, <http://www.heise.de/newsticker/meldung/Bundesnetzagentur-legt-Streit-um-VDSL-Vectoring-bei-1915247.html>; heise.de, “Bundesnetzagentur gibt Startschuss für VDSL-Vectoring” [Federal Network Agency issues clearance on VDSL vectoring], August 29, 2013, <http://www.heise.de/newsticker/meldung/Bundesnetzagentur-gibt-Startschuss-fuer-VDSL-Vectoring-1945510.html>.

43 Due to substantial criticism by activists and NGOs that provoked an intense political debate, the 2010 law on blocking websites containing child pornography, the Access Impediment law (Zugangerschwerungsgesetz), never came into effect and was finally repealed by the German parliament in December 2011.

44 Collecting societies are private organizations at the national level in Germany authorized by the Copyright Administration Act (*Urheberrechtswahrnehmungsgesetz*). Although they act under the supervision of the German Patent and Trademark Office (DPMA), they belong to the private sector. With the foundation of the collecting society C3S, provided the DPMA grants permission, GEMA’s national monopoly could soon come to an end, see Jens Uthoff, “Neue Wege im Paragraphenschlinge” [New paths through the regulation jungle], taz.de, April 9, 2014, <http://www.taz.de/!136441/>.

45 Compared to 0.9 per cent in the United States and ca. 1 per cent in Austria and Switzerland. Cf. sueddeutsche.de, “Diese Kultur ist in Deutschland leider nicht verfügbar” [This culture is not available in Germany], January 28, 2013, <http://sz.de/1.1584813>

46 GEMA, “GEMA and YouTube”, accessed April 23, 2014, <https://www.gema.de/en/press/popular-subjects/youtube/browse/4.html>.

47 Süddeutsche.de, “Streit mit Youtube: Gema schaltet Schiedsstelle ein” [Dispute with Youtube: Gema calls in arbitration body], January 10, 2013, <http://sz.de/1.1570166>.

is not available in Germany because GEMA has not granted the publishing rights.⁴⁸ This practice results in the blocking of seemingly unrelated video content that may have copyrighted music playing on the radio in the background, for example. Google has raised concerns about the resulting undesired harms for freedom of expression.⁴⁹

In early 2014, most likely due to these copyright concerns, YouTube blocked a number of videos and live streams from the protests and uprisings in Ukraine, displaying the error message referring to GEMA's copyright claims. However, GEMA denied that it was in any way responsible for the blocking practice in this context, stating that YouTube's error message incorrectly implies that GEMA, not YouTube, is blocking the content.⁵⁰ In February 2014, the Munich district court decided in an injunction suit filed by GEMA that the phrasing of YouTube's error message violated the collecting society's rights.⁵¹ Although the judgment is not final, YouTube subsequently altered the content of the displayed message on blocked videos.⁵²

New evidence has confirmed that ISPs across Europe regularly use deep packet inspection (DPI) for the purposes of traffic management, as well as to throttle peer-to-peer traffic. Users are especially affected by P2P-related restrictions in the mobile market.⁵³ In their coalition agreement, the governing parties have announced a plan for new legislation to restrict the practice.⁵⁴

The autocomplete function of Google's search engine has repeatedly been subject to scrutiny. In May 2013, the Federal Court of Justice ruled that Google could be held liable, at least under some circumstances, for the infringement of personal rights through its autocomplete function.⁵⁵ In its subsequent decision concerning the same case, the Higher Regional Court in Cologne decided that Google's liability amounted to the obligation to delete the respective automated search query combination and to refrain from repeating the tort, but not to pay further compensation.⁵⁶

Similarly, in another European Court of Justice ruling issued on May 13, 2014, the court found that the 1995 Data Protection Directive applied to the activities of search engines like Google, and that

48 GEMA demands 0.375 cents per retrieval.

49 In particular Google argues that because the GEMA doesn't provide a list on the complete repertoire they licensed, most music videos have been blocked in order to avoid financial risks. cf. <http://bit.ly/1if3Qk7>.

50 Dinah Riese, "Wir sperren keine Videos" [We do not block any videos], Interview with GEMA spokeswoman Ursula Goebel, taz.de, February 19, 2014, <http://www.taz.de/!133379/>.

51 Gema.de, "Landgericht München urteilt: GEMA-Sperrtafeln auf YouTube sind rechtswidrig" [District Court Munich rules: GEMA error messages are unlawful], February 25, 2014, <http://bit.ly/1hfKwdX>.

52 Markus Beckedahl, "Dieses Video ist in Deutschland leider immer noch nicht verfügbar" [Unfortunately, this video is still not available in Germany], Netzpolitik.org, March 10, 2014, <https://netzpolitik.org/2014/dieses-video-ist-in-deutschland-immer-noch-nicht-verfuegbar/>.

53 BEREC, "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe. Findings from BEREC's and the European Commission's joint investigation," May 29, 2012, http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Traffic%20Management%20Investigation%20BEREC_2.pdf.

54 Coalition Agreement, <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>, p. 36.

55 BGH [Federal Supreme Court], judgment of May 14, 2013, Az. VI ZR 269/12; Jürgen Kuri/Martin Holland, "BGH zu Autocomplete: Google muss in Suchvorschläge eingreifen" [BGH on autocomplete], May 14, 2013 <http://heise.de/-1862062>.

56 Beck Aktuell, "OLG Köln: Klage gegen Google auf Unterlassung bestimmter Suchwortkombinationen erfolgreich" [Higher Regional Court Cologne: Injunction suit against Google concerning certain search query combinations successful], April 8, 2014, <http://beck-aktuell.beck.de/news/olg-k-oln-klage-gegen-google-auf-unterlassung-bestimmter-suchwortkombinationen-erfolgreich>; Adrian Schneider, "OLG Köln: Die Autocomplete-Entscheidung im Detail" [Higher Regional Court Cologne: the autocomplete decision in detail], Telemedicus, April 11, 2014, <http://www.telemedicus.info/article/2757-OLG-Koeln-Die-Autocomplete-Entscheidung-im-Detail.html>.

these companies may have to remove search results if the data is deemed to violate an individual's right to privacy. Cases in which search engines may have to remove links are limited only to searches for an individual's name: the original content in the link would not be removed and would still appear in other searches, but the link would no longer appear in search results for the individual who requested the removal. Many critics of this ruling argue that the court should not have granted private companies the authority to arbitrate competing concerns between the right to privacy and the right to information, and that the court failed to establish clear guidelines regarding when links to data should be removed.

There is no censorship prior to the publication of internet content. On the other hand, figures released by ICT corporations indicate that post-publication content removal is used extensively. According to Google's latest transparency report regarding requests to remove content, covering the period from January to June 2013, the company received 138 requests from the German courts and other public authorities.⁵⁷ Based on absolute numbers, with regard to court orders Germany ranks fourth of all countries that issued requests for removal of content, following the United States, Brazil, and Turkey. Defamation remains by far the most common reason for court orders to remove content.⁵⁸

The protection of minors constitutes an important legal framework for the regulation of online content.⁵⁹ Youth protection on the internet is principally addressed by states through the Interstate Treaty on the Protection of Human Dignity and the Protection of Minors in Broadcasting (JMStV), which bans content similar to that outlawed by the criminal code, such as the glorification of violence and sedition.⁶⁰ A controversial provision of the JMStV reflecting the regulation of broadcasting media mandates that adult-only content on the internet, including adult pornography, must be made available in a way that verifies the age of the user.⁶¹ The JMStV enables the blocking of content if other actions against offenders fail and if such blocking is expected to be effective. The Federal Criminal Police Office (*Bundeskriminalamt*) has initiated the deletion of thousands of sites related to child pornography.⁶²

The liability of platform operators for illegal content is regulated by the Telemedia Act. The law distinguishes between full liability for owned content and limited "Breach of Duty of Care" (*Stoererhaftung*) of access providers and host providers for third party content.⁶³ Although access and host providers⁶⁴ are not generally responsible for the content they transmit or temporarily auto store, there is a certain tension between the underlying principles of liability privilege and that of

57 Google complied fully or partially with 74 percent of these requests. Google, "Google Transparency Report. Germany. January to June 2013," 2014, <http://www.google.com/transparencyreport/removals/government/DE/>.

58 Google, "Google Transparency Report. Germany", <http://www.google.com/transparencyreport/removals/government/DE/>.

59 The legal framework regulating media protection of minors in particular consists of the Law for the protection of children and youth ("Jugendschutzgesetz", JuSchG) of the federal government and the Interstate Treaty on the Protection of Minors in the Media (short "Jugendmedienschutzstaatsvertrag", JMStV).

60 Cf. the respective §§ 130, 131 StGB [Criminal Code]. English translation: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

61 Cf. the respective § 5, Abs. 3 JMStV.

62 Handelsblatt.com, "BKA ließ 2012 tausende Internetseiten löschen", February 26, 2014, <http://www.handelsblatt.com/politik/deutschland/kinderpornografie-bka-liess-2012-tausende-internetseiten-loeschen/9543674.html>.

63 In particular: Part 3, §§ 7-10 TMG: liability for own content (§ 7, Abs. 1 TMG); limited liability for access providers (§§ 8, 9 TMG) and host providers (§ 10 TMG).

64 The BGH in particular has developed the principles of limited liability of host providers: BGH [Federal Court of Justice], judgment of October 25, 2011, Az. VI ZR 93/10.

secondary liability.⁶⁵ Principally, ISPs are not required to proactively control or review the information of third parties on their servers; they become legally responsible as soon as they gain knowledge of violations or violate reasonable audit requirements.⁶⁶

In 2012, court rulings limited the liability privilege of ISPs by further specifying requirements, responsibilities, and obligations. Additional blocking and filtering obligations of host providers have been put in more concrete terms by the Federal Court of Justice (*Bundesgerichtshof*, BGH) in the “Alone in the Dark” case.⁶⁷ In this specific instance, the game publisher Atari sued the file hosting service Rapidshare for copyright violations concerning a video game. Although the judges did not hold Rapidshare liable for a direct infringement, they saw a violation of the service’s monitoring obligations under the breach of duty of care as a result of Rapidshare’s failure to proactively control its service for copyrighted material after it was notified of one infringing copy.⁶⁸

In a subsequent decision concerning Rapidshare in August 2013, the BGH substantiated and further extended host providers’ duties. According to the judgment, if the business model of a service aims to facilitate copyright infringements, the company is considered less worthy of protection with regard to liability privilege.⁶⁹ As a consequence, host providers are required to monitor their own servers and search for copyright-protected content as soon as it has been notified of a possible violation.⁷⁰ In their coalition agreement, the governing parties announced that such host providers should lose the privilege and the ability to obtain advertising revenues through their business practices.⁷¹ However, provider liability has to be in line with the European legal framework, in this case, the Directive 2000/31/EC.⁷²

The situation regarding intermediary liability was further complication by a European Court of Human Rights (ECtHR) case regarding third-party comments. On October 10, 2013, the ECtHR issued a ruling that reaffirmed an earlier Estonian Supreme Court decision regarding the legal liability of content hosts for third-party comments. The ECtHR found that a company’s legal liability for comments posted by its users did not sufficiently interfere with the freedom of expression guarantees enshrined in the European Convention on Human Rights; therefore, intermediaries could be held responsible for third-party content published on their website or forum, even if they delete the content upon notification.⁷³

65 Liability privilege means that information intermediaries on the internet such as ISPs are not responsible for the content their customers transmit. Secondary or indirect liability applies when intermediaries contribute to or facilitate wrongdoings of their customers.

66 BGH [Federal Court of Justice], judgment of March 27, 2012, Az. VI ZR 144/11, <http://openjur.de/u/405723.html>.

67 BGH [Federal Court of Justice], judgment of July 12, 2012, Az. I ZR 18/11, <http://openjur.de/u/555292.html>.

68 Timothy B. Lee: Top German court says RapidShare must monitor link sites for piracy, July 16, 2012, <http://arstechnica.com/tech-policy/2012/07/top-german-court-says-rapidshare-must-monitor-link-sites-for-piracy/>.

69 BGH [Federal Court of Justice], judgment of 15 August, 2013, Az. I ZR 80/12, <http://www.telemedicus.info/urteile/Urheberrecht/1413-BGH-Az-I-ZR-8012-Pruefpflichten-fuer-File-Hosting-Provider-Rapidshare.html>.

70 Thomas Stadler, “BGH erweitert Prüfpflichten von Filehostern wie Rapidshare” [Federal Court of Justice extends monitoring duties for host providers such as Rapidshare], Internet-Law, September 4, 2013, <http://www.internet-law.de/2013/09/bgh-erweitert-pruefpflichten-von-filehostern-wie-rapidshare.html>.

71 Coalition Agreement, p. 93.

72 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), June 8, 2000, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

73 Case of Delfi AS v. Estonia, Judgement, accessed April 12, 2014, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126635#{"itemid":\["001-126635"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126635#{)

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ISPs are obliged to disclose customer information for prosecutions of copyright infringement, even though the person may not have infringed copyrights for commercial purposes.⁷⁴ A special requirement to review the content on any violations of rights was also ruled in a case where a blogger integrated a YouTube video onto his website.⁷⁵ Whereas linking to other websites is regarded as unproblematic, embedding content, primarily videos from other sources, could cause liability risks for the provider.⁷⁶

An important exception to the liability privilege concerns wireless networks.⁷⁷ Because of a highly disputable ruling against the existing liability privilege by the Federal High Court in 2010, legislative initiatives from states and political parties now seek to modify the secondary liability of local Wi-Fi operators. In this respect, the governing parties agreed to press ahead with new legislation that aims to create legal certainty for operators in order to facilitate the expansion of publicly accessible Wi-Fi networks.⁷⁸ However, while the general intention has been lauded, questions remain concerning the details of such a legal framework.⁷⁹

The principle of proportionality has constitutional status in Germany to which public authorities must comply. The interplay between the Ministry of Justice, the Federal Data Protection Officer, the association of internet service providers (Eco), and the internet community effectively hold the bodies involved accountable.

There is no systematic self-censorship in the German media. Still, there are more or less unspoken rules reflected in the publishing principles of the German press.⁸⁰ The penal code and the JMStV prohibit content in a well-defined manner (such as child pornography, racial hatred, and the glorification of violence).

While the degree to which political actors can successfully pressure online news outlets to exclude certain information from their reporting is still insignificant, there have been some attempts to delete critical information on the internet. In April 2013, the Federal Ministry of Defense took legal steps against a newspaper,⁸¹ demanding that it delete a set of leaked mission reports covering Afghanistan operations of the federal armed forces (*Bundeswehr*), based on alleged copyright

74 Bundesgerichtshof [Federal Court of Justice], judgement of April 19, 2012, Az. I ZB 80/11, <http://openjur.de/u/438903.html>.

75 LG Hamburg [Regional Court Hamburg], judgement of May 18, 2012, Az. 324 O 596/11, <http://openjur.de/u/404386.html>.

76 Leonhard Dobusch, "Risikofaktor Einbettung: YouTube, Twitter und das Urheberrecht" [Risk factor embedding: YouTube, Twitter and copyright legislation], January 23, 2013, <http://netzpolitik.org/2013/risikofaktor-einbettung-youtube-twitter-und-das-urheberrecht/>.

77 In 2010, the German Federal High Court sentenced the private owner of a wireless router on the grounds that his or her open network allowed illegal activities. cf. Christopher Burgess, "Three Good Reasons to Lock Down Your Wireless Network," The Huffington Post (blog), June 8, 2010, http://www.huffingtonpost.com/christopher-burgess/three-good-reasons-to-loc_b_599945.html.

78 Coalition Agreement, p. 35.

79 Alexander Sander, "Netzpolitische Bilanz der Koalitionsvereinbarung" [Review of the coalition agreement concerning internet policies], Digitale Gesellschaft, December 2, 2013, <https://digitalegesellschaft.de/2013/12/netzpolitische-bilanz-der-koalitionsvereinbarung/>.

80 Presserat [Press Council], "Pressekodex" [press code], version dated March 13, 2013, <http://www.presserat.de/pressekodex/pressekodex/>.

81 David Schraven, "Verteidigungsministerium geht juristisch gegen die WAZ vor" [Ministry of Defense taking legal steps against the WAZ], DerWesten Rechercheblog, April 8, 2013, <http://www.derwesten-recherche.org/2013/04/verteidigungsministerium-geht-juristisch-gegen-waz-vor/>.

infringement.⁸² The same legal argument was employed by the Federal Ministry of the Interior in January 2014 after the website *FragdenStaat.de* published an internal document concerning legal analysis of an election threshold for the elections to the European Parliament.⁸³ The decision was criticized as an attempt to abuse copyright laws in order to suppress freedom of information.⁸⁴

The principle of net neutrality was legally codified with the latest amendment of the telecommunications act (*Telekommunikationsgesetz*, TKG), § 41a TKG, enacted in May 2012. The law authorizes the government to define basic requirements for non-discriminatory data transfer and content access, but it does not require the government to take any further action. The German Federal Network Agency (Bundesnetzagentur, BNetzA) principally supports net neutrality, but instead of safeguarding it legally, the national regulator favors new business models based on price discrimination and differentiated classes of service as long as ISPs are transparent about their policies and give customers a choice.⁸⁵

The lack of concrete action on the part of the German government was met with criticism when the market-leading telecommunications company Deutsche Telekom announced plans to place limits on customers' high-speed data transfer per month while exempting certain services such as their own movie-streaming and television offers.⁸⁶ Afterward, the Federal Ministry of Economy and Technology presented two drafts of a net neutrality decree (*Netzneutralitätsverordnung*) in June and July 2013.⁸⁷ However, German consumer advice centers (*Verbraucherzentralen*) raised concerns regarding the administrative proposal's effectiveness concerning net neutrality.⁸⁸ In October 2013, a regional court in Cologne decided that Deutsche Telekom's plans were unlawful at least vis-à-vis those customers who had entered into a contract with the company that expressly included flat rate billing.⁸⁹ Deutsche Telekom subsequently announced that it would accept the ruling, although without entirely abandoning plans to introduce differentiated classes of service in the future.⁹⁰ In their coalition agreement, the governing parties announced plans to make promoting and securing net neutrality a principal goal of the internet policies in the forthcoming legislative term.⁹¹ Still, the

82 David Schraven/WAZ, *Die Afghanistan Papiere* [The Afghanistan wires], accessed April 10, 2013, <http://afghanistan.derwesten-recherche.org/>.

83 Heise.de, "Urheberrecht: Innenministerium mahnt *FragdenStaat.de* ab" [Copyright law: Federal Ministry of the Interior warns *FragdenStaat.de*], January 22, 2014, <http://www.heise.de/newsticker/meldung/Urheberrecht-Innenministerium-mahnt-FragdenStaat-de-ab-2093546.html>.

84 Thomas Stadler, "Der Missbrauch des Urheberrechts durch den Staat", *Internet-Law*, January 22, 2014, <http://www.internet-law.de/2014/01/der-missbrauch-des-urheberrechts-durch-den-staat.html>.

85 Cf. minutes of the Expert Meeting on net neutrality of the Parliamentary Inquiry Commission, October 8, 2010, <http://bit.ly/1dOvaQI>.

86 Rolf Wenkel, "Telekom's planned data limit meets with protest," *Deutsche Welle*, April 25, 2013, <http://www.dw.de/telekoms-planned-data-limit-meets-with-protest/a-16773016>; Cindy Raunick, "Rosa Ladebalken – Konsequenzen der Volumengrenze bei T-DSL" [Pink progress bar – consequences of T-DSL's restrictions on volume], *Telemedicus*, March 28, 2013, <http://www.telemedicus.info/article/2551-Rosa-Ladebalken-Konsequenzen-der-Volumengrenze-bei-T-DSL.html>.

87 Bundesministerium für Wirtschaft und Technologie [Federal Ministry of Economy and Technology], June 17, 2013, <http://bit.ly/1r2bFcn>, and July 31, 2013, <http://www.cr-online.de/netzneutralitaet-zweiter-entwurf.pdf>.

88 Verbraucherzentrale Bundesverband, "Geplante Netzneutralitätsverordnung kann Netzneutralität nicht sichern" [Proposed net neutrality decree unable to secure net neutrality], August 26, 2013, <http://www.vzbv.de/12151.htm>.

89 Zeit Online, "Gericht untersagt Telekom die Netz-Drosselung" [Court prohibits cutting back of internet services by Telekom], October 30, 2013, <http://www.zeit.de/digital/internet/2013-10/telekom-drosselkom-festnetz>.

90 Philipp Blank, "Mehr Transparenz für unsere Kunden" [More transparency for our customers], *Blog.Telekom*, December 2, 2013, <http://blog.telekom.com/2013/12/02/mehr-transparenz-fuer-unsere-kunden/>; Spiegel Online, "Nach Gerichtsurteil: Telekom verzichtet auf Mogel-Flatrate" [After court ruling: Telekom renounces flatrate cheating], December 2, 2013, <http://www.spiegel.de/netzwelt/netzpolitik/drosselkom-telekom-begraebt-mogel-flatrate-a-936752.html>.

91 Coalition Agreement, p. 35-36.

declaration has been criticized as being partly inconsistent and insufficient.⁹² Furthermore, while the European Parliament's April 2014 vote in favor of net neutrality has widely been considered a success, the details of the new regulation are likewise considered deficient and incomplete.⁹³

Germany is home to a vibrant internet community and blogosphere. Local and international media outlets and news sources are generally accessible and represent a diverse range of opinions. However, the enactment of the ancillary copyright for press publishers (*Leistungsschutzrecht für Presseverleger*), a regulation that came into effect on August 1, 2013 and that would allow publishers to monetize even the small snippets of information that search engine operators display as part of the results of a query,⁹⁴ raised concerns regarding the constitutionally protected rights to freedom of expression and freedom of information.⁹⁵ In an advisory opinion, the Max Planck Institute for Intellectual Property and Competition Law warned that the law could lead to a decline in online diversity of available press publications and other sources of information, thus infringing on the right to communication.⁹⁶ Despite coming into effect on August 1, 2013, however, search engines have not yet been impacted by the law, as no companies have taken action to enforce the copyright protection.⁹⁷

A potential downside of the rising power of internet-enabled discourse became apparent in late 2013 when a high school teacher initiated an online petition on the platform openPetition aimed at thwarting a planned curriculum change in the state of Baden-Württemberg that had the goal of promoting awareness of sexual diversity and to prevent homophobia and other forms of sexual discrimination.⁹⁸ The petition quickly gained traction on the net, gathering more than 190,000 signatures within two months, a turnout that was at least in part a result of the easy accessibility of this form of activism.⁹⁹ The case gave rise to concerns about the potential ramifications of online platforms for political grassroots campaigning that can have negative impacts on minority

92 Alexander Sander, "Netzpolitische Bilanz der Koalitionsvereinbarung" [Review of the coalition agreement concerning internet policies], Digitale Gesellschaft, December 2, 2013, <https://digitalegesellschaft.de/2013/12/netzpolitische-bilanz-der-koalitionsvereinbarung/>.

93 Markus Beckedahl, "EU-Parlament stimmt für Netzneutralität" [European Parliament votes in favor of net neutrality], Netzpolitik.org, April 3, 2014, <https://netzpolitik.org/2014/eu-parlament-stimmt-fuer-netzneutralitaet/>.

94 David Meyer, "Google fighting German plan for linking fee", cnet.com, November 27, 2012, <http://www.cnet.com/news/google-fighting-german-plan-for-linking-fee/>.

95 Philipp Otto, "Kommentar: ein unmögliches Gesetz" [Comment: an impossible law], iRights.info, August 30, 2012, <http://irights.info/2012/08/30/kommentar-ein-unmogliches-gesetz/4595>.

96 Max Planck Institute for Intellectual Property and Competition Law, "Stellungnahme zum Gesetzentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger" [Statement concerning the draft for an amendment of the copyright law with an ancillary copyright for press publishers], November 27, 2012, p. 2, http://www.ip.mpg.de/files/pdf2/Stellungnahme_zum_Leistungsschutzrecht_fuer_Verleger.pdf.

97 Christian Meier, "Burda: 'Wir bereiten die Verwertung vor'" [Burda: We are preparing for the utilization], MEEDIA, July 30, 2013, <http://meedia.de/2013/07/30/burda-wir-bereiten-die-verwertung-vor/>; Nicolas Fennen, "Leistungsschutzrecht: Springer-Verlag macht keinen Gebrauch vom neuen Gesetz" [Ancillary copyright law: Springer publishing does not make use of new law], Netzpolitik.org, July 30, 2013, <https://netzpolitik.org/2013/leistungsschutzrecht-springer-verlag-macht-keinen-gebrauch-vom-neuen-gesetz/>.

98 Gabriel Stängle, "Zukunft – Verantwortung – Lernen: Kein Bildungsplan 2015 unter der Ideologie des Regenbogens" [Future – Responsibility – Learning: No 2015 curriculum under the rainbow ideology], openPetition, November 28, 2013, <https://www.openpetition.de/petition/online/zukunft-verantwortung-lernen-kein-bildungsplan-2015-unter-der-ideologie-des-regenbogens>.

99 Lena Müssigmann, "Herr Stängle wittert Unfreiheit" [Mister Stängle senses unfreedom], taz.de, January 2, 2014, <http://www.taz.de/1130274/>.

populations.¹⁰⁰ However, at the same time, opposition against the petition and its proponents' discriminatory tendencies also quickly formed online, with the Twitter hashtag #idpet providing a tenacious forum for promotion of equality.¹⁰¹ Additionally, activists have been waging Europe-wide online campaigns in the fight for net neutrality.¹⁰² The vote of the European Parliament in favor of net neutrality has partly been accredited to the persistent activism.¹⁰³

Violations of User Rights

The NSA surveillance revelations that began in June 2013 have had a significant impact on discussions in Germany surrounding privacy, data retention, and freedom of expression online. After initial hesitation and following substantial public pressure, the federal government and public authorities have reluctantly started to review the incidents and have initiated preliminary arrangements that aim to safeguard civil rights and constrain the powers of both domestic and foreign intelligence agencies. However, no tangible, long-term solutions regarding online surveillance have been proposed as of yet.

The German Basic Law guarantees freedom of expression and freedom of the media (Article 5) as well as the privacy of letters, posts, and telecommunications (Article 10). These articles generally safeguard offline as well as online communication. In addition, a groundbreaking 2008 ruling by the Federal Constitutional Court established a new fundamental right warranting the "confidentiality and integrity of information technology systems" grounded in the general right of personality guaranteed by Article 2 of the Basic Law.¹⁰⁴

Online journalists are largely granted the same rights and protections as journalists in the print or broadcast media. Although the functional boundary between journalists and bloggers is starting to blur, the German Federation of Journalists maintains professional boundaries by issuing press cards only to full-time journalists.¹⁰⁵ Similarly, the German Code of Criminal Procedure grants the right to refuse testimony solely to individuals who have "professionally" participated in the production or dissemination of journalistic materials.¹⁰⁶ Furthermore, in December 2013 several political bloggers reported that the press office of the Federal Parliament had refused to grant them one-year

100 Andrea Meyer/Nele Tabler, "#idpet: Wenn Participation und Grundrechte kollidieren" [#idpet: When participation and fundamental rights collide], presentation during the re:publica 14 conference in Berlin, May 8, 2014, <http://re-publica.de/session/idpet-wenn-partizipation-und-grundrechte-kollidieren>.

101 Netzempowerung.de, "#idpet: Reaktion auf Petition gegen ideologische Manipulation für 'neue Sexualmoral', Kritik an Plattform openPetition" [#idpet: Response to petition against ideological manipulation for 'new sexual morals', critique of platform openPetition], January 8, 2014, <http://netzempowerung.de/2014/01/08/idpet-reaktion-auf-petition-gegen-ideologische-manipulation-fuer-neue-sexualmoral-kritik-an-plattform-openpetition/>.

102 <http://savetheinternet.eu/en/>.

103 Markus Bechedahl, "EU-Parlament stimmt für Netzneutralität" [European Parliament votes in favor of net neutrality], Netzpolitik.org, April 3, 2014, <https://netzpolitik.org/2014/eu-parlament-stimmt-fuer-netzneutralitaet/>.

104 BVerfG [Federal Constitutional Court], Provisions in the North-Rhine Westphalia Constitution Protection Act (Verfassungsschutzgesetz Nordrhein-Westfalen) on online searches and on the reconnaissance of the internet null and void, judgment of February 27, 2008, 1 BvR 370/07 Absatz-Nr. (1 - 267), http://www.bverfg.de/entscheidungen/rs20080227_1bvr037007.html; See also, Press release no. 22/2008, <http://www.bundesverfassungsgericht.de/en/press/bvg08-022en.html>. For more background cf. Wiebke Abel/Burkhard Schaferr, "The German Constitutional Court on the Right in Confidentiality and Integrity of Information Technology Systems – a case report on BVerfG", NJW 2008, 822", 2009, 6:1 SCRIPTed 106, <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-1/abel.asp>.

105 See <http://www.djv.de/startseite/service/mitgliederservice/presseausweis.html>.

106 Code of Criminal Procedure (StPO), § 53 (1) 5, http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0198.

accreditations, thus provoking allegations of discrimination against online journalists.¹⁰⁷ After vocal protests, including from members of parliament, the accreditation policy was changed, although the office insisted that the principal distinction all along had merely been between professional and non-professional journalists, with only the former being eligible.¹⁰⁸

The German Criminal Code (StGB) includes a paragraph on “incitement to hatred” (§ 130 StGB), which penalizes calls for violent measures against minority groups and assaults on human dignity.¹⁰⁹ The German people mostly regard this provision as legitimate, particularly because it is generally applied in the context of holocaust denials.¹¹⁰

Website owners or bloggers are not required to register with the government. However, most websites and blogs need to have an imprint naming the person in charge and contact address. The anonymous use of email services, online platforms, and wireless internet access points are legal. Although the Federal Minister of the Interior and some other members of the conservative parties have repeatedly expressed their disapproval of anonymity on the internet,¹¹¹ in their coalition agreement, the elected governing parties expressly endorsed the principles of anonymity and pseudonymity, and declared the intention to further advance the techniques necessary for their effective implementation.¹¹² Still, the announcement was criticized as being partly contradictory to other envisaged policies such as data retention, the implementation of which had been an officially stated goal of the coalition prior to the European Court of Justice’s decision to invalidate the EU Data Retention Directive in April 2014, thus casting lasting doubt on the federal government’s sincerity concerning the right of anonymity and pseudonymity online.¹¹³

The right of anonymity notwithstanding, the telecommunication act of 2004 stipulates that the purchase of SIM cards requires registration, including the purchaser’s full name, address, international mobile subscriber identity (IMSI), and international mobile station equipment identity (IMEI) numbers if applicable.¹¹⁴ In this way, the growing penetration of mobile internet threatens to further erode the possibility of anonymous communication.

The use of proxy servers is common in Germany, but more for the purpose of circumventing copyright restrictions than to avoid censorship. There are no figures available for the extent of their use.

107 Kristina Ludwig, “Bundestag sperrt Blogger aus” [Bundestag bars out bloggers], taz.de, February 6, 2014, <http://www.taz.de/1132359/>.

108 Tobias Schwarz, “Blogger dürfen wieder aus dem Bundestag berichten”, Netzpiloten, March 13, 2014, <http://www.netzpiloten.de/blogger-duerfen-wieder-aus-dem-bundestag-berichten/>.

109 Cf. fn. 54.

110 BVerfG, [Federal Constitutional Court] 1 BvR 2150/08 from November 4, 2009, Absatz-Nr. (1 - 110), http://www.bverfg.de/entscheidungen/rs20091104_1bvr215008.html ; See also the Press release no. 129/2009 of 17 November 2009, Order of 4 November 2009 – 1 BvR 2150/08 – § 130.4 of the Criminal Code is compatible with Article 5.1 and 5.2 of the Basic Law, <http://www.bverfg.de/pressemitteilungen/bvg09-129en.html> .

111 Cf. Anna Sauerbrey, “Innenminister Friedrich will Blogger-Anonymität aufheben” [Federal Minister of Interior wants to abolish anonymity of bloggers], Tagesspiegel online, August 7, 2011, <http://www.tagesspiegel.de/politik/internet-innenminister-friedrich-will-blogger-anonymitaet-aufheben/4473060.html>.

112 Coalition Agreement, p. 104.

113 Alexander Sander, “Netzpolitische Bilanz der Koalitionsvereinbarung” [Review of the coalition agreement concerning internet policies], Digitale Gesellschaft, December 2, 2013, <https://digitalegesellschaft.de/2013/12/netzpolitische-bilanz-der-koalitionsvereinbarung/>.

114 Telecommunications Act (TKG), § 111, http://www.bfdi.bund.de/EN/DataProtectionActs/Artikel/TelecommunicationsAct-TKG.pdf?__blob=publicationFile.

Excessive interceptions by secret services formed the basis of a 2008 Federal Constitutional Court ruling, which established a new fundamental right warranting the “confidentiality and integrity of information technology systems.” The court held that preventive covert online searches are only permitted “if factual indications exist of a concrete danger” that threatens “the life, limb, and freedom of the individual” or “the basis or continued existence of the state or the basis of human existence.”¹¹⁵ Based on this ruling, the Federal Parliament passed an act in 2009 authorizing the Federal Bureau of Criminal Investigation (BKA) to conduct covert online searches to prevent terrorist attacks on the basis of a warrant.¹¹⁶ In addition to online searches, the act authorizes the BKA to employ methods of covert data collection, including dragnet investigations, surveillance of private residences, and the installation of a program on a suspect’s computer that intercepts communications at their source.

In June 2013, documents leaked by former NSA contractor Edward Snowden revealed that the intelligence services of the United States and the United Kingdom, principally the National Security Agency (NSA) and the Government Communications Headquarters (GCHQ), had been conducting worldwide surveillance of online communications.¹¹⁷ Through the course of the revelations, the vast degree of the spying measures became apparent, culminating in the information that the NSA had considered Germany a “target state,” entailing the monitoring of about half a billion telephone, email, and text message communications in Germany each month.¹¹⁸ In the beginning of August 2013, media outlets reported that it had in fact been the German Federal Intelligence Service (*Bundesnachrichtendienst*, BND) which had forwarded the relevant data to the NSA since 2007.¹¹⁹ A few months later, it was disclosed that the BND had accessed internet traffic in Germany by tapping into a central node in Frankfurt, with the approval of both the Office of the Federal Chancellor and the Federal Ministry of the Interior.¹²⁰ The practice was widely considered unlawful, as the relevant G-10 law only permits the BND to monitor international, as opposed to domestic, telecommunications. The revelation gave rise to doubts concerning the effectiveness of judicial and parliamentary control over the intelligence service.¹²¹

115 Bundesverfassungsgericht [Federal Constitutional Court], Provisions in the North-Rhine Westphalia Constitution Protection Act (Verfassungsschutzgesetz Nordrhein-Westfalen) on online searches and on the reconnaissance of the Internet null and void, judgment of February 27, 2008, 1 BvR 370/07; For more background cf. W Abel and B Schafer, “The German Constitutional Court on the Right in Confidentiality and Integrity of Information Technology Systems – a case report on BVerfG”, NJW 2008, 822, (2009) 6:1 SCRIPted 106, <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-1/abel.asp>.

116 Dirk Heckmann, “Anmerkungen zur Novellierung des BKA-Gesetzes: Sicherheit braucht (valide) Informationen” [Comments on the amendment of the BKA act: Security needs valid information], Internationales Magazin für Sicherheit nr. 1, 2009, www.ims-magazin.de/index.php?p=artikel&id=1255446180.1.gastautor.

117 Jacob Appelbaum/Laura Poitras, “Edward Snowden Interview: The NSA and Its Willing Helpers”, Spiegel Online, July 8, 2013, <http://www.spiegel.de/international/world/interview-with-whistleblower-edward-snowden-on-global-spying-a-910006.html>; Friedhelm Greis, “NSA-Skandal: Chronologie der Enthüllungen” [NSA scandal: chronology of disclosures], iRights.info, December 30, 2013, <http://irights.info/nsa-skandal-chronologie-der-enthuellungen>.

118 Laura Poitras/Marcel Rosenbach/Holger Stark, “Geheimdokumente: NSA überwacht 500 Millionen Verbindungen in Deutschland” [Classified documents: NSA monitors 500 million connections in Germany], Spiegel Online, June 30, 2013, <http://www.spiegel.de/netzwelt/netzpolitik/nsa-ueberwacht-500-millionen-verbindungen-in-deutschland-a-908517.html>.

119 Zeit Online, “BND leitet seit 2007 Daten an NSA weiter” [BND forwards data to NSA since 2007], August 8, 2013, <http://www.zeit.de/politik/deutschland/2013-08/zusammenarbeit-nsa-bnd-2007>.

120 Spiegel Online, “BND lässt sich Abhören von Verbindungen deutscher Provider genehmigen” [BND gets official approval for wiretapping of connection of German providers], October 6, 2013, <http://www.spiegel.de/spiegel/vorab/bnd-laesst-sich-abhoeren-von-verbindungen-deutscher-provider-genehmigen-a-926221.html>.

121 Thomas Stadler, “Bundesregierung genehmigt das Abhören deutscher Provider durch den BND” [Federal Government permits monitoring of German providers by the BND], Internet-Law, October 6, 2013, <http://www.internet-law.de/2013/10/bundesregierung-genehmigt-das-abhoeren-deutscher-provider-durch-den-bnd.html>.

The Federal Government was criticized for reacting too slowly to the disclosures, and even defending the services' conduct.¹²² In particular, then Federal Minister of the Interior Hans-Peter Friedrich came under pressure after stating that a "fundamental right of security" effectively takes precedence over other constitutionally protected rights such as freedom of communication and the protection of privacy.¹²³ Still, in their coalition agreement, the governing parties announced they would move forward with an international treaty to protect the citizens from excessive surveillance.¹²⁴ However, the conclusion of a desired bilateral accord with the United States failed due to resistance from the U.S. government.¹²⁵ After notable public pressure, in February 2014 Federal Prosecutor General Harald Range announced he would initiate a formal criminal investigation against the NSA,¹²⁶ though only two months later, reports were released stating that instituting an official case seemed unlikely due to a lack of evidence against the agency.¹²⁷ In March 2014, the Federal Parliament appointed a commission of inquiry to investigate the activity of the intelligence agencies of all so-called "Five Eyes" countries,¹²⁸ as well as the role of the Federal Government, in the surveillance of communications data.¹²⁹

The amended telecommunication act of 2013 reregulates the "stored data inquiry" requirements (*Bestandsdatenauskunft*).¹³⁰ Under the new provision, approximately 250 registered public agencies, among them the police and customs authorities, are authorized to request from ISPs both contractual user data and sensitive data. While the 2004 law restricted the disclosure of sensitive user data to criminal offenses, the amended act extends it to cases of misdemeanors or administrative offenses. Additionally, whereas the disclosure of sensitive data and dynamic IP addresses normally requires an order by the competent court, contractual user data (such as the user's name, address, telephone number, and date of birth) can be obtained through automated processes. The requirement of judicial review has been subject to two empirical studies, both of

122 Nicolas Fennen, "Internationale Internetüberwachung: 'Die Bundesregierung hat Briefe geschrieben und wartet auf Antwort'" [International internet surveillance: The Federal Government has written letters and is waiting for an answer], Netzpolitik.org, June 26, 2013, <https://netzpolitik.org/2013/internationale-internetuberwachung-die-regierung-hat-briefe-geschrieben-und-wartet-auf-antwort/>; Spiegel Online, "NSA-Affäre: Datenschützer Schaar greift Innenminister Friedrich an" [NSA scandal: Commissioner for Data Protection Schaar attacks Minister of the Interior Friedrich], September 5, 2013, <http://www.spiegel.de/politik/deutschland/schaar-uebt-in-nsa-ffaere-harsche-kritik-an-bundesregierung-a-920706.html>.

123 Manuel Bewarder/Thorsten Jungholt, "Friedrich erklärt Sicherheit zum 'Supergrundrecht'" [Friedrich declares security to be 'super fundamental right'], Welt Online, July 16, 2013, <http://www.welt.de/politik/deutschland/article118110002/Friedrich-erklaert-Sicherheit-zum-Supergrundrecht.html>.

124 Coalition Agreement, p. 104.

125 Hans Leyendecker/Georg Mascolo, "Die Amerikaner haben uns belogen" [The Americans have lied to us], Sueddeutsche.de, January 13, 2014, <http://www.sueddeutsche.de/politik/kaum-hoffnung-auf-no-spy-abkommen-die-amerikaner-haben-uns-belogen-1.1862138>.

126 Steffen Hebestreit, "Ermittlungen gegen die NSA" [Investigations against the NSA], Frankfurter Rundschau, February 8, 2014, <http://www.fr-online.de/datenschutz/nsa-ffaere-ermittlungen-gegen-die-nsa.1472644.26127294.html>.

127 Markus Beckedahl, "de Maziere findet NSA-Überwachung maßlos – Generalbundesanwalt findet nichts" [de Maziere considers NSA surveillance excessive – Federal Prosecutor General cannot find anything], Netzpolitik.org, April 7, 2014, <https://netzpolitik.org/2014/de-maziere-findet-nsa-ueberwachung-masslos-generalbundesanwalt-findet-nichts/>.

128 United States, United Kingdom, Canada, Australia, and New Zealand; see Carly Nyst, "The Five Eyes Fact Sheet", Privacy International, November 27, 2013, <https://www.privacyinternational.org/blog/the-five-eyes-fact-sheet>.

129 Eckart Lohse, "Bundestag setzt Untersuchungsausschuss ein" [Federal Parliament appoints commission of inquiry], faz.net, March 20, 2014, <http://www.faz.net/aktuell/politik/inland/nsa-ffaere-bundestag-setzt-untersuchungsausschuss-ein-12855445.html>.

130 Bundesrat, "Mehr Rechtssicherheit bei Bestandsdatenauskunft" [More legal certainty for stored data inquiry], Press release no. 251/2013, May 3, 2013, <http://www.bundesrat.de/SharedDocs/pm/2013/094-2013.html>.

which found that in the majority of cases a review by a judge does not take place.¹³¹ Data protection experts criticize the lower threshold for intrusions of citizens' privacy as disproportionate. Two members of the Pirate Party and a lawyer who had already filed the complaint against the data retention law in 2007 have filed a new constitutional complaint against the telecommunication act.¹³² In the aftermath of the enactment on the federal level, several German states established their own laws, with one state legislation even entirely omitting the requirement of preceding judicial review.¹³³

Telecommunications interception by state authorities for reasons of criminal prosecution is regulated by the code of criminal procedure (StPO) and is understood as a serious interference with basic rights. It may only be employed for the prosecution of serious crimes for which specific evidence exists and when other, less-intrusive investigative methods are likely to fail. According to recent statistics published by the Federal Office of Justice, there were a total of 23,687 orders for telecommunications interceptions in 2012, compared to 21,118 in 2011, of which 4,488 concerned internet communications, compared to only 1,345 in the year before.¹³⁴ There were also a total of 18,026 orders requesting internet traffic data in 2012, compared to 14,153 in 2011.¹³⁵ Surveillance measures conducted by the secret services under the Act for Limiting the Secrecy of Letters, the Post, and Telecommunications exceed these figures. For 2012, the competent Parliamentary Control Panel reported that a total of 851,691 telecommunications – most of them email – were scanned, of which only 288 were considered relevant.¹³⁶ The panel highlighted the steady decline in surveillance measures, the number of which had been above 2.8 million in 2011. The email contents were scanned for keywords relating to certain “areas of risk,” namely international terrorism, proliferation of arms and other military technology, and human smuggling.¹³⁷

Recent evidence shows that German police authorities regularly make use of radio cell queries

131 Two independent studies from by the Universität of Bielefeld (2003: Wer kontrolliert die Telefonüberwachung? Eine empirische Untersuchung zum Richtervorbehalt bei der Telefonüberwachung” [Who controls telecommunication surveillance? An empirical investigation on judicial overview of telecommunication surveillance], edited by Otto Backes and Christoph Gusy, 2003) and Max-Planck-Institut Institute for Foreign and International Criminal Law (Hans-Jörg Albrecht, Claudia Dorsch, Christiane Krüpe 2003: Rechtswirklichkeit und Effizienz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen [Legal reality and efficiency of wiretapping, surveillance and other covert investigation measures], <http://www.mpg.de/868492/pdf.pdf>) evaluated the implementation of judicial oversight of telecommunication surveillance. Both studies found that neither the mandatory judicial oversight nor the duty of notification of affected citizens are carried out. According to the study by the Max Planck Institute, only 0,4 % of the requests for court orders were denied.

132 Breyer, Patrick, “Verfassungsbeschwerde gegen Bestandsdatenauskunft eingereicht” [Constitutional complaint against stored data inquiry submitted], July 1, 2013, <http://bestandsdatenauskunft.de/?p=357>.

133 Stefan Krempel, “Länder verabschieden neue Regeln zur Bestandsdatenauskunft” [States enact new rules concerning stored data inquiries], heise.de, June 22, 2013, <http://www.heise.de/newsticker/meldung/Laender-verabschieden-neue-Regeln-zur-Bestandsdatenauskunft-1894865.html>.

134 Bundesamt für Justiz [Federal Office of Justice], “Übersicht Telekommunikationsüberwachung (Maßnahmen nach §100a StPO) für 2012”, October 24, 2013 [Summary of telecommunication surveillance for 2012] <http://bit.ly/1lliOCT>.

135 Bundesamt für Justiz, “Übersicht Verkehrsdatenerhebung (Maßnahmen nach § 100g StPO) für 2012” [Summary of traffic data collection for 2012], August 1, 2013, <http://bit.ly/1nhtaru>.

136 These are aggregated figures related to the three areas of risk in which scannings took place according to the report of the Parliamentary Control Panel. Cf. Deutscher Bundestag, Drucksache 18/218, December 19, 2013, p.7, <http://dip21.bundestag.de/dip21/btd/18/002/1800218.pdf>. Note that the annually presented numbers do not refer to the last year but to the year before, i.e. 2012. The Parliamentary Control Panel periodically reports to the parliament and nominates the members of the G10 Commission. The G10 Commission controls surveillance measures and is also responsible for overseeing telecommunications measures undertaken on the basis of the Counterterrorism Act of 2002 and the Amendment Act of 2007. See also: http://www.bundestag.de/htdocs_e/bundestag/committees/bodies/scrutiny/index.html.

137 Cf. the report of the Parliamentary Control Panel: Deutscher Bundestag, Drucksache 18/218, December 19, 2013, p. 7, <http://dip21.bundestag.de/dip21/btd/17/127/1712773.pdf>.

for criminal investigation.¹³⁸ The state government of North Rhine-Westphalia has conceded that between December 2010 and August 2013, the state's law enforcement authorities employed the method 10,330 times, which equates to more than 10 radio cell queries each day.¹³⁹ Projected onto the Federal Republic of Germany, this would mean more than 50 queries every day.¹⁴⁰ The extensive use of radio cell queries has raised questions of proportionality.¹⁴¹ In May 2013, members of the group of Die Linke in the Saxon parliament filed a constitutional complaint to the Federal Constitutional Court in reaction to the allegedly disproportionate employment of radio cell queries during an anti-Nazi demonstration in Dresden in February 2011.¹⁴² According to reports, the measures had gathered call detail records and other data of almost 60,000 people, disregarding whether they had participated in the demonstration or not.¹⁴³

For the sake of transparency, Germany's biggest ISP, Deutsche Telekom, has started to inform the public about the number of requests from authorities regarding stored and traffic data, IP address identification, and telecommunications interceptions. According to the report, in 2013 the provider enabled 49,796 telecommunications interceptions and disclosed 436,331 sets of traffic data and 28,162 sets of stored data. The authorities also requested the identification of 946,641 IP addresses.¹⁴⁴ However, while the disclosure has been lauded in principle, its content was criticized due to the lack of detail.¹⁴⁵ According to Green Party member Malte Spitz, traffic data inquiries include radio cell queries, which means that one set potentially includes thousands of individual traffic data, thus rendering the report insufficiently transparent concerning this aspect, with the effect that the extent of surveillance is in fact downplayed.¹⁴⁶

In May 2013, then Federal Commissioner for Data Protection and Freedom of Information Peter Schaar disclosed that certain offices of the agency for labor had considered investigating the behavior of unemployed persons via social media such as Facebook in order to match their

138 Berlin Commissioner for Data Protection and Freedom of Information, Alexander Dix: "Abschlussbericht zur rechtlichen Überprüfung von Funkzellenabfragen [Report on the legal examination of radio cell queries], p. 16, http://www.datenschutz-berlin.de/attachments/896/Pr_fbericht.pdf?1346753690.

139 Kleine Anfrage 1549 des Abgeordneten Frank Herrmann der Fraktion der PIRATEN „Ermittlungen mit Funkzellenabfragen in Nordrhein-Westfalen [Minor interpellation 1549 by member of parliament Frank Herrmann of the Pirate Party "Investigations with radio cell queries in North Rhine-Westphalia], LT-Drs. 16/3785, September 9, 2013, https://netzpolitik.org/wp-upload/2013-09-09_FZA-NRW.pdf.

140 Andre Meister, "Funkzellenabfrage: Allein in Nordrhein-Westfalen finden jeden Tag mehr als zehn Handy-Rasterfahndungen statt" [Radio cell query: in North Rhine-Westphalia alone more than 10 cell phone grid investigations each day], Netzpolitik.org, September 11, 2013, <https://netzpolitik.org/2013/funkzellenabfrage-allein-in-nordrhein-westfalen-findnen-jeden-tag-mehr-als-zehn-handy-rasterfahndungen-statt/>.

141 Berlin Commissioner for Data Protection and Freedom of Information, 2012, see footnote 35, p. 17 ; Landgericht Dresden [District Court of Dresden] Az. 15 Qs 34/12, <http://bit.ly/15RxTaL>.

142 Barbara Wegner, "'Handygate' – LINKE MdL reichen Verfassungsbeschwerde ein" ['Cell Phone Gate': Linke members of parliament file constitutional complaint], press release 171/2013, May 23, 2013, <http://www.linksfraktionsachsen.de/index.php?section=news&cmd=details&newsid=2608>.

143 Andre Meister, "Handygate in Dresden: Dritte Verfassungsbeschwerde gegen Funkzellenabfrage zu Anti-Nazi-Protessen" [Cell Phone Gate: Third constitutional complaint against radio cell query during anti nazi protests], Netzpolitik.org, September 25, 2013, <https://netzpolitik.org/2013/handygate-in-dresden-dritte-verfassungsbeschwerde-gegen-funkzellenabfrage-zu-anti-nazi-protessen/>.

144 Deutsche Telekom, "Jahresbericht – Auskunft an Sicherheitsbehörden" [Annual report – information to security authorities], May 5, 2014, <http://www.telekom.com/verantwortung/datenschutz/235758>.

145 Die Zeit Online, "Transparenzbericht verschleiert Ausmaß der Überwachung" [Transparency report disguises degree of surveillance], May 11, 2014, <http://www.zeit.de/digital/datenschutz/2014-05/telekom-transparenz-bericht-verkehrsdatsaetze>.

146 Malte Spitz, "Volle Transparenz bei der Telekommunikationsüberwachung" [Full transparency on telecommunications surveillance], May 11, 2014, <http://malte-spitz.de/2014/05/11/volle-transparenz-bei-der-telekommunikationsueberwachung/>.

statements toward the authorities.¹⁴⁷ Agency officials denied that the practice was in fact being pursued, while Schaar publically stated that it would be illegal.¹⁴⁸ For the purpose of discovering welfare fraud, the agency furthermore called for the enactment of a statutory basis for allowing online investigations into the conduct of welfare recipients' more generally.¹⁴⁹ The Pirate Party contested the constitutionality of the proposed framework.¹⁵⁰

On April 8, 2014, after both the Irish High Court and the Austrian Constitutional Court had asked for a preliminary ruling on the validity of the EU Data Retention Directive, the European Court of Justice declared the directive to be invalid due to its disproportionate interference with the fundamental rights to respect for private life and to the protection of personal data.¹⁵¹ Although the Federal Ministry of Justice had reportedly already finalized a draft for a new law on data retention,¹⁵² the government declared that it did not intend to enact any regulation prior to the issuing of a new EU directive on the matter.¹⁵³ So far, it is unclear whether or when the EU Commission will propose an amended directive.¹⁵⁴ Furthermore, the ECJ judgment is likely to have a significant impact on the drafting process of a new EU Data Protection Directive. According to independent scholars, to be in line with the Court's findings, the proposed directive will need to include, among other things, precise rules on public-private cooperation in the law enforcement sector, independent oversight, and the permitted time period of potential data retention.¹⁵⁵

According to a recent survey, 30 percent of all companies in Germany were victims of cyberattacks within the last two years. Of those attacks, 30 percent were conducted via the internet, while 58 percent were carried out with the help of flash drives or other devices by persons in direct contact with the attacked computer or network.¹⁵⁶ A particularly critical cyberattack was reported in April 2014, when the German Aerospace Center (*Deutsches Zentrum für Luft- und Raumfahrt*) disclosed

147 Pascal Beucker/Anja Krüger, "Der Arbeitsagentur gefällt das" [The agency for labor likes this], taz.de, May 24, 2013, <http://www.taz.de/1116813/>.

148 Achim Sawall, "Jobcenter sollen nicht bei Facebook recherchieren" [Job centers ought not investigate on Facebook], golem.de, May 24, 2013, <http://www.golem.de/news/bundesdatenschuetzer-jobcenter-sollen-nicht-bei-facebook-recherchieren-1305-99432.html>.

149 Spiegel Online, "Internethandel: Arbeitsagentur will Hartz-IV-Empfänger im Netz überwachen" [Internet trading: agency for labor wants to monitor welfare recipients on the net], November 14, 2013, <http://www.spiegel.de/wirtschaft/soziales/arbeitsagentur-will-hartz-iv-empfaenger-im-netz-ueberwachen-a-933520.html>.

150 Pirate Party, "Verdachtsunabhängige Überwachung von Alg II-Empfängern gefährdet Rechtsstaat" [Surveillance of welfare recipients without suspicion threatens the rule of law], press release, November 14, 2013, <https://www.piratenpartei.de/2013/11/14/verdachtsunabhaengige-ueberwachung-von-alg-ii-empfaengern-gefaehrdet-rechtsstaat/>.

151 Court of Justice of the European Union, "The Court of Justice declares the Data Retention Directive to be invalid", press release No 54/14, April 8, 2014, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf>.

152 Kai Biermann, "Gerichtshof kippt Richtlinie zur Vorratsdatenspeicherung" [European Court of Justice declares Data Retention Directive as invalid], Zeit Online, April 8, 2014, <http://www.zeit.de/digital/datenschutz/2014-04/vorratsdatenspeicherung-europaeischer-gerichtshof-eugh>.

153 Ingo Pakalski, "Vorerst kein neues Gesetz zur Vorratsdatenspeicherung" [No new law on data retention for the time being], golem.de, April 14, 2014, <http://www.golem.de/news/bundesregierung-vorerst-kein-neues-gesetz-zur-vorratsdatenspeicherung-1404-105837.html>.

154 Andre Meister, "Debatte im Europaparlament: Die Vorratsdatenspeicherung ist tot. Nach der Wahl entscheidet sich, ob das so bleibt." [Debate in the European Parliament: Data retention is dead. After the elections it will turn out whether it will stay that way], Netzpolitik.org, April 17, 2014, <https://netzpolitik.org/2014/debatte-im-europaparlament-die-vorratsdatenspeicherung-ist-tot-nach-der-wahl-entscheidet-sich-ob-das-so-bleibt/>.

155 Franziska Boehm and Mark D. Cole, "Data Retention after the Judgement of the Court of Justice of the European Union", Münster/Luxembourg, 30 June 2014, http://www.janalbrecht.eu/fileadmin/material/Dokumente/Boehm_Cole_-_Data_Retention_Study_-_June_2014.pdf, p. 84-87.

156 BITKOM, "Fast ein Drittel der Unternehmen verzeichnet Cyberangriffe" [Almost a third of all companies registers cyberattacks], press release, March 11, 2014, http://www.bitkom.org/de/presse/8477_78903.aspx.

that for months it had been attempting to fend off a very elaborate and sophisticated cyberattack that had allegedly been carried out by a foreign intelligence service. Among other things, the Center conducts research in defense technologies.¹⁵⁷

In response to the rising number of attacks, the Federal Ministry of Interior published a “Cyber Security Strategy for Germany” in 2011.¹⁵⁸ In March 2013, the Federal Ministry of the Interior proposed a law to improve the security of information networks by obliging telecommunication firms and critical infrastructure operators to report security breaches to the Federal Office for Information Security (BSI).¹⁵⁹ The Federal Ministry of Economics and Technology blocked the legislative draft in the early consultation phase. Digital rights advocates criticized the legislative proposal because it did not include a notification of users in instances of security breaches. Industry associations, on the other hand, feared potential costs and bureaucratic burdens of notifying the Federal Office for Information Security.¹⁶⁰ Despite these reservations, in their coalition agreement the governing parties announced intentions to further promote such a law,¹⁶¹ aiming for enactment before mid-2015.¹⁶²

157 Spiegel Online, “Cyber-Angriffe: Spähangriff auf Deutsches Luft- und Raumfahrtzentrum” [Cyberattacks: espionage intrusions into German Aerospace Center], April 13, 2014, <http://www.spiegel.de/netzwelt/web/dlr-mit-trojanern-von-geheimdienst-ausgespaehet-a-964099.html>.

158 Federal Ministry of the Interior, “Cyber Security Strategy for Germany,” Edition February 2011, http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Informationsgesellschaft/cyber.pdf?__blob=publicationFile.

159 Cf. Federal Ministry of the Interior, “Entwurf eines Gesetzes zur Erhöhung der Sicherheit informationstechnischer Systeme” [Draft legislative proposal for improving the security of information networks], March 5, 2013, <http://bit.ly/XsVWs1>.

160 Cf. Andre Meister, “IT-Sicherheitsgesetz vor dem Aus: Wirtschaft verhindert Meldepflicht über Sicherheitsvorfälle” [Cyber security law on the brink: Industry blocks reporting obligation for security breaches], June 5, 2013, <https://netzpolitik.org/2013/it-sicherheitsgesetz-vor-dem-aus-wirtschaft-verhindert-meldepflicht-uber-sicherheitsvorfaelle/>.

161 Coalition agreement, p. 103.

162 Chrisitan Raum, “IT-Sicherheitsgesetz: staatliche Kontrolle und höhere Kosten” [IT security law: governmental control and higher costs], ZDNet, March 10, 2014, <http://www.zdnet.de/88186435/it-sicherheitsgesetz-staatlich-kontrolle-und-hoehere-kosten/>.