THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

Fifth Edition

Editor
JOHN P JANKA

LAW BUSINESS RESEARCH LTD
THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW
THE RESTRUCTURING REVIEW
THE PRIVATE COMPETITION ENFORCEMENT REVIEW
THE DISPUTE RESOLUTION REVIEW
THE EMPLOYMENT LAW REVIEW
THE PUBLIC COMPETITION ENFORCEMENT REVIEW
THE BANKING REGULATION REVIEW
THE INTERNATIONAL ARBITRATION REVIEW
THE MERGER CONTROL REVIEW
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW
THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW
THE CORPORATE GOVERNANCE REVIEW
THE CORPORATE IMMIGRATION REVIEW
THE INTERNATIONAL INVESTIGATIONS REVIEW
THE PROJECTS AND CONSTRUCTION REVIEW
THE INTERNATIONAL CAPITAL MARKETS REVIEW
THE REAL ESTATE LAW REVIEW
THE PRIVATE EQUITY REVIEW
THE ENERGY REGULATION AND MARKETS REVIEW
THE INTELLECTUAL PROPERTY REVIEW
THE ASSET MANAGEMENT REVIEW
ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM
AJUMOGOBIA & OKEKE
ALI BUDIARDJO, NUGROHO, REKSODIPUTRO
BAKER & MCKENZIE.WONG & LEOW
BING HODNELAND ADVOKATSELSKAP DA
CASTRO, BARROS, SOBRAL, GOMES ADVOGADOS
CLEARY GOTTLIEB STEEN & HAMILTON LLP
DESCHAMPS Y ASOCIADOS SC
ELVINGER, HOSS & PRUSSEN
GOODMANS LLP
GRATA LAW FIRM
GÜN + PARTNERS
JONES DAY
KARATZAS & PARTNERS LAW FIRM
LATHAM & WATKINS LLP
LAW FIRM OF HASSAN MAHASSNI
ROSCHER
SETH DUA & ASSOCIATES
SHAY & PARTNERS
Acknowledgements

URÍA MENÉNDEZ

YOOM & YANG LLC

ZHONG LUN LAW FIRM
# CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>COMPETITION LAW OVERVIEW</td>
<td>1</td>
<td>Abbott B Lipsky, Jr with John D Colahan</td>
</tr>
<tr>
<td>2</td>
<td>BRAZIL</td>
<td>16</td>
<td>André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes</td>
</tr>
<tr>
<td>3</td>
<td>CANADA</td>
<td>28</td>
<td>Richard Corley, Michael Koch and Monique McAlister</td>
</tr>
<tr>
<td>4</td>
<td>CHINA</td>
<td>48</td>
<td>Jihong Chen</td>
</tr>
<tr>
<td>5</td>
<td>EU OVERVIEW</td>
<td>61</td>
<td>Maurits J F M Dolmans, Francesco Maria Salerno and Federico Marini-Balestra</td>
</tr>
<tr>
<td>6</td>
<td>FINLAND</td>
<td>89</td>
<td>Mikko Manner, Anna Haapanen and Suvi Laes</td>
</tr>
<tr>
<td>7</td>
<td>FRANCE</td>
<td>101</td>
<td>Myria Saarinen and Jean-Luc Juhan</td>
</tr>
<tr>
<td>8</td>
<td>GERMANY</td>
<td>119</td>
<td>Laura Johanna Reinlein and Gabriele Wunsch</td>
</tr>
</tbody>
</table>

**Editor's Preface**

Information about the editor's preface.

**List of Abbreviations**

List of abbreviations for the document.

---

*John P Janka*

---

*Abbott B Lipsky, Jr with John D Colahan*
Chapter 9  GREECE ................................................................. 136
Anna Manda and Valia Apostolopoulou

Chapter 10  HONG KONG ...................................................... 154
Simon Berry and Carmen Guo

Chapter 11  INDIA ................................................................. 171
Atul Dua, Salman Waris and Arjun Uppal

Chapter 12  INDONESIA ......................................................... 185
Agus Abadi Deradjat and Kevin Omar Sidharta

Chapter 13  ITALY ................................................................. 199
Stefano Macchi di Cellere

Chapter 14  KAZAKHSTAN ...................................................... 214
Yerzhan Yessimkhanov, Kuben Abzhanov and Assem Tnalina

Chapter 15  KOREA .............................................................. 225
Wonil Kim and Kwang-Wook Lee

Chapter 16  LEBANON ............................................................ 237
Souraya Machnouk, Rania Khoury and Ziad Maatouk

Chapter 17  LUXEMBOURG .................................................... 250
Linda Funck

Chapter 18  MEXICO ............................................................. 272
Jaime Deschamps and Andoni Zurita

Chapter 19  NIGERIA .............................................................. 282
Ebunoluwa Awosika and Olumide K Obayemi

Chapter 20  NORWAY ........................................................... 296
Olav Tørvund, Jon Wessel-Aas and Magnus Ødegaard
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Country</th>
<th>Page</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>21</td>
<td>PORTUGAL</td>
<td>304</td>
<td>Joana Torres Ereio, Joana Mota and Raquel Maurício</td>
</tr>
<tr>
<td>22</td>
<td>SAUDI ARABIA</td>
<td>323</td>
<td>Rahul Goswami and Zaid Mahayni</td>
</tr>
<tr>
<td>23</td>
<td>SINGAPORE</td>
<td>337</td>
<td>Ken Chia and Seng Yi Lin</td>
</tr>
<tr>
<td>24</td>
<td>SPAIN</td>
<td>359</td>
<td>Pablo González-Espejo</td>
</tr>
<tr>
<td>25</td>
<td>SWEDEN</td>
<td>375</td>
<td>Erik Ficks and Björn Johanson Heigis</td>
</tr>
<tr>
<td>26</td>
<td>TAIWAN</td>
<td>387</td>
<td>Arthur Shay and David Yeh</td>
</tr>
<tr>
<td>27</td>
<td>TURKEY</td>
<td>402</td>
<td>Begüm Yavuzdoğan Okumuş, Bentley J Yaffe and Bensu Aydin</td>
</tr>
<tr>
<td>28</td>
<td>UNITED KINGDOM</td>
<td>420</td>
<td>Omar Shah and Gail Crawford</td>
</tr>
<tr>
<td>29</td>
<td>UNITED STATES</td>
<td>448</td>
<td>John P Janka and Jarrett S Taubman</td>
</tr>
<tr>
<td>30</td>
<td>UZBEKISTAN</td>
<td>468</td>
<td>Nodir Yuldashev</td>
</tr>
<tr>
<td>Appendix 1</td>
<td>ABOUT THE AUTHORS</td>
<td>479</td>
<td></td>
</tr>
<tr>
<td>Appendix 2</td>
<td>CONTRIBUTING LAW FIRMS’ CONTACT DETAILS</td>
<td>501</td>
<td></td>
</tr>
</tbody>
</table>
This fully updated fifth edition of The Technology, Media and Telecommunications Review provides an overview of the evolving legal constructs that govern the issues facing lawmakers and regulators, as well as service providers and new start-ups, in 29 jurisdictions around the world.

As noted in the previous edition, the pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models continue to fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today’s world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a ‘light touch’ in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; 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 the growing influence of the ‘new media’ conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address ‘network neutrality’ concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

I would like to take the opportunity to thank all the contributors for their analytical input into this publication. In the space allotted, the authors simply cannot address all of the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2014
LIST OF ABBREVIATIONS

3G Third-generation (technology)
4G Fourth-generation (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
FTTC Fibre to the curb
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>FTTH</td>
<td>Fibre to the home</td>
</tr>
<tr>
<td>FTTN</td>
<td>Fibre to the node</td>
</tr>
<tr>
<td>FTTx</td>
<td>Fibre to the x</td>
</tr>
<tr>
<td>FWA</td>
<td>Fixed wireless access</td>
</tr>
<tr>
<td>Gb/s</td>
<td>Gigabits per second</td>
</tr>
<tr>
<td>GB/s</td>
<td>Gigabytes per second</td>
</tr>
<tr>
<td>GSM</td>
<td>Global system for mobile communications</td>
</tr>
<tr>
<td>HDTV</td>
<td>High-definition TV</td>
</tr>
<tr>
<td>HITS</td>
<td>Headend in the sky</td>
</tr>
<tr>
<td>HSPA</td>
<td>High-speed packet access</td>
</tr>
<tr>
<td>IaaS</td>
<td>Infrastructure as a service</td>
</tr>
<tr>
<td>IAC</td>
<td>Internet access provider</td>
</tr>
<tr>
<td>ICP</td>
<td>Internet content provider</td>
</tr>
<tr>
<td>ICT</td>
<td>Information and communications technology</td>
</tr>
<tr>
<td>IPTV</td>
<td>Internet protocol TV</td>
</tr>
<tr>
<td>IPv6</td>
<td>Internet protocol version 6</td>
</tr>
<tr>
<td>ISP</td>
<td>Internet service provider</td>
</tr>
<tr>
<td>kb/s</td>
<td>Kilobits per second</td>
</tr>
<tr>
<td>kB/s</td>
<td>Kilobytes per second</td>
</tr>
<tr>
<td>LAN</td>
<td>Local area network</td>
</tr>
<tr>
<td>LRIC</td>
<td>Long-run incremental cost</td>
</tr>
<tr>
<td>LTE</td>
<td>Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)</td>
</tr>
<tr>
<td>Mb/s</td>
<td>Megabits per second</td>
</tr>
<tr>
<td>MB/s</td>
<td>Megabytes per second</td>
</tr>
<tr>
<td>MMDS</td>
<td>Multichannel multipoint distribution service</td>
</tr>
<tr>
<td>MMS</td>
<td>Multimedia messaging service</td>
</tr>
<tr>
<td>MNO</td>
<td>Mobile network operator</td>
</tr>
<tr>
<td>MSO</td>
<td>Multi-system operators</td>
</tr>
<tr>
<td>MVNO</td>
<td>Mobile virtual network operator</td>
</tr>
<tr>
<td>MWA</td>
<td>Mobile wireless access</td>
</tr>
<tr>
<td>NFC</td>
<td>Near field communication</td>
</tr>
<tr>
<td>NGA</td>
<td>Next-generation access</td>
</tr>
<tr>
<td>NIC</td>
<td>Network information centre</td>
</tr>
<tr>
<td>NRA</td>
<td>National regulatory authority</td>
</tr>
<tr>
<td>OTT</td>
<td>Over-the-top (providers)</td>
</tr>
<tr>
<td>PaaS</td>
<td>Platform as a service</td>
</tr>
<tr>
<td>PNENTS</td>
<td>Public non-exclusive telecommunications service</td>
</tr>
<tr>
<td>PSTN</td>
<td>Public switched telephone network</td>
</tr>
<tr>
<td>RF</td>
<td>Radio frequency</td>
</tr>
<tr>
<td>SaaS</td>
<td>Software as a service</td>
</tr>
<tr>
<td>SBO</td>
<td>Services-based operator</td>
</tr>
<tr>
<td>SMS</td>
<td>Short message service</td>
</tr>
<tr>
<td>STD–PCOs</td>
<td>Subscriber trunk dialling–public call offices</td>
</tr>
<tr>
<td>UAS</td>
<td>Unified access services</td>
</tr>
<tr>
<td>UASL</td>
<td>Unified access services licence</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>UCL</td>
<td>Unified carrier licence</td>
</tr>
<tr>
<td>UHF</td>
<td>Ultra-high frequency</td>
</tr>
<tr>
<td>UMTS</td>
<td>Universal mobile telecommunications service</td>
</tr>
<tr>
<td>USO</td>
<td>Universal service obligation</td>
</tr>
<tr>
<td>UWB</td>
<td>Ultra-wideband</td>
</tr>
<tr>
<td>VDSL</td>
<td>Very high speed digital subscriber line</td>
</tr>
<tr>
<td>VHF</td>
<td>Very high frequency</td>
</tr>
<tr>
<td>VOD</td>
<td>Video on demand</td>
</tr>
<tr>
<td>VoB</td>
<td>Voice over broadband</td>
</tr>
<tr>
<td>VoIP</td>
<td>Voice over internet protocol</td>
</tr>
<tr>
<td>W-CDMA</td>
<td>Wideband code division multiple access</td>
</tr>
<tr>
<td>WiMAX</td>
<td>Worldwide interoperability for microwave access</td>
</tr>
</tbody>
</table>
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 2013, the ICT sector is one of the largest economic sectors in Germany. Constantly growing, it already employs more than 900,000 people in Germany.\(^3\)

ICT has become a driving force in Germany’s economy contributing to 4.7 per cent of the national gross value added in 2013. 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 government adopted specific programmes and strategies tailored to the needs of the ICT sector. Currently, the German federal government is developing the Digital Agenda 2014–2017 focusing on a strategy for the digital future of Germany\(^4\) and planning to

---

1. Laura Johanna Reinlein and Gabriele Wunsch are associates at Latham & Watkins LLP.
2. See www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html.
3. 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. In 2013 about 77 per cent of the German private households had internet access: www.bmwi.de/DE/Themen/Wirtschaft/branchenfokus,did=197740.html.
ensure nationwide broadband access with transmission rates of at least 50Mb/s also in rural areas until 2018 with the initiative Netalliance Digital Germany.\(^5\)

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; the discussion is ongoing in Germany, with no clear trend apparent. The area of application of media law needs to be clarified, in light of the appearance of new and increasingly interconnected services along the convergence trend, and services need to be unambiguously and distinctly assigned to their suitable legal frameworks. Another predominant subject of current discussion is how to ensure internet security and data protection as more than 50 per cent of all German companies in every sector are already depending on the reliability of their own IT systems as well as a secure cyberspace at their disposal.

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,\(^6\) whose responsibilities – apart from the supervision itself – includes granting authorisation according to Section 20, Paragraph 1 of the Inter-State Broadcasting Treaty (RStV), and assigning transmission capacities. Private and public television broadcasting in Germany is governed by the RStV, which outlines the side-by-side existence of public and private broadcasting. The provisions of the RStV have been modified 15 times since it came into force in 1987. The 15th amendment to the RStV came into effect on 1 January 2013.\(^7\) Further legal sources, at a federal level, are various interstate treaties, especially

\(^5\) The netalliance as a platform for innovation and investment is formed by the government and ICT-companies and commenced its work in 2014 under the guidance of the German minister for transport and digital infrastructure Alexander Dobrindt (see www.bmvi.de/SharedDocs/DE/Artikel/Digitales/startschuss-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html).

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

\(^7\) The 15th amendment primarily concerns the reform of the financing of the public broadcasting system; since January 2013, the level of broadcasting fees no longer depends on the kind or number of the receiver devices but a flat fee is charged for every household or office. The 14th modification of 2010 did not become effective because it had not been ratified by the state parliament of North-Rhine-Westphalia.
on the Protection of Human Dignity and the Protection of Minors in Broadcasting and in Telemedia (the JMStV) and European-level directives (e.g., the Audiovisual Media Services Directive (AVMSD), treaties and conventions). In addition, there are individual state media laws.

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

All private broadcasters require a licence for the purpose of providing broadcasting services. According to Section 20, Paragraph 2 of the RStV, the provider of an electronic information and communications service – if it is to be categorised as 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 choice either submit a licence application within three months or change the service in a way that it is no longer to be qualified as 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 broadcast.

If an enterprise wishes to obtain a licence as a national broadcasting service provider, it needs to be a natural or legal person who:

a. has unlimited legal capacity;
b. has not lost the ability to serve in a public capacity as a result of a legal ruling;
c. has not forfeited the fundamental right of freedom of expression under the German Constitution;
d. has not been banned as an organisation;
e. has its residence or seat in Germany, another Member State of the European Union or another state of the European Economic Area (EEA) and can be pursued by the courts; and
f. guarantees that in providing broadcasting, it will respect the legal provisions and any administrative acts passed thereon.

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 ALM Statute). The main focus is on promoting programming diversity and 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, also the promotion of media literacy of viewers and listeners.

---

8 Section 50ff of the RStV.
9 Section 38, Paragraph 2 of the RStV.
10 Section 20a, Paragraph 1 of the RStV.
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 committees: the Licensing and Monitoring Commission (ZAK), the Directors’ Conference of the State Media Authorities, the Committee Chairpersons’ Conference, the Commission for the Protection of Minors in the Media (KJM) and the Commission on Concentration in the Media (KEK).

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 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.

German telecommunications law has developed in accordance with the European Regulations. The 2002 Telecoms Package caused fundamental changes to the previous German telecommunications law and was implemented into the German Telecommunications Act (TKG) on 22 June 2004. Since then, further changes have been made (e.g., on data retention). The amendment of the TKG of 3 May 2012 particularly strengthened consumers’ rights, for example, as regards the transparency of costs of telecommunication services and the charging of costs (such as those relating to waiting loops). Moreover, the amendment tackled the further development of broadband networks and spectrum regulation. The amendment of 1 July 2013 substantially extended the rights of security authorities to monitor mobile and online communication and is currently being discussed critically.

ii Regulated activities

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 Federal Network Agency when they start to provide the services or the network. A notification is not necessary for non-public telecommunications networks or services.

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 may prohibit certain acts that might interfere with

---

12 Section 6 of the TKG.
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.\(^\text{13}\)

Due to the security-related aspects of telecommunications services, the German Telecommunications Act 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 and a provider with significant market power is not able to choose its customers freely).\(^\text{14}\)

The TKG also provides for mandatory maximum liability of telecommunications providers for negligent infringements. The provider’s liability for a publicly available telecommunications service is capped at compensation for damages in the amount of €12,500 with regard to an individual end-user if the provider’s infringing act was not wilful. The total liability for claims by several end-users caused by a single event is capped at an amount of €10 million if the provider’s infringing act was not wilful.\(^\text{15}\)

The RStV contains special ownership control provisions\(^\text{16}\) that are designed to ensure media-plurality objectives. These rules apply in addition to the general merger control regime under German and European competition law and are administered by the KEK.

### iv Transfers of control and assignments

The German merger control provisions are enforced by the Federal Cartel Office (the 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.

The filing of merger notifications in Germany is mandatory if the turnover thresholds according to Section 35, Paragraph 1 of the GWB are met and none of the *de minimis* exemptions\(^\text{17}\) apply. In addition, the completion of a (cleared) merger must be announced without undue delay (post-completion notice). If the statutory conditions

\(^{13}\) The Foreign Trade Law was last modified and thereby fully modernised in June 2013 to increase its comprehensibility.

\(^{14}\) See Sections 21 and 28 of the TKG.

\(^{15}\) See Section 44a of the TKG.

\(^{16}\) Section 25 et seq. of the RStV.

\(^{17}\) 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).
Germany

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.

For the purpose of notification, the GWB, in Section 39, requires – as a minimum
– a description of the transaction to be given in the notification, and in addition, sets out
the following required information in respect of all participating enterprises:

- a name and place of business or registered seat;
- b type of business;
- c turnover of the parties involved (worldwide, in the EU and in Germany);
- d market shares of the parties in Germany and the basis of its own calculation if the
  combined market shares amount to 20 per cent or more;
- e in the case of an acquisition of shares in another company, information about the
  shares already held in the target company and the shares to be acquired; and
- f if the enterprise is not located in Germany, a person in Germany who is authorised
to accept service.

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. 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. In practice, the filing is often done by the acquiring firm also on behalf of all other
parties involved. The GWB provides for filing fees payable to the BKartA for merger
proceedings. The fees can amount to up to €50,000. In cases of minor importance or
with insignificant effect on the German market, the filing fees normally range between
€3,000 and €15,000.

Submission of an incorrect or incomplete filing constitutes an administrative
offence and can lead to a fine of up to €100,000. The same applies to the failure to submit
a post-merger completion notice or in cases of incomplete, incorrect or late notice.19

---

books/20/jurisdictions/11/germany.

19 A fine of up to €1 million or, in the case of an undertaking, up to 10 per cent of its total
worldwide group turnover in the preceding business year can be imposed if the notifying
parties intentionally include or make use of incorrect or incomplete information in the
notification with a view to causing the BKartA to refrain from issuing a prohibition decision
or from opening a second-phase investigation.
III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation
Since the German parliament adopted the Telemedia Act (TMG) on 18 January 2007, last amended on 31 May 2010, all IP-based services are now regulated under this Act. The TMG no longer distinguishes between ‘teleservices’, which were previously covered by the Telemedia Act and ‘media services’, which were previously the subject of the Inter-State Agreement on Media Services. Instead, it combines the two concepts: commercial rules for telemedia are covered in the TMG, while aspects relating to journalistic content are regulated in a specific section of the Inter-State Broadcasting Treaty and the JMSv. 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 reality, the distinction is often difficult to make. Moreover, the regulatory structure of telemedia services oscillates somewhere between unregulated press law and the framed supervision the television and radio broadcasters are under. Thus, the state media authorities are also the regulators of telemedia services.

ii Universal service
Germany currently has good broadband penetration, which compares well against international levels. Based on the currently accepted broadband definition of at least 1Mb/s, penetration amounts to approximately 99.9 per cent of German households. Sixty per cent of German households currently have broadband access with transmission rates of 50Mb/s.

The federal government intends to give a further boost to the development of the broadband network, which will be achieved by capitalising on synergies in the construction of infrastructure, using the ‘digital dividend’, formulating regulation that fosters investment and growth through financial support. Various initiatives exist at the federal, state and local level – especially worth mentioning is the German Broadband Initiative and the Netalliance Digital Germany with the objective to ensure nationwide broadband access with transmission rates of at least 50Mb/s until 2018.

Moreover, the federal government encourages projects to pursue best-practice solutions. For example, small and medium-sized telecommunications companies can

---

20 Section 54 et seq.
21 TÜV Rheinland, Bericht zum Breitbandatlas Ende 2013 im Auftrag des BMWi; see also: www.zukunft-breitband.de and Holznagel, NJW 2012, 1622 (1626).
22 See www.breitbandinitiative.de.
23 See www.bmvi.de/SharedDocs/DE/Artikel/Digitale/startschrift-fuer-die-netzallianz-digitales-deutschland-2014-03-07.html. The newly competent Federal ministry for transport and digital infrastructure will further develop its broadband portal www.zukunft-breitband.de which had been initiated by the formerly competent Federal ministry for economic affairs. Apart from the yearly Broadband Atlas and best-practice examples, this portal also includes checklists for local authorities and information on financial support.
borrow funds on privileged terms and with adequate risk pricing through the corporate financing programme of Germany’s state-owned development bank. 24

In any event, the existing and modified 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 states or the federal government and federal states together assume up to 90 per cent of the risk of default for project financing.

The government’s policy is to actively encourage people to use the internet and to help them acquire skills in the area of new media by, for example, providing governmental services electronically (e-government), 25 or in relation to transport and health-care telematics and the digitisation of cultural assets.

The ‘white areas’ in rural Germany 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 the areas affected and the nationwide activities of associations such as the German Association of Internet Enterprises (eco, see www.eco.de), the Association of the Providers of Telecommunications and Value-Added Services (www.vatm.de) and the Association of Towns and Municipalities (www.dstgb.de).

The National IT Summit, which takes place every year, examines the main challenges and identifies solutions for high-speed networks in Germany. The development of a sustainable broadband network is seen as an essential basis for the opening of new economic potential for growth and innovative business models. The next National IT Summit will take place in Hamburg in October 2014. 26

The TKG amendment of 3 May 2012 contained special provisions to foster the extension of broadband networks. 27 Terrestrial transmission in Germany is now exclusively digital after the last analogue transmitters were switched off in 2008. Digital satellite reception also continues to expand; the same applies for cable. The terrestrial transmission of public and private TV broadcasts through satellites was terminated on 30 April 2012.

iii Restrictions on the provision of service

The Federal Network Agency is responsible for the surveillance of broadband network owners to comply with the TKG. 28 Whereas previously, the subject of net neutrality appeared to be of no major concern to the German or the European legislators – the

24 www.kfw.de/inlandsfoerderung/Unternehmen/Erweitern-Festigen/Breitbandnetze-finanzieren/.
25 The German 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. This statute facilitates electronic communication with administrative authorities.
26 www.it-gipfel.de/IT-Gipfel/Navigation/start.html.
27 Section 2 (3) of the TKG.
28 See Section 126ff of the TKG.
German legislator in particular trusted that existing competition would ensure neutral data transmission on the internet and other new media – the subject has gained considerable attention over the past years. The amendment of 3 May 2012 of the TKG introduced the concept of net neutrality. 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 or an unjustified deceleration of data traffic. After the German Telekom announced to throttle the speed of data transfers after reaching a certain data volume, the German Federal Ministry of Economics and Technology (BMWi) drafted a proposal for a regulation on net neutrality. The regulation has not been passed yet, however. A consultation process of the market participants and a study by the Body of European Regulators for Electronic Communications (GEREK) are intended to frame the actions that should be taken to safeguard net neutrality. The European Commission published its legislative plans for net neutrality on 12 September 2013 (Connected Continent legislative package). Under the Connected Continent legislative package, companies would, however, be allowed to differentiate their offers – for example, 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’.

iv Security

The federal government implemented the National Protection Plan for Information Structures (NPSI) based on plans for specific target groups. The aim is to ensure a high level of IT security in the medium and long term. The NPSI addresses all social groups, including citizens and small and medium-sized enterprises. With regard to the latter, the focus is on making them aware of the risks involved in using IT and informing them about the protection mechanisms available. The NPSI was implemented in the KRITIS plan (concerning essential pieces of IT infrastructure) on 6 September 2009. As of 5 December 2007, the Office of the Federal Government Commissioner for Information Technology was created. The Commissioner is the central point of contact for the federal states and the private sector when working with the federal government on IT matters.

29 Sections 2 (2) and 41a of the TKG.
30 Section 41a (1) of the TKG.
32 See Wimmer/Löw, MMR 2013, 636 ff.
Unfortunately, there is no single act that regulates all the facets of IT security, so from a legal perspective, the matter is very disjointed.  

**Cybersecurity**

The German parliament passed the Act to Strengthen the Security of Federal Information Technology on 14 August 2009. According to Section 1 of the Act, a Federal Office for Information Security (BSI) will be maintained as a superior federal authority, to be overseen by the Federal Ministry of the Interior. The BSI is responsible for promoting IT security in Germany.  

Due to the complexity of IT problems, the spectrum of tasks the BSI faces is wide-ranging. 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 or components and to test and evaluate compliance with IT security standards, and developing technical security standards for federal information technology and for the suitability of information technology contractors in special need of protection. Furthermore, the BSI investigates security risks associated with the use of IT and develops preventive security measures, provides information on risks and threats relating to the use of information technology and seeks out appropriate solutions. This work includes IT security testing and assessment of IT systems, including their development, in cooperation with the industry. On 23 February 2011, the German Cabinet enacted a new cyber strategy for Germany. The strategy comprises the creation of a national cyber defence centre, which works together closely with all security and police authorities, and the creation of a national cybersecurity council. The Federal Government Commissioner for Information Technology will be the chairman of the cybersecurity council.  

Further, there are plans for an IT security Act in Germany. The Federal Ministry of the Interior presented a first draft of a bill in March 2013. This bill has not been passed yet, so currently there is no IT security Act in Germany. 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 Union.  

**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 developed the notion

---

38 Gaycken and Karger, MMR 2011, 3 (6); Beucher/Utzerath, MMR 2013, 362 ff.  
39 www.bsi.bund.de.  
of an individual’s right to decide how its data are to be used.\textsuperscript{44} 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. Its requirements are partially supplemented by the German Act Against Unfair Competition with regard to certain methods of marketing – particularly by e-mail and SMS – and by the TMG. The BDSG applies mainly 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 or if the data originate from publicly accessible sources. Bodies responsible for processing data are required to correct information if necessary and to delete or block personal data if unlawfully stored or no longer needed. If a body responsible for processing data harms a data subject by unlawfully or incorrectly collecting, processing or using his or her personal 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 data concerning them and the reason for storing these data.

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\textsuperscript{45} and has been discussed extensively in the European Parliament and European Council since then. The project is supported by the European Network and Information Security Agency (ENISA).

**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 JMSrV.

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 videos, DVDs, computer games and websites. The BPjM can act only at the request of other administrative institutions, 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 the prohibition from publication, blocking the provider and fines up to €500,000.

\textsuperscript{44} Federal Constitutional Court Decision 65,1 (41).

\textsuperscript{45} KOM (2012) 11.
The JMSv forms the legal basis for assessing content distributed in broadcast or media services. The compliance of broadcast and media services with the JMSv is controlled by the KJM. The JMSv distinguishes between illegal content and content that impairs the development of minors; illegal content must not be distributed in broadcasting services or in 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 JMSv, the KJM decides on the sanctions to be imposed against the respective media content provider. The measures will depend on the severity of the breach, and can range from a complaint against the content provider to fines or even the issue being handed over to the State Prosecutor.

v The De-Mail Act
On 3 May 2011 the De-Mail Act came into force. De-Mail is a German e-government communications service that makes it possible to exchange electronic documents between citizens, agencies and companies over the internet. Through this it is now possible to offer new services for the communication via the internet whose security is verified and accredited. De-Mail services can be used as the basis for safer electronic legal and business relations. Electronic communication is now legally viewed at the same level as paper-based communication, with additional functionality. The sunrise period for registering domains, which correspond to a ‘.de’ domain under ‘de-mail.de’ ended on 30 June 2014.

IV SPECTRUM POLICY
i Development
Originally, frequencies in Germany were used exclusively – with a few exceptions – by Germany’s federal mail service (Deutsche Bundespost). The Law concerning the Restructuring of Posts and Telecommunications was adopted as early as 1989, and this new law created new regulatory provisions for opening up broader competitive opportunities on the telecommunications markets. With the Telecommunications Act of 1996, the monopoly on both network and telephony was ended and these markets were 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, demand for more bandwidth will continue to rise in line with increasing mobility. Both growing demand and technological innovation call for the availability of adequate frequency spectrum.

46 Last amended in August 2013.
47 Accredited De-Mail service providers are 1&1 De-Mail GmbH, Mentana –Claimsoft GmbH, T-Systems International GmbH and Telekom Deutschland GmbH.
48 Roßnagel, NJW 2011, 1473 (1478).
49 www.cio.bund.de/Web/DE/Innovative-Vorhaben/De-Mail/de_mail_node.html.
Because of its type of use and the current state of technology, the frequency spectrum available is still considered a scarce resource. The Federal Network Agency is the regulatory authority for the use of frequencies, the allocation of which needs a forward-looking, non-discriminatory and proactive frequency regulation. The ‘digital dividend’ is the frequently used term whenever digitisation results in the freeing up of spectrum.

ii Flexible spectrum use

The use of a spectrum requires its prior allocation. The Telecommunications Act states that the allocation of spectra shall be regulated by a Spectrum Regulation, which requires the Federal Council’s consent. Based on the allocation of frequencies and the specifications as set out in the Spectrum Regulation under Section 53 of the TKG, the Federal Network Agency shall divide the spectrum ranges into spectrum uses and related terms of use (Spectrum Plan). Spectra for wireless net access to telecommunication networks must be assigned in a technologically and service-neutral way.

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 or a co-use or in the form of a joint use via ‘spectrum pooling’. It is necessary, however, that the Federal Network Agency releases such forms of use for a flexible use and specifies the conditions of such use.

iii Broadband and next-generation mobile spectrum use

A few rural areas in Germany still lack high-speed internet connections (white areas). The development costs for fibre-optic networks are estimated to amount to between €70 billion and €80 billion. These costs are up to four times higher in rural areas than in cities. Such investments can hardly be borne by the communities in question without state subsidy. The federal government has refrained, however, from creating any new funding programmes for rural areas in the context of the amendment of the TKG in 2012.

The Federal Network Agency imposed rather strict requirements on the auction purchase of mobile network spectrum in 2010 (see also Section IV.iv, infra). Adequate internet access has to be supplied on a size basis: thus every successful bidder had to agree to provide internet access to communities and cities with not more than 5,000 inhabitants, then to those with between 5,000 and 20,000 inhabitants and then to cities with more than 50,000 inhabitants. Further expansion of internet services will not be allowed before supply to 90 per cent of any particular stage has been ensured.

---

50 See Section II.i, supra.
51 Section 55 (1) of the TKG.
52 Section 53 (1) of the TKG.
53 Section 54 (1) of the TKG.
54 Section 54 (2) of the TKG.
55 Section 62 (1), (2) of the TKG; also see Scherer and Heinickel, NWwZ 2012, 585 (591f).
56 Holznagel, NJW 2012, 1622 (1627).
Spectrum auctions and fees

If the Federal Network Agency finds that the number of available spectra is not sufficient for their allocation, it can order that the allocation of frequencies must be preceded by a procurement procedure. Often, the procurement is held in the form of a spectrum auction. Germany held Europe’s first 4G mobile broadband spectrum (radio airwave) auction from mid-April to mid-May 2010. The Federal Network Agency was in charge of the auction, which was the first wireless broadband spectrum auction in Germany for nearly a decade. Four operators were allowed to bid for frequencies from the fields at 800MHz, 1.8GHz, 2GHz and 2.6GHz; no new entrants were allowed to bid. The minimum bid price was set at €1.5 million per 5MHz frequency block. After 224 auctions on 27 days in total the auction aggregated a total amount of €4.4 billion for 41 frequency blocks.

As of 1 January 2017, the allocation of frequencies in 700MHz, 900MHz, 1800MHz and 1.5GHz will be renewed. Interested companies are requested to renew or notify their prospects until 20 August 2014. Following the merger of Telefónica and E-Plus, Telefónica might sell certain radio frequencies and other assets to an existing or new mobile network operator that might be established in the future.

V THE YEAR IN REVIEW

Numerous skimming affairs and the ongoing public debate within society and politics in Germany about a ‘right to be forgotten’ (i.e., the right of individuals to have their data deleted from the internet where they are no longer needed for legitimate purposes) show that the desire for efficient supervision of internet companies such as Google or Facebook are primary concerns in Germany, with a strong emphasis on the wish for effective protection of personal data in online communication. In the past 18 months, some important court decisions were rendered and legislative changes passed regarding internet and multimedia law. The great number of judgments and essays published in

---

57 Section 55 (10) of the TKG.
58 Section 61 of the TKG.
59 Telefónica O2 Germany, T-Mobile, Vodafone and E-Plus.
60 See also www.spiegel.de/wirtschaft/unternehmen/mobilfunkwellen-frequenzauktion-bringt-ueber-vier-milliarden-euro-a-696037.html.
62 https://beck-online.beck.de/default.aspx?vpath=bibdata%2freddok%2fbecklink%2f1033333.htm&pos=2&hlwords=telefonica%u00d0eplus%u00d0telefonica%eplus+telefonica%eplus+telefonicaeplus+xhlhit.
63 For an overview of the developments in internet and multimedia law in 2013, see Hoeren and Buchmüller, MMR-Beilage 2014, 1 ff.
2013 and so far in 2014 represent an exciting development in this dynamic legal area in Germany.

As regards consumer protection, the legislator further strengthened the position of consumers. In 2012, the legislator adopted a law for the better protection of consumers from cost traps in electronic commerce (the Button Law), which has been incorporated into Section 312g of the German Civil Code. Due to this new regulation every entrepreneur using a telecoms or media service in order to enter into a contract for the supply of goods or the rendering of services must clearly and comprehensively communicate to the consumer all essential facts of the contract in good time prior to sending its order and make sure that the consumer expressly confirms that he or she commits to a payment obligation. In October 2013, the act against dubious business practices came into force; the law capped the legal fees for a first warning letter or a cease and desist request to €155.30 as it had long been criticised that some lawyers illegitimately benefit from the high substantive values involved in sending cease and desist requests for alleged copyright infringements such as file sharing.

IT contract law has again been mostly influenced by the contractual framework conditions of cloud computing, especially regarding questions of data protection and copyright law. Although the growth of the market for cloud computing services has been mitigated after the disclosure of a number of skimming affairs, still 40 per cent of the companies in Germany used cloud-services in 2013 (compared to 37 per cent in 2012) and experts predict high annual growth rates for this market. The federal government recognised this potential and, 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. The trusted clouds programme will conclude its work in 2015. The contractual framework for IT outsourcing has also been an important subject. In the field of liability on the internet, the framework for liability of hosts of internet platforms for infringement of intellectual property rights or basic personal rights by the users has been determined further by the German Federal Court of Justice (FCJ). The FCJ reaffirmed its position that a host provider is under no general duty to proactively prevent violations of the aforementioned rights by its users and can only be forced to desist from publishing third party content after he has been notified of the violation (concept of ‘Störerhaftung’); the German courts in addition do not grant damages unless the violation has been provoked or adopted by the host. The European

64 See Federal Law Gazette I 2012, 1084. The amendment is based on the Consumer Directive RL 2011/83/EU of 25 October 2011, which aims at harmonising the European distance-selling laws. The directive accounts for other major changes to the German distance-selling law.
65 For a more detailed review of the new law see Raue, MMR 2012, 438ff.
66 BGBI I, 3714; see Köhler, NJW 2013, 3473ff.
68 For an overview of the ongoing discussion about IT outsourcing, see Mann, MMR 2012, 499.
Court of Human Rights, however, now held in its decision in *Delfi v. Estonia*\(^{69}\) that a violation of basic personal rights leads to a liability of the forum operator for damages if he or she did not arrange for sufficient spot checks of the available content. This decision in favour of personal rights may affect the jurisdiction of the German courts over the next years.

The admissibility of online archives and file-sharing were other topics on which German courts had to rule. In a decision involving the file hosting service Rapidshare, the FCJ 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 by its business model.\(^{70}\) Also, Google is under an obligation to prevent violations of personality rights caused by the auto-complete function of its search machine after being notified of such violations.\(^{71}\) In addition, a recent decision by the ECJ in *Google v. Spain*\(^{72}\) generated enormous public attention as the ECJ held that Google as a search agent can be forced to delete search results if the individual interest in hiding information exceeds the public information interest. The decision already led to several thousands of extinctions in the Google-search hit list. As far as streaming of content by private users is concerned the ECJ held in its decision in the case of *Newspaper Licensing Agency v. Public Relations Consultants Association*\(^{73}\) that the caching of copyrighted content does not violate intellectual property rights, at least if the source is legal. Thus, streaming of copyright-protected content – which has been a grey area from a legal point of view in Germany – can be assessed as lawful following the ECJ judgment.

Since the Federal Constitutional Court (FCC) rendered data retention as intended in the TKG of 2007 to be inadmissible,\(^{74}\) the question of whether and to what extent data retention is in line with national and European law has been discussed extensively. The Federal Ministry of Justice presented drafts of the relevant TKG provisions in 2011 and 2013, neither of which has been adopted. As the ECJ has meanwhile decided that the European Directive setting the framework for data retention (2006/24/EC) is invalid,\(^{75}\) we do not expect the German legislator to pass a new data retention act before the legal framework has been reset by the EU. In this context, the FCJ, however, recently held that even without the act on data retention telecom and internet access, 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.\(^{76}\)

---

69 Judgment of the ECHR of 10 October 2013, 64569/09.
70 Judgment of the FCJ of 15 August 2013, I ZR 80/12.
71 Judgment of the FCJ of 14 May 2013, VI ZR 269/12.
72 Judgment of the ECJ of 13 May 2014, C-131/12.
73 Judgment of the ECJ of 5 June 2014, C-360/13; see Solmecke/Dam, MMR 2014, 544 f.
74 Judgment of the FCC of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.
75 Judgment of the ECJ of 8 April 2014, C-293/12 and C/594/12.
76 Judgment of the FCJ of 3 July 2014, III ZR 391/13. The prevailing party Deutsche Telekom AG has been represented by Latham & Watkins LLP Germany.
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 and consumer, copyright and youth protection in the context of new media. Indeed, it is impossible to separate these international activities from national policymaking.
SIMON BERRY  
*Latham & Watkins*  
Simon Berry is a counsel in the Hong Kong office of Latham & Watkins and a member of the corporate department.  
Mr Berry has extensive experience in regulatory law. His practice also focuses on a broad range of mergers and acquisitions, reorganisations, post-acquisition integration and corporate finance transactions involving regulated entities such as banks, insurance companies and financial institutions.  
His experience in regulatory matters includes licensing and advisory work covering a wide range of regulated activities including securities, commodities, futures and other derivatives, asset management and proprietary trading including offerings of investment products, outsourcing, e-commerce-related issues, data privacy, internet securities trading and e-banking matters. He has advised on the acquisition and disposal of a number of licensed entities as well as members of stock exchanges, futures exchanges, clearing companies and other regulated entities.  
His experience in mergers and acquisitions includes takeover offers, sales and purchases of businesses and companies, direct investments, private equity, joint ventures, mergers by legislation, schemes of arrangement and other commercial agreements. He has also advised on transactions involving television companies and radio broadcasting companies. He is the chairman of the Competition Law Committee of the Law Society of Hong Kong.  

JOHN D COLAHAN  
*Latham & Watkins LLP*  
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.

GAIL CRAWFORD
Latham & Watkins
Gail Crawford is a partner in the London office. Her practice focuses primarily on technology, data privacy and security, intellectual property and commercial law and includes advising on technology licensing agreements and joint ventures, technology procurement, data protection issues and e-commerce and communications regulation. She also advises both customers and suppliers on multi-jurisdictional IT, business process and transformation outsourcing transactions. Ms Crawford has extensive experience advising on data protection issues including advising a global corporation with operations in over 100 countries on its compliance strategy and advising a number of US e-commerce and web businesses as they expand into Europe and beyond. She also advises online businesses and providers of communications services on the impact of the UK and European restrictions on interception and disclosure of communications data.

CARMEN GUO
Latham & Watkins
Carmen Guo is an associate in the Hong Kong office of Latham & Watkins and a member of the corporate department.

Her practice focuses on advising banks and financial institutions on regulatory and compliance issues under Hong Kong’s financial regulatory regime, including licensing matters, selling restrictions, disclosure issues and marketing of securities.

Ms Guo’s experience in the corporate finance area includes advising on acquisitions from Hong Kong law perspective, public offerings and compliance matter for listed companies in Hong Kong.

JOHN P JANKA
Latham & Watkins LLP
John P Janka is a partner in the Washington, DC office of Latham & Watkins LLP, where he is chair of the communications law practice group. For 26 years, Mr Janka has counselled international telecommunications operators and ISPs, content providers, investors and banks on a variety of regulatory, transactional and controversy matters. His experience includes the purchase, sale and financing of communications companies, the procurement and deployment of communications facilities, global spectrum strategies and dispute resolution, the provision of communications capacity, content distribution,
strategic planning, and effecting changes in legal and regulatory frameworks. His clients include satellite, wireless and other terrestrial communications companies, video programming suppliers, information service providers, television and radio broadcast stations, and firms that invest in and finance these types of entities.

Mr Janka has served as a United States delegate to an ITU World Radiocommunication 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.

JEAN-LUC JUHAN
Latham & Watkins

Jean-Luc Juhan is a partner in the corporate department in the Paris office of Latham & Watkins.

His practice focuses on outsourcing and technology transactions, including business process, information technology, telecommunications, systems and software procurement and integration. He also has extensive experience advising clients on all the commercial and legal aspects of technology development, licensing arrangements, web hosting, manufacturing, distribution, e-commerce, entertainment and technology joint ventures.

Mr Juhan is in particular cited in Chambers Europe 2014, Option Droit & Affaires 2014 and Legal 500 Paris 2014: “Great negotiator” Jean-Luc Juhan, who is “very sharp and down-to-earth” and has “a very good knowledge of the industry”, advises high-profile French and international groups on large outsourcing, telecommunication and integration system projects.

ABBOTT B LIPSKY, JR
Latham & Watkins LLP

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 in 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.

**LAURA JOHANNA REINLEIN**  
*Latham & Watkins LLP*

Laura Johanna Reinlein is an associate in the Hamburg office of Latham & Watkins LLP, practising in the firm’s litigation department. Dr Reinlein wrote her doctoral thesis on the topic of control of concentrations in the media sector under the influence of media convergence. During her legal studies at Johannes Gutenberg University at Mainz she worked as a research associate at the chair of public and media law under Professor Karl-E Hain, mainly in the field of media, constitutional and administrative law. During her legal traineeship she worked, *inter alia*, for a public broadcasting corporation and the State Media Authority of Bavaria.

**MYRIA SAARINEN**  
*Latham & Watkins*

Myria Saarinen is a partner in the Paris office of Latham & Watkins. She has extensive experience in IP and IT litigation, including internet and other technology-related disputes. She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes.

She has developed specific expertise in the area of privacy and personal data, including advising clients on their transborder data flows, handling claims raised by the French Data Protection Authority and setting up training sessions on the personal data protection framework in general and on specific topics. She also has expertise in cross-border issues raised in connection with discovery or similar requests in France.

Ms Saarinen is named among leading practitioners in commercial litigation, data privacy and IT (*The Legal 500 Paris 2014, Chambers Europe 2013, Chambers Global 2013*).

**OMAR SHAH**  
*Latham & Watkins*

Omar Shah is a partner in Latham & Watkins’ London office. He advises clients in the media and communications sector on antitrust and regulatory issues and represents them before UK, EU and other regulatory and competition authorities, courts and tribunals. His experience includes acting for a UK broadcaster in an Ofcom investigation into licensing of digital terrestrial television; acting for a major UK telco in an Ofcom investigation into consumer broadband pricing; acting for a leading provider of electronic programme guides in securing UK licensing from Ofcom; representing various telcos in securing merger control clearance from the Office of Fair Trading (now part of the Competition and Markets Authority), the European Commission and other regulators for several transactions; and defending a major advertiser and provider of online music services in an investigation by the Advertising Standards Authority including subsequent judicial review proceedings in the High Court.
About the Authors

JARRETT S TAU BMAN
Latham & Watkins LLP
Jarrett S Taubman is counsel in the Washington, DC, office of Latham & Watkins LLP, where he represents providers of telecommunications, media, internet and other communications services (and their investors) before the Federal Communications Commission (FCC), state public utilities commissions and various courts. Mr Taubman assists clients in implementing strategies to facilitate the development of favourable regulatory policy, structuring transactions and securing required regulatory consents, and ensuring ongoing compliance with complex regulatory requirements. Much of his practice involves the navigation of the complex legal and policy issues raised by the advent of broadband services. Mr Taubman also represents both communications and non-communications clients before the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review and block proposed investments in critical US infrastructure from non-US sources.

Mr Taubman received his JD from New York University School of Law, a master’s degree in public policy from Harvard University’s Kennedy School of Government, and a BS from Cornell University’s School of Industrial and Labor Relations.

GABRIELE WUNSCH
Latham & Watkins LLP
Gabriele Wunsch is an associate in the Hamburg office of Latham & Watkins LLP, practising IP and media law in the firm’s litigation and corporate departments. She is a graduate of the Westphalian Wilhelms University at Münster and studied on the Humboldt University of Berlin’s European and civil business law postgraduate programme, promoted by the German Research Foundation, where she wrote her doctoral dissertation on the harmonisation of EU law. She completed parts of her studies and work in Germany, England, Spain, Switzerland and the United States. During her legal traineeship, Dr Wunsch worked, inter alia, for the Ministry of Foreign Affairs, in the IP and unfair competition department of another major law firm, and in the legal department of a well-known online auction house. Subsequently she completed a master’s degree (LLM) at the Technical University of Dresden and Queen Mary, University of London, specialising in intellectual property law.

LATHAM & WATKINS LLP
45 rue Saint-Dominique
75007 Paris
France
Tel: +33 1 40 62 20 00
Fax: +33 1 40 62 20 62
jean-luc.juhan@lw.com
myria.saarinen@lw.com
Latham & Watkins LLP
Warburgstrasse 50
20354 Hamburg
Germany
Tel: +49 40 4140 30
Fax: +49 40 4140 3130
johanna.reinlein@lw.com
gabriele.wunsch@lw.com

Latham & Watkins
18th Floor, One Exchange Square
8 Connaught Place, Central
Hong Kong
Tel: +852 2912 2500
Fax: +852 2912 2600
simon.berry@lw.com
carmen.guo@lw.com

99 Bishopsgate
London
EC2M 3XF
United Kingdom
Tel: +44 20 7710 1000
Fax: +44 20 7374 4460
john.colahan@lw.com
omar.shah@lw.com
gail.crawford@lw.com

555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
United States
Tel: +1 202 637 2200
Fax: +1 202 637 2201
john.janka@lw.com
jarrett.taubman@lw.com
tad.lipsky@lw.com

www.lw.com