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current reform of intelligence legislation

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Legislative reform(s)

The German reform process was completed by the end of 2016 when two legislative acts came into force that significantly revised the surveillance powers of the Federal Intelligence Service (*Bundesnachrichtendienst*, BND) and the regime of oversight of the three federal intelligence services.

Amendment of the Parliamentary Control Panel Act

The **Act on the Further Development of the Parliamentary Oversight of the Federal Intelligence Services** (*Gesetz zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*) came into force on 7 December 2016, amending the Parliamentary Control Panel Act (*Kontrollgremiumgesetz*, PKGrG).¹

The act established the office of a “Permanent Representative” (*Ständiger Bevollmächtigter*) who is nominated by a simple majority of the Control Panel and appointed by the president of the German Bundestag for five years (Section 5a and 5b PKGrG).² He or she can be re-appointed once and only be dismissed by request of a majority of three quarters of the Control Panel. The Permanent Representative shall support the regular work and specific investigations of the Control Panel (*Parlamentarisches Kontrollgremium*) and the Trust Panel (*Vertrauensgremium*). The Permanent Representative is authorized to attend all meetings of the Control Panel, the Trust Panel and the G 10 Commission, thus, acting as an interface between the different oversight bodies. He or she will, however, not be entitled to attend meetings of the newly established “Independent Body” that was established by the amendment of the Federal Intelligence Service Act (see below) to oversee the surveillance of foreign communication. The Permanent Representative is supervising the work of the staff of both the Control Panel and the G10 Commission; he or she is supported by the newly established function of a Managing Officer (*Leitender Beamter*) (Section 12 PKGrG).

¹ Germany, Act to Advance the Parliamentary Oversight of the Federal Intelligence Services (*Gesetz zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*), 30 November 2016, available at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBI&jumpTo=bgbl116s2746.pdf. For a consolidated version of the Parliamentary Control Panel Act see: www.gesetze-im-internet.de/pkgrg/BJNR234610009.html.

² According to Section 5b II PKGrG, the Permanent Representative has to be at least 35 years old and must be either to be qualified to hold the office of a judge (which means that s/he has to be a full qualified lawyer, a German *Volljurist*, who has studied law and successfully passed both state examina in law) or to be qualified to serve in the higher level (*höheren Dienst*) of non-technical public administration (which entails that , and s/he must be a person with security clearance. In addition, s/he must not hold any other office or profession in order to warrant full availability and avoid conflicts of interest.

For the first time, the revised Control Panel Act specifies “issues of particular concern” about which the Federal Government must inform the Control Panel by a list of rule examples, namely “significant changes in the situation assessment of internal and external security”, “incidents within the administration with remarkable implications for the fulfilment of tasks” and “singular incidents which are issue of political discussion and public reporting” (Section 4 I PKGrG).

The revised Control Panel Acts also provides for an improved protection of whistleblowers as the Control Panel may now handle submissions by members of the intelligence agencies on a confidential basis (Section 8 I PKGrG). Moreover, the Control Panel will hold public hearings of the presidents of the three federal intelligence agencies on an annual basis (Section 10 III PKGrG).

Following the coming into force of these amendments, the Control Panel quickly amended also its internal regulations (*Geschäftsordnung*) in December 2017. Most important, the former custom to rotate the chairmanship on an annual basis between the parties in power and the opposition was replaced. Now the internal regulations simply stipulate that the chair of the Control Panel is elected by simple majority and that the deputy chair must be a member of the opposition if the chair represents a party in power.³ Thus, for the first time, the Control Panel’s chairman of 2016 (the conservative MP Clemens Binninger) was re-elected at the beginning of the 2017.⁴

On 10 January 2017, Arne Schlatmann was appointed by the President of the German Bundestag as the first Permanent Representative of the Control Panel. Prior to this Schlatmann was a high-ranking official in the department for public security of the Federal Ministry of Interior where he served for more than 20 years. In addition, the recent unit PD 5 of the administration of the German Bundestag which was serving as secretariat for the Control Panel, the G10 Commission and other oversight bodies of the federal parliament was upgraded and became a new sub-department for the “Parliamentary Control of Intelligence Services”.⁵

³ Germany, Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) (2016), *Geschäftsordnung gemäß § 3 Abs. 1 Satz 2 des Gesetzes über die parlamentarische Kontrolle nachrichtendienstlicher Tätigkeit des Bundes*, available at: www.bundestag.de/blob/366638/a85399f8781425f72cb0158d59ba56bf/go_pkgr-data.pdf.

⁴ Denkler, T. (2016), ‘Koalition will linken Ausschuss-Chef verhindern’, *Süddeutsche Zeitung*, 30 November 2016, available at: www.sueddeutsche.de/politik/geheimdienst-kontrolle-koalition-will-linken-geheimdienst-kontrolleur-verhindern-1.3272533.

⁵ Germany, German Bundestag (*Deutscher Bundestag*) (2017), ‘Arne Schlatmann zum Bevollmächtigten des Kontrollgremiums ernannt’, News, 10 January 2017, available at: www.bundestag.de/dokumente/textarchiv/2017/kw02-schlatmann-pkgr/487768.

Amendment of the Federal Intelligence Service Act

On 31 December 2016, the **Act on Foreign-to-Foreign Telecommunication Surveillance of the Federal Intelligence Service** (*Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*) came into force on 31 December, amending the Federal Intelligence Service Act (*Bundesnachrichtendienstgesetz*, BNDG).⁶

Briefly summarised, the act regulates the BND domestic surveillance of foreigners' telecommunication extracted at German communication hubs or by satellite interception, whereas data collection in the context of extraterritorial surveillance in foreign countries remains unregulated. For this purpose, the BND is authorised to collect and process any foreign telecommunication content data – except information related to the “core area of private life” (*Kernbereich privater Lebensgestaltung*) (Section 11 BNDG) and communication of EU institutions, public authorities of EU Member States and EU citizens – from telecommunication networks if these data are deemed necessary to detect and preempt “threats against internal or external security”, to protect Germany’s “capacity to act”, or to collect “other intelligence of importance for German foreign and security policies” on events to be specified by a core group of five federal ministries and the Federal Chancellery (Section 6 BNDG). The selectors being used to search the flow of telecommunication data must not contradict the interests of German foreign and security policy. EU institutions, public authorities of Member States and EU citizens may be targeted if this aims to detect and preempt risks of military or terrorist attacks, arms proliferation, cyberthreats, serious organized crime and human smuggling, or if this aims to extract only intelligence on events in third countries which is of significant relevance for national security (Section 6 III BNDG).

The collection of metadata is not limited, except for the provision that metadata have to be deleted after six months (Section 6 IV BNDG).

The selection of telecommunication networks to be targeted is to be ordered in advance for not more than nine months (with authorised renewals possible) by the Federal Chancellery and approved by a new oversight body, the “Independent Body” (*Unabhängiges Gremium*) (Section 9 I BNDG). The new oversight body will be established at the Federal Court of Justice (*Bundesgerichtshof*) in Karlsruhe and shall be composed of two federal judges and one prosecutor from the Public Prosecutor General of the Federal Court of Justice (*Generalbundesanwalt am Bundesgerichtshof*) (Section 16 BNDG). The three members and

⁶ Germany, Act on Foreign-to-Foreign Telecommunication Surveillance of the Federal Intelligence Service (*Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*), 23 December 2016, available at: www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl116s3346.pdf. For a consolidated version of the BND Act see: www.gesetze-im-internet.de/bndg/BJNR029790990.html.

their three proxies shall be appointed for six years by the Federal Government following the suggestion of the President of the Federal Court of Justice respectively of the Public Prosecutor General.

The oversight body has to approve also the selectors targeting the communications of EU institutions or public authorities of Member States (Section 9 IV BNDG) which are ordered by President of the BND for not more than nine months (with authorised renewals possible). Surveillance targeting EU citizens is not to be approved by the Independent Body prior to surveillance, but the body may exercise random sample *ex post* checks (Section 9 V BNDG). Surveillance affecting the rest of the world is almost completely exempted from oversight by the Independent Body. The Independent Body is only authorised to conduct *ex post* checks if the BND complies with the provision to respect the “core area of private life” of all foreigners in the context of international signal intelligence cooperation (Section 15 III BNDG).

The Independent Body does report to the Parliamentary Control Body about its activities at least twice a year; public reports are not foreseen (Section 16 VI BNDG).

Moreover, the act regulates and legalises signal intelligence (SIGINT) cooperation of the BND and foreign intelligence services (Sections 13 to 15 BNDG), and the automated sharing of information among the BND and its partners by means of joint international databases (Sections 26 to 30 BNDG).

In the context of the reform procedure **several, mostly critical, opinions were issued by legal experts and interest groups**, among others by the Federal Council (*Bundesrat*),⁷ the Research Services of the German Bundestag,⁸ three Special Rapporteurs of the United Nations,⁹ think

⁷ Germany, Federal Council (*Bundesrat*) (2016), *Entwurf eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes: Empfehlungen der Ausschüsse*, Printed Document 420/1/16, 12 September 2016, available at: www.bundesrat.de/SharedDocs/drucksachen/2016/0401-0500/430-1-16.pdf?blob=publicationFile&v=1.

⁸ Wissenschaftliche Dienste des Deutschen Bundestages (2016), *Zur strategischen Ausland-Ausland-Fermeldeaufklärung in Bezug auf Unionsbürger nach § 6 Abs. 3 Bundesnachrichtendienstgesetz-Entwurf*, Berlin, 6 July 2016, available at: www.bundestag.de/blob/438390/6d9b7a1f5a5eb07ed214811a12a70d60/wd-3-171-16-pdf-data.pdf; Wissenschaftliche Dienste des Deutschen Bundestages (2016), *Verfassungsfragen des Entwurfs eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes*, Ausarbeitung, Berlin, 29 August 2016, available at: www.bundestag.de/blob/438618/548e5efdf2d15766bd01dfe5e0e3e045/wd-3-194-16-pdf-data.pdf.

⁹ Kaye, D., Forst, M., Pinto, M. (2016), *Letter of three Special Rapporteurs to the German Ambassador at the United Nations*, Geneva, 29 August 2016, available at: www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_DEU_2.2016.pdf.

tanks,¹⁰ the Federal Commissioner for Data Protection and Freedom of Information,¹¹ and experts invited to a public hearing of the Home Affairs Committee of the Bundestag in late September 2016.¹²

A key issue being discussed in this context was the question if extraterritorial surveillance and/or surveillance of foreigners' communication by the BND do interfere with fundamental rights of foreign citizens at all. Unlike the legislator, the majority of opinions emphasised that the foreign-to-foreign-surveillance of the BND does interfere with fundamental rights of foreigners, in particular with the right to confidential communication (Article 10 of the Basic Law). Given the different legal regimes being applied by the new legislation to Germans on the one hand and to foreigners on the other hand it was also pointed out that the principle of legal non-discrimination (Article 3 I of the Basic Law) is violated by this distinction.

The opinions differ when considering the consequences to be drawn from these findings. Some commentators argued that it would be sufficient if the so-called "citation duty" (the obligation to explicitly mention the fundamental rights being infringed by a law in an extra section, according to Article 19 I of the Basic Law) would be respected; they argued further that the procedural standards of privacy protection are adequate as they consider the interference as marginal given the fact that no executive power could be exercised by German authorities against foreigners on foreign soil.¹³ Others called for a limitation and specification of the

¹⁰ Wetzling, T. (2016), *BND-Gesetzentwurf: Schwachstellen und Verbesserungsvorschläge*, Berlin, Stiftung Neue Verantwortung, 5 July 2016, available at: www.stiftung-nv.de/sites/default/files/bndgesetzentwurf_schwachstellen_und_verbesserungsvorschlaege.pdf; Schaller, C. (2016), *Detaillierte Regeln für die Auslandsüberwachung*, Berlin, Stiftung Wissenschaft und Politik, available at: www.swp-berlin.org/fileadmin/contents/products/aktuell/2016A66_slr.pdf.

¹¹ Germany, Federal Commissioner for Data Protection and Freedom of Information (Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit) (2016), *Stellungnahme der Bundesbeauftragten für den Datenschutz und die Informationsfreiheit zum Entwurf eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes (BT-Drs. 18/9041)*, Printed Document 18(4)660, 21 September 2016, available at: www.bundestag.de/blob/459634/a09df397dff6584a83a43a334f3936a3/18-4-660-data.pdf.

¹² The expert opinions are published at: www.bundestag.de/ausschuesse18/a04/anhoerungen?url=L2F1c3NjaHVlc3NIMTgvYTA0L2FuaG9lcnVuZ2VuLzgzLXNpdHp1bmctaW5oYWx0LzQ1OTY0MA==&mod=mod458740.

¹³ Wolff, H. A. (2016), *Schriftliche Stellungnahme zur Vorbereitung der mündlichen Anhörung am 26.09.2016*, Printed Paper A-Drs. 18(4)653 F, 22 September 2016, p. 3, available at: www.bundestag.de/blob/459628/e6b3125cfbb2a07940d375aa744b4e0a/18-4-653-f-data.pdf. Gärditz, who denies an interference with privacy rights, does, however, recommend to respect the "citation obligation" as an act of precaution: Gärditz, F. (2016), *Stellungnahme: Gesetzentwürfe zur Reform des Nachrichtendienstrechts: Gesetz zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes und Gesetz zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*, Printed Document 18(4)653 A, 8 September 2016, p. 4, available at:

purposes and targets of surveillance, and for improved procedural protections against potential privacy violations.¹⁴

In particular the design of the oversight regime was contested, even by those commentators who deny an interference with privacy. Whereas some opinions expressed the view that oversight on BND surveillance should be, preferably, the domain of the G10 Commission,¹⁵ others prefer professional judicial oversight by an Independent Body and point towards weaknesses of the G10 Commission and its volunteering members.¹⁶ Most opinions criticised the fragmentation of oversight by the establishment of a new body. However, given the political will to install a new oversight body the following proposals were made to warrant an independent and effective oversight by the Independent Body: 1) election of its members by the parliament rather than appointment by the government, 2) seat in Berlin (or at the Federal Administrative Court in Leipzig) rather than at the Federal Court of Justice in Karlsruhe,¹⁷ 3) increasing the capabilities

www.bundestag.de/blob/459618/df6624db722964570b5f397c84ce067e/18-4-653-a-data.pdf. The Legal Committee of the Federal Council (*Bundesrat*) suggested a carefully assessment if the provisions constitute an interference with privacy in the light of the overwhelming critique. Cf. Germany, Federal Council (*Bundesrat*) (2016), *Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes: Empfehlungen der Ausschüsse*, Printed Document 420/1/16, 12 September 2016, p. 1, available at: www.bundesrat.de/SharedDocs/drucksachen/2016/0401-0500/430-1-16.pdf?__blob=publicationFile&v=1.

- ¹⁴ Bäcker, M. (2016), *Stellungnahme zu dem Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes* (BT-Drs. 18/9041), Printed Document 18(4)653 G, 23 September 2016, p. 2, available at: www.bundestag.de/blob/459630/1ddfe2451c0fd067872976d0f0467882/18-4-653-g-data.pdf; Wetzling, T. (2016), *BND-Gesetzentwurf: Schwachstellen und Verbesserungsvorschläge*, Berlin, Stiftung Neue Verantwortung, p. 3, available at: www.stiftung-nv.de/sites/default/files/bndgesetzentwurf_schwachstellen_und_verbesserungsvorschlaege.pdf; Töpfer, E. (2016), *Menschenrechtliche Anforderungen an die Ausland-Ausland-Fernmeldeaufklärung und ihre Kontrolle: Stellungnahme zur Öffentlichen Anhörung des Innenausschusses des Deutschen Bundestages am 26. September 2016*, Printed Document 18(4)653 E, Berlin, Deutsches Institut für Menschenrechte, pp. 7-9, available at: www.bundestag.de/blob/459626/8d4790e5d6505b403e14d4982d20a9e5/18-4-653-e-data.pdf.
- ¹⁵ Deutscher Anwaltverein (2016), *Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Gefahrenabwehrrecht und Informationsrecht zum Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*, Berlin, October 2016, available at: https://anwaltverein.de/de/newsroom/sn-65-16-zum-entwurf-eines-gesetzes-zur-ausland-ausland-fernmeldeaufklaerung-des-bundesnachrichtendienstes?file=files/anwaltverein.de/downloads/newsroom/stellungnahmen/2016/DAV-SN_65-16.pdf.
- ¹⁶ Wolff, H. A. (2016), *Schriftliche Stellungnahme zur Vorbereitung der mündlichen Anhörung am 26.09.2016*, Printed Document 18(4)653 F, pp. 4-5.
- ¹⁷ See, for example, Gärditz, K. F. (2016), *Stellungnahme: Gesetzentwürfe zur Reform des Nachrichtendienstrechts: Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes und Gesetz zur weiteren Fortentwicklung der parlamentarischen Kontrolle der Nachrichtendienste des Bundes*, p. 20; for the proposal to locate the Independent Body in Leipzig see: Graulich, K. (2016), *Gutachtliche Stellungnahme: Entwurf der*

for an effective oversight, among others by an expansion of powers for *ex post* controls or even the introduction of a right to sue the executive branch of government in cases of non-cooperation, 4) complementing legal with technical expertise. Some opinions suggested establishing a “public advocate” (*Anwalt der Betroffenen*) to represent the interests of those under surveillance in the decision-making process of the body.¹⁸

Several experts pointed to the technical problem of separating domestic German communication (so-called “G10 traffic” as its surveillance is regulated by the G10 Act) from foreign-to-foreign communication which is routed via Germany. These voices claim that it is impossible to effectively separate the different communication flows given the fact that digital communication is split today into individual data packets which are routed very the very same cables in Germany whatever their final destination is. Thus, the experts doubt that the revised BND can be implemented properly. Moreover, the deep packet inspections which are necessary to assess the origins and destinations of communication packets constitute an interference with privacy itself.¹⁹

Another matter of concern was the regulation of international intelligence cooperation. In particular the Federal Data Protection Commissioner complained that her office is lacking the competences for a comprehensive control of the joint international databases as it is denied both the right to investigate data delivered by foreign intelligence agencies to databases established by the BND and the right to investigate the BND practice of sharing data with databases established by foreign partners.²⁰

In addition, journalists, newspaper editors and broadcasting corporations issued opinions emphasising that the revised BND Act is lacking protection of privileged communication against covert surveillance which is seen as a risk for the freedom of expression and press

Fraktionen der CDU/CSU und SPD eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes (BT-Drs. 18/9041), Printed Document 18(4)653 B, pp. 34-36, available at: <http://www.bundestag.de/blob/459620/a34e858b9999b071b2c79ac6495f89e7/18-4-653-b-data.pdf>.

¹⁸ See, for example, Deutscher Anwaltverein (2016), *Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Gefahrenabwehrrecht und Informationsrecht zum Entwurf eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes*, pp. 17.

¹⁹ Schaller, C. (2016), *Detaillierte Regeln für die Auslandsüberwachung*, Berlin, Stiftung Wissenschaft und Politik, p. 8; Papier, H.-J. (2016), ‘Beschränkungen der Telekommunikationsfreiheit durch den BND an Datenaustauschpunkten’, *Neue Zeitschrift für Verwaltungsrecht*, Vol. 35, No. 15, pp. 1–15.

²⁰ Germany, Federal Commissioner for Data Protection and Freedom of Information (*Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) (2016), *Stellungnahme der Bundesbeauftragten für den Datenschutz und die Informationsfreiheit zum Entwurf eines Gesetzes zur Ausland-Ausland-Fermeldeaufklärung des Bundesnachrichtendienstes (BT-Drs. 18/9041)*, pp. 3-4.

(Article 5 I of the Basic Law and Article 10 of the European Convention on Human Rights).²¹ Therefore, they called for the protection of privileged communication of journalists, lawyers, clerics and other professions who need to maintain confidential relations with their clients or sources.

Despite the broad critique, the act revising the BND Act was adopted by the majority in parliament without any amendments to the initial bill.

On 8 March 2017, the **Independent Body**, which is tasked with the oversight and authorisation of the BND's collection of extraterritorial communication, was established: Gabriele Cirener and Claus Zeng, two judges of the criminal court branch of the Federal Court of Justice (*Bundesgerichtshof*), and the federal prosecutor Lothar Maur were appointed by the Federal Cabinet for the forthcoming six years as members of the body.²² In late April, the president of the Federal Court of Justice reported publicly that the Independent Body was not operational yet. Rather, support staff was hired and trained, the rules of procedure prepared, and secure facilities set up.²³

Reform of German data protection legislation

On 27 April 2017, the German Bundestag (*Deutscher Bundestag*) adopted the **Act for the Adjustment of Data Protection Law to Regulation (EU) 2016/679 and for the Implementation of Directive (EU) 2016/680** (*Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680*), also referred to as Data Protection Adjustment and Implementation Act EU (*Datenschutz-Anpassungs- und*

²¹ Reporter ohne Grenzen (2016), *Wahrung der Meinungs- und Pressefreiheit durch eine grundrechtskonforme Fassung des BND-Gesetzes: Stellungnahme*, Berlin, August 2016, available at: www.reporter-ohne-grenzen.de/uploads/tx_ifnews/media/20160804_BNDG-E_ROG_Stellungnahme.pdf; Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten, Bundesverband Deutscher Zeitungsverleger, Deutscher Journalisten-Verband, Deutscher Presserat, Verband Deutscher Zeitschriftenverleger, Vereinte Dienstleistungsgewerkschaft, Verband Privater Rundfunk und Telemedien, Zweites Deutsches Fernsehen (2016), *Gemeinsame Stellungnahme zum Gesetzentwurf des Bundeskanzleramtes sowie zum Gesetzentwurf der Fraktionen der CDU/CSU und SPD (BT-Drs. 18/9041) Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*, 9 September 2016, available at: www.bundestag.de/blob/459632/b8528075cc5e9224d5cd964e84b80075/18-4-654-data.pdf.

²² Lorenz, P. (2017), 'BND-Kontrolle am BGH: Unabhängiges Gremium nimmt Arbeit auf', *Legal Tribune Online*, 9 March 2017, available at: www.lto.de/recht/nachrichten/n/bnd-kontrolle-gremium-bgh-nimmt-arbeit-auf/.

²³ Dreusicke, L. (2017), 'Präsidentin des BGH in Osnabrück: Wer das Ausspähen des BND kontrollieren soll', *Osnabrücker Zeitung*, 27 April 2017, available at: www.noz.de/deutschland-welt/politik/artikel/887478/wer-das-ausspaehen-durch-den-bnd-kontrollieren-soll.

Umsetzungsgesetz EU). The Federal Council (*Bundesrat*) endorsed the act on 12 May.²⁴ According to article 8, the act will come into force on 25 May 2018.

This reform aims on the one hand to realise respectively implement the EU data protection reform package – Regulation (EU) 2016/679 and Directive (EU) 2016/680 – and on the other hand to revise the data protection regime for areas not covered by EU law, namely activities in the field of national security. Thus, the draft Data Protection Adjustment and Implementation Act EU (*Datenschutz-Anpassungs- und Umsetzungsgesetz EU*) amends the Federal Data Protection Act (*Bundesdatenschutzgesetz*), the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*), the Federal Intelligence Service Act (*Bundesnachrichtendienstgesetz*), the Military Counter-Intelligence Service Act (*Gesetz über den Militärischen Abschirmdienst*), the Security Clearance Act (*Sicherheitsüberprüfungsgesetz*) and the Article 10 Act (*Artikel 10-Gesetz*). Accordingly, the legal system of data protection law relevant for the intelligence agencies will be changed significantly.

²⁴ Germany, German Bundestag (*Deutscher Bundestag*), *Gesetzgebung. Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU - DSAnpUG-EU)*, available at: <http://dipbt.bundestag.de/extrakt/ba/WP18/796/79680.html>.

System of revised Federal Data Protection Act	New provisions applying for intelligence agencies
Part I: Common provisions - Sections 1 to 21	Applies for intelligence agencies, except: <ul style="list-style-type: none"> - Section 1 VIII: special clause on the scope of the act - Section 4: video surveillance; - Section 14 II – does not apply for BND only !: task of the Federal Data Protection Commissioner to give advice to German Bundestag and the general public on data protection issues; - Section 16 I and Section 16 IV: selected powers of the Federal Data Protection Commissioner; - Chapter 5: European Data Protection Board and European cooperation of DPAs - Chapter 6: remedies
Part II: Provisions on the execution of Regulation (EU) 2016/679 - Sections 22 to 44	Does not apply for intelligence agencies
Part III: Provision on the implementation of Directive (EU) 2016/680 - Sections 45 to 84	Does not apply for intelligence agencies, except: <ul style="list-style-type: none"> - Section 46: definitions - Section 51 I to IV: informed consent - Section 52: data processing ordered by data controller - Section 53: data secrecy - Section 54: automated individual decisions - Section 62: subcontracted data processing - Section 64: security requirements for data processing - Section 83: compensation and reparation - Section 84: penal provisions
Part IV: Special provisions on data processing in areas of “national security” neither covered by the Regulation nor by the Directive - Section 85	Does only apply for the military but not for the Military Counter-Intelligence Service (<i>Militärischer Abschirmdienst</i>).

Key provisions on the powers of the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für Datenschutz und Informationsfreiheit*) to oversee the agencies that are now regulated by Section 24 of the Federal Data Protection Act are being shifted to the acts governing the intelligence agencies, namely to the Federal Act on the Protection of the Constitution, the Federal Intelligence Service Act, the Military Counter-Intelligence Service Act and the Security Clearance Act. Whereas many of the provisions – including the limitations on DPA oversight in cases of individual national security interests – remain unchanged in substance, five issues are noteworthy:

1. Unlike in the past, when the Federal Data Protection Commissioner (DPA) was exempted from inspecting G10 data by Section 24 (2) of the Federal Data Protection Act, he or she will be authorised to access such data originating from surveillance approved by the G10 Commission when his or her oversight fulfils the purpose of checking the legality of data processing in other contexts.²⁵ Thus, the Federal Data Protection Commissioner will be enabled, for example, to check the entry of personal data, which was obtained through wiretapping by the Federal Office of the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), in the inter-agency counter-terrorism database (*Antiterrordatei*). In 2013, the Federal Constitutional Court had called in its decision on the Counter-Terrorism Database Act (*Antiterrordateigesetz*) on the legislator to close gaps in control which resulted from the exclusive responsibility of the G10 Commission for the control of so-called G10 data.²⁶ Whereas the gap was already informally closed by an agreement between the DPA and the Federal Ministry of Interior in the wake of the decision, it will be formally closed by the new legislation.
2. Whereas the Federal Data Protection Commissioner is currently authorised by Section 26 II of the Federal Data Protection Act to inform the German Bundestag about relevant issues at any time, the proposal foresees to restrict the power of the DPA to inform the parliament public about data protection issues concerning the Federal Intelligence Service (BND). In the future the DPA must only confidentially inform the special oversight bodies, namely the Parliamentary Control Panel, the Trust Panel, the G10 Commission or the Independent Body. The oversight bodies must not be informed about such BND-related issues before the formal procedure of reclamation (*Beanstandung*) is closed by a final statement by the Federal Government.²⁷
3. Oversight of the DPA over other authorities will be governed by the intelligence service data protection regime if these authorities process data for intelligence purposes, as, for example, the transfers of data on asylum seekers from so-called “risk countries” by the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*) for the purpose of security vetting. In effect, it could happen in individual cases that DPA

²⁵ Section 26a II of the proposed revised version of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*).

²⁶ Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 1215/07, 24 April 2013, para. 216.

²⁷ Section 32a of the proposed revised version of the Federal Intelligence Service Act (*Bundesnachrichtendienstgesetz*).

controls at such other authorities are inhibited on decision of the responsible federal ministry.²⁸

4. For the first time, the legislation will establish special provisions on military data transfers – beyond any adequacy assessments – to third states or international and transnational organisations for purposes of defence, crisis management, conflict prevention or humanitarian missions. In addition, the obligation of data controllers to inform data subjects about the collection of their personal data as well as data subjects’ access right are strictly limited in the area of (military) national security.²⁹
5. The new act confirms the status quo in terms of the power of the Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) to issue only non-binding complaints (*Beanstandungen*) against the intelligence agencies if he or she detects data breaches.³⁰ However, the act may provide for a new power of the Commissioner to request individual penalties against staff who is suspected of being responsible for specific data breaches. Accordingly, individuals may be sentenced to three years imprisonment or fines if they either make confidential personal data accessible without authorisation and acting business-like. Individuals who process confidential personal data without being authorised and with the aim to make profit may be sentenced to two years imprisonment or fines. Besides the Federal Data Protection Commissioner, also affected persons, data controllers and the supervisory authority can request such penalties.³¹ However, the legal provisions on penalties for intelligence agencies are ambiguous, thus, also other interpretations are possible: According to the revised intelligence agencies acts (new Section 27 BVerfSchG, new Section 13 MADG, new Section 32a BNDG) Section 84 of the revised Federal Data Protection Act, regulating penalties for law enforcement authorities, does also apply also to the intelligence agencies. The wording of Section 84, however, says, that the general penalty provisions of Section 42 of the revised Federal Data Protection Act, do apply to the processing of data by public authorities in the context of activities defined in Section 45, i.e. the prevention, investigation and detection of crime and administrative offences, including the protection against and the averting of dangers for public security. The key issue is that most experts say that averting dangers for public security is the exclusive mission of the police whereas

²⁸ Section 26a of the proposed revised version of the Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*).

²⁹ Section 85 of the proposed revised version of the Federal Data Protection Act (*Bundesdatenschutzgesetz*).

³⁰ Section 16 II of the revised Federal Data Protection Act (*Bundesdatenschutzgesetz*).

³¹ Section 42 of read in conjunction with Section 45 and Section 84 the revised Federal Data Protection Act and Section 27 of the revised Federal Act on the Protection of the Constitution (*Bundesverfassungsschutzgesetz*).

the mission of intelligence agencies is the collection of intelligence for the purpose of reporting to the political leaders; others say that the intelligence agencies also have the mission to avert dangers, or at least to protect against dangers for public security. One expert, who was informally consulted, said, despite belonging to the former camp, that the chain of legal cross-references would not make any sense if the intelligence agencies should be kept excluded from the scope of the new penalty provisions.

In summary, the proposed legislation will, on the one hand, expand the powers of the Federal Data Protection Commissioner when it comes to inspections of G10 data for purposes related to his or her core tasks. On the other hand, his or her right to alert the German Bundestag on issues concerning the BND would be limited. In addition, the justification of the proposed legislation explicitly states that the Federal Data Protection Commissioner would be not allowed to inspect BND premises that are exclusively used by foreign intelligence services.³² In the recent past, staff of the Federal Data Protection Commissioner was, however, already barred from inspections of a premise used by NSA staff in the context of the Joint SIGINT Activity at the BND field station at Bad Aiblingen with reference to Section 24 IV of the Federal Data Protection Act for reasons of national security.

The Federal Data Protection Commissioner sharply criticised the limitation of her powers to proactively inform the German Bundestag about data breaches at the Federal Intelligence Service (*Bundesnachrichtendienst*) and the attempts to limit her inspection rights when it comes to BND premises used by foreign intelligence agencies. In addition, she recommended revising also the Article 10 Act (*G10*) in order to clarify her right, as foreseen by the Data Protection Adjustment and Implementation Act EU, to control G10 data, parallel to the G10 Commission, if needed for checking the legality of other processing of personal data.³³ Currently, Section 15 V of the G10 provides that the G10 Commission is authorised to oversee the overall collection, processing and use of G10 data, which could still be read as a provision excluding the Federal Data Protection Commissioner from checking G10 data.

³² Germany, Federal Council (*Bundesrat*) (2017), *Entwurf eines Gesetzes zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU - DSAnpUG-EU) - Gesetzentwurf der Bundesregierung*, Printed Document 110/17, 2 February 2017, p. 131, available at: www.bundesrat.de/drs.html?id=110-17.

³³ Germany, Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) (2017), *Positionen der Bundesbeauftragten für den Datenschutz und die Informationsfreiheit - Entwurf eines Gesetzes zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU – DSAnpUG-EU)*, 3 March 2017, available at: www.bundestag.de/blob/499112/c1c5844dba7cdbb809878b7d03b676cc/18-4-824-h--18-4-788--data.pdf.

Reports and inquiries by oversight bodies

Parliamentary Control Panel's investigation of BND selectors

On 7 July 2016, the Parliamentary Control Panel published the final report of its “task force” who investigated around deactivated 3,300 “selectors” deployed by the Federal Intelligence Service (*Bundesnachrichtendienst* – BND) against foreign partners.³⁴ The task force investigation was launched in October 2015 after the Control Panel learned from secret reporting by the Federal Chancellery and the BND about the interception of targets in member states of the EU and NATO. The task force was headed by three members of the Control Panel, namely MPs from the Christian Democratic Union, the Social Democratic Party and the Green Party. The aim of their investigation was to assess whether the deployment of the 3,300 selectors was in line with the mission profile (*Auftragsprofil*) of the BND and the legal framework and how these were implemented in organisational and technical terms. It is important to note that “selectors” meant in this context natural persons or organisations which were associated with around 15,000 formal search terms.

The task force found that the legal framework for strategic surveillance of foreign communication (the BND Act rather than the G10 Act!) and the mission profile do hardly limit the selection of targets by the BND. Internal guidelines detailing the selection of targets did not exist. In addition, the protection of fundamental rights of German citizens within and outside the national territory was limited by the so-called “functionary theory” (*Funktionsträgertheorie*), developed by the BND, according to which German staff of foreign or international organisations can be targeted. Procedural routines for an assessment on how to handle sensitive targets such as political partners, media or civil society organisations did only exist in a rudimentary stage. A proper assessment of the proportionality of selecting certain targets did not exist. The task force concluded that the targeting process within the SIGINT department of the BND was usually guided by informal orders on a case by case basis. Whereas it was evident for the task force that these mode of work left wide discretion for the SIGINT department of the BND, they were unable to determine to what extent the analysts of the BND could steer the target selection. However, they concluded that the SIGINT department and in particular its outposts became more or less independent. The BND did not document the justification for the selection of individual targets in written form. Only the *ex post* extraction of fragmented information from various databases allowed to reconstruct the reasons for the selection partially.

³⁴ Germany, German Bundestag (*Deutscher Bundestag*) (2016), *Öffentliche Bewertung des Parlamentarischen Kontrollgremiums gemäß § 10 Absatz 2 und 3 des Kontrollgremiumsgesetzes zur BND-eigenen Steuerung in der strategischen Fernmeldeaufklärung - Unterrichtung durch das Parlamentarische Kontrollgremium*, Printed Paper 18/9142, available at: <http://dipbt.bundestag.de/doc/btd/18/091/1809142.pdf>.

Briefly summarised, the list of 3,300 targets included a double-digit number of heads of states or governments, ministers, close staff or military facilities in EU and NATO member states, few targets from EU institutions and organisations, more than two thousand targets in embassies or consulates of EU and NATO states, a double-digit number of NGOs and private companies, and a heterogenous group of around thousand individuals who were living in or originating from EU and NATO states or who were using communication connections related to these states. In addition, some targets were likely Germans or foreigners or foreign diplomatic representations in Germany – so-called “G10 issue” cases.

Based on a detailed assessment of the legality and proportionality of a random sample of each of these categories, the task force concluded that it is very likely that around one third of the overall targets were selected rightly. They seemed being related either to crisis regions (so-called “core countries” or “monitoring countries”) or to risk areas as defined by the BND mission profile. Thus, their interception was seen as legitimate by the task force. In relation to the other two third of the targets, the task force was cautious in its assessment and concluded that some of them were targeted in line with the mission profile, e.g. private companies engaged in arms trade or individual related to international terrorism, espionage or organised crime. Others could have been legitimate targets under certain conditions and in individual cases, e.g. diplomatic representations of EU or NATO member states in crisis regions. But regarding political leaders of partner states, embassies and consulates outside of crisis regions and EU institutions and international organisation of which Germany is a member, the task force concluded that the targeting by the BND clearly violated its mission profile and legal mandate.

The Parliamentary Control Panel concluded that the mission profile alone is not suitable to steer legitimate and proportionate SIGINT activities by the BND. Combined with poor coordination among the SIGINT department and the analysts of the BND and the lack of controlling and executive oversight this led to highly problematic surveillance practices. By majority vote the Control Panel recommended to specify the legal framework (which happened in December 2016 with the amendment of the BND Act) and the mission profile, and to revise the organisation and capacity of executive oversight, including regular reporting and controlling. Moreover, the Panel suggested to improve the cooperation between those who collect data and those who analyse data, to improve information exchange between the BND and the Foreign Office (*Auswärtiges Amt*), to develop internal guidelines and to tighten internal and external control by the data protection officer of the BND and the Federal Data Protection Commissioner for the purpose of supporting the executive governance of the BND.

Annual report on the activities of the G10 Commission

On 16 February 2017, the German Bundestag published the annual report of the Parliamentary Control Panel (*Parlamentarisches Kontrollgremium*) on the recent activities of the G10

Commission.³⁵ The report summarises figures on both targeted and strategic surveillance of telecommunication that was approved by the G10 Commission from January to December 2015.

Accordingly, the G10 Commission approved 193 orders (compared to 109 in 2014) for targeted surveillance, each limited (or extended) for three months. Most of the orders (140) authorised surveillance by the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*), the domestic intelligence agency, in the area of Islamism. In total, more than 1,500 telephone connections of around 550 persons were affected per semester. Out of the 1,628 persons whose surveillance was stopped in the course of 2015, 400 have been notified. For the other persons, the G10 Commission will reassess the decision to abstain from notification after two years. In 2015, the commission decided to abstain definitely from notification five years after the end of surveillance in the case of 188 persons in 2015.³⁶

In the area of strategic surveillance by the Federal Intelligence Service (*Bundesnachrichtendienst*), the G10 Commission approved 2,272 formal search terms (compared to 15,679 in 2014), mostly targeting foreign phone numbers, websites or email addresses that were suspected being related to international terrorism. In total 1,964 telecommunications (*Telekommunikationsverkehre*) were filtered from the data flow between Germany and foreign countries (compared to 25,192 in 2014), of which 52 were eventually categorised as “relevant” intelligence (compared to 65 in 2014).³⁷

Whereas the figures suggest a significant decrease of telecommunication intercepted by strategic surveillance, critics argue that the numbers are not comparable over time because of technical innovations in the filtering process. They suspect that upgraded filtering procedures rely on “selectors” which are in fact algorithms programmed for a sequential analysis of data based on combinations of formal search terms rather than simple search terms such as email addresses or mobile phone identifiers.³⁸ This would also explain the significant drop in the number of approved search terms.

Kurt Graulich, who was commissioned by the Federal Government as “person of trust” to assess the controversial NSA selectors, describes “formal search terms” as follows: “Formal search

³⁵ Germany, German Bundestag (*Deutscher Bundestag*) (2017), *Bericht gemäß § 14 Absatz 1 Satz 2 des Gesetzes zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses (Artikel 10-Gesetz – G 10) über die Durchführung sowie Art und Umfang der Maßnahmen nach den §§ 3, 5, 7a und 8 G 10 (Berichtszeitraum 1. Januar bis 31. Dezember 2015): Unterrichtung durch das Parlamentarische Kontrollgremium*, Printed Document 18/11227, 16 February 2017, available at: <http://dip21.bundestag.de/dip21/btd/18/112/1811227.pdf>.

³⁶ *Ibid.*, pp. 4 and following.

³⁷ *Ibid.*, pp. 7 and following.

³⁸ Scheele, J. (2014), ‘Verdachtslose Rasterfahndung des BND, Eine Zehnjahresbilanz 2002-2012’, *Bürgerrechte & Polizei/CILIP*, No. 105 (May 2014), pp. 34–43.

terms are formed of telecommunication attributes and their permutations, as well as of characteristic technical parameters or patterns which are predefined for certain telecommunication types. A telecommunication attribute (TKM) is precisely the feature that uniquely and persistently describes a subscriber in a telecommunication service. It is used as a formal search term to identify and select relevant traffic. TKM can be, for example, telephone numbers, mail addresses or IMSIs. Each TKM may have a different number of technical spellings, the so-called permutations, in the course of the technical transmission of telecommunications. For example, the string max.mustermann@internet.org can be found in the digital data stream in various spellings (encodings) depending on the protocol and use. A powerful control system for IP capture must take this into account. This means, if an agent controls an e-mail address, the control system translates it directly into many different spellings, depending on the domain in up to 20 variants. [emphasis by author of this report]³⁹

Reporting by the Federal Commissioner for Data Protection and Freedom of Information

On 30 May 2017, the **Federal Data Protection Commissioner** published her **26th bi-annual Activity Report for 2015 and 2016**.⁴⁰ Referring to recent decisions of the Federal Constitutional Court (in particular the decision on the counter-terrorism database 2013 and the decision on the Federal Criminal Police Office Act 2016), the Commissioner highlights the function of her office to compensate the lack of individual legal remedies in the field of covert surveillance and data processing, which requires effective oversight. Against this backdrop she complains that her authority is lacking adequate resources for the regular and effective oversight of the security and intelligence agencies.⁴¹

She recalls the inspections of her staff at both the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*) to control the use of the counter-terrorism database and at the BND to control the SIGINT outpost Bad Aiblingen:

³⁹ Graulich, K. (2015), Nachrichtendienstliche Fernmeldeaufklärung mit Selektoren in einer transnationalen Kooperation - Prüfung und Bewertung von NSA-Selektoren nach Maßgabe des Beweisbeschlusses BND-26, pp. 24-25, available at: www.bundestag.de/blob/393598/b5d50731152a09ae36b42be50f283898/mat_a_sv-11-2-data.pdf.

⁴⁰ Germany, Federal Commissioner for Data Protection and Freedom of Information (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) (2017), 26. *Tätigkeitsbericht zum Datenschutz für die Jahre 2015 und 2016*, Bonn, *Die Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*, Bonn, 30 May 2017, available at: www.bfdi.bund.de/SharedDocs/Publikationen/Taetigkeitsberichte/TB_BfDI/26TB_15_16.pdf?__blob=publicationFile&v=3.

⁴¹ *Ibid.*, pp. 36-39.

The focus of the inspection at the Federal Office for the Protection of the Constitution was on the data sharing practices in the context of the counter-terrorism database. At a previous inspection, the Commissioner's staff had noticed illegal practices of transferring data that were originating from G10 surveillance to the counter-terrorism database without labelling them as such. More than two years later the practice was still in operation despite the intelligence agency's pledge to revise the policies. Hence, the Commissioner issued a formal complaint against the illegal situation. Moreover, the Commissioner issued another formal complaint against the lack of support by the staff of the Federal Office. The inspection was, for the first time, a joint exercise together with staff from the secretariat of the G10 Commission. The Commissioner hails the new joint approach as a promising means to avoid gaps in oversight.⁴²

The Commissioner reports that her staff determined serious data protection violations during the inspection of the SIGINT outpost of the BND at Bad Aiblingen. Details are not reported due to her obligations to secrecy. She did only inform the Parliamentary Control Panel, the G10 Commission and the NSA Inquiry Committee of the German Bundestag about her findings in more but not in full detail. However, the Commissioner highlights the amount of staff resources that was needed for the inspection due to intense preparation, several inspection visits, the technical complexity of the issues at stake, and the lengthy follow-up with the BND and the Federal Chancellery. Given the need to increase such inspections the Commissioner, once again, reminds that her office is lacking adequate resources.⁴³

Details of the inspection of the Federal Data Protection Commissioner's staff at the BND outpost in Bad Aiblingen were made public by the online platform netzpolitik.org which leaked the **top secret inspection report** in September 2016.⁴⁴ Accordingly, the Commissioner determined 18 serious violations of data protection law, and issued 12 formal complaints: The BND was found operating seven databases without having performed the prior mandatory consultation of the Federal Data Protection Commissioner. Among others, the XKEYSCORE programme was used for the real-time search of internet traffic. Other systems, such as DAFIS (*Daten-Filter-System*), aiming to delete communications of Germans, were found not functioning adequately. In addition, the BND was found using vast amounts of selectors delivered by the NSA without a proper assessment if these fit the tasks of the BND. Nonetheless, it was found that SIGINT data which were collected with the help of the problematic systems and NSA selectors were transferred from the BND to the NSA. In addition,

⁴² Ibid., pp. 134-135.

⁴³ Ibid., pp. 135-136.

⁴⁴ Meister, A. (2016), 'Geheimer Prüfbericht: Der BND bricht dutzendfach Gesetz und Verfassung – allein in Bad Aiblingenetzpolitik.org', netzpolitik.org, 1 September 2016, available at: <https://netzpolitik.org/2016/geheimer-pruefbericht-der-bnd-bricht-dutzendfach-gesetz-und-verfassung-allein-in-bad-aiblingen/>.

all metadata were stored after a filtering routine, aiming to protect Germans, in the VERAS database (*Verkehrs-Analyse-System*) for purposes of network analyses. The Commissioner complains that the inspection process itself was seriously inhibited by BND staff, e.g. by the deletion of logfiles or the denial to inspect the NSA selectors with reference to the “third party rule”.

Work of specific ad hoc parliamentary commissions

From 7 July 2016 to 16 February 2017, the **1st Inquiry Committee of the 18th German Bundestag (the so-called “NSA Inquiry Committee”)** held its remaining 27 sessions, both in public and behind closed doors. In June 2016, the mandate of the Committee was expanded in order to cover also aspects of the generic (i.e. unaided by the NSA or other foreign partners) BND surveillance. Consequently, the targeting of EU and NATO allies by the BND was an important issue during the hearings in these eight months. It became evident that the Federal Chancellery’s executive oversight of the SIGINT activities of the BND was rather weak: Within Department 6, which is in charge of the executive supervision of the BND and the coordination of the federal intelligence agencies, mainly two units are overseeing the SIGINT activities of the BND, i.e. Referat 601 and 603, whereas the former is in charge of legal issues and the latter is in charge of functional and line supervision. Only five persons worked in Referat 603 in 2013 (meanwhile seven persons), most of them former BND staff. Two witnesses from Referat 603 reported that they did only start actively supervising stand-alone and joint SIGINT activities of the BND in spring 2015, among others by drafting a regulatory manual for SIGINT (*Dienstvorschrift SIGINT*).⁴⁵ The Federal Data Protection Commissioner’s inspection was also an issue when the head of the responsible unit was heard in October 2016 for a second time. She reported that the Federal Chancellery classified even the legal assessment of the visit by the Federal Data Protection Commissioner as secret document with the consequence that she must not talk in public about the report despite its leak a month before.⁴⁶ Other issues in the Committee have been the intelligence reforms in the U.S. and the United Kingdom, the role of German intelligence for the U.S. drone war. The last sessions were dedicated to the hearing of high-ranking officials such as the Federal Chancellor Angela Merkel or her chief of the Chancellery, Peter Altmaier. According to their statements the Federal Government had reacted

⁴⁵ hib. heute im bundestag (2016), ‘Kanzleramts-Fachebene uninformiert’, *heute im bundestag*, 21 October 2016, available at: www.bundestag.de/presse/hib/201610/-/476614; Biselli, A. (2016), ‘Live-Blog aus dem Geheimdienst-Untersuchungsausschuss: „Das Schaf, das ich nicht sehe, kann ich nicht zählen.“’, *netzpolitik.org*, 20 October 2016, available at: <https://netzpolitik.org/2016/live-blog-aus-dem-geheimdienst-untersuchungsausschuss-dreimal-kanzleramt-einmal-bundesdatenschutzbehoerde/>.

⁴⁶ hib. heute im bundestag (2016), ‘Zeugin unter Geheimschutzbedingungen’, *heute im bundestag*, 20 October 2016, available at: www.bundestag.de/presse/hib/201610/-/476568.

quickly and adequately to the Snowden revelations and the collusion of the BND.⁴⁷ Currently, the Inquiry Committee is drafting its final report which will be adopted on 21 June 2017, before being tabled in a plenary session of the parliament in the last week of June.⁴⁸

Work of non-governmental organisations

On 15 November 2016, Amnesty International and several of its members and staff, supported by the strategic litigation organisation Association for Freedom Rights (*Gesellschaft für Freiheitsrechte*), lodged a constitutional complaint against the Article 10 Act (*G10*). The complainants challenge the legal provisions that regulate strategic surveillance of international telecommunication to and from Germany by the Federal Intelligence Service (*Bundesnachrichtendienst*). The amendment of the G10 in November 2015 opened the window of opportunity. The organisers hope that the Federal Constitutional Court will revise its 1999 decision on BND surveillance as the context has changed significantly in the “digital age”.⁴⁹

On 2 March 2017, the German section of the NGO Reporters without Borders (*Reporter ohne Grenzen – RoG*) and the lawyer Niko Härting lodged constitutional complaints against strategic G10 surveillance of the BND in 2012/2013 with the Federal Constitutional Court (*Bundesverfassungsgericht*). After the Federal Administrative Court (*Bundesverwaltungsgericht*) had turned down their complaint on 14 December 2016 (see case III in annex with court decisions), rejecting them as inadmissible, the complainants could bring the case to the Constitutional Court. Among others, they challenged the one-year period after which logfiles on data collection in the context of strategic surveillance have to be deleted. They argued that this period is too short, pointing to the reasoning of the Federal Administrative Court who dismissed the complaint as no evidence could be found for the interception of their communication. RoG and the lawyer claimed that under these conditions no effective remedies are available as the sole indicator for the risk of being targeted by strategic surveillance of the BND, i.e. the annual report on the activities of the G10 Commission, is only published after the logfiles are deleted.⁵⁰ However, the constitutional complaints were turned down by the Federal

⁴⁷ hib. heute im bundestag (2017), ‘Merkel bekräftigt Haltung zur NSA-Affäre’, *heute im bundestag*, 16 February 2017, available at: www.bundestag.de/presse/hib/2017_02/-/493782.

⁴⁸ cf. <https://www.bundestag.de/blob/510644/bc56e9f6a525dcd32ad435febf433e0/134--sitzung-data.pdf>.

⁴⁹ Gesellschaft für Freiheitsrechte (2016), ‘Verfassungsbeschwerde von GFF & Amnesty gegen das Artikel-10-Gesetz’, Press release, 15 November 2016, available at: <https://freiheitsrechte.org/index.php/2016/11/15/pressemitteilung-verfassungsbeschwerde-von-gff-amnesty-gegen-das-artikel-10-gesetz/>.

⁵⁰ Reporter ohne Grenzen (2017), ‘Verfassungsbeschwerde gegen BND-Überwachung’, Press release, 2 March 2017, available at: <https://www.reporter-ohne-grenzen.de/presse/pressemitteilungen/meldung/verfassungsbeschwerde-gegen-bnd-ueberwachung/>.

Constitutional Court only six weeks after the submission as inadmissible.⁵¹ The court's decision is not published yet.

RoG is also planning to lodge a constitutional complaint against the foreign-to-foreign surveillance under the new BND Act before December 2017.⁵²

Reports, opinions and academic articles related to the German surveillance reform in 2016

- Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten, Bundesverband Deutscher Zeitungsverleger, Deutscher Journalisten-Verband, Deutscher Presserat, Verband Deutscher Zeitschriftenverleger, Vereinte Dienstleistungsgewerkschaft, Verband Privater Rundfunk und Telemedien, Zweites Deutsches Fernsehen (2016), *Gemeinsame Stellungnahme zum Gesetzentwurf des Bundeskanzleramtes sowie zum Gesetzentwurf der Fraktionen der CDU/CSU und SPD (BT-Drs. 18/9041) Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*, A-Drs. 18(4)654, 9 September 2016, available at: <http://www.bundestag.de/blob/459632/b8528075cc5c9224d5cd964c84b80075/18-4-654-data.pdf>.
- Bäcker, M. (2016), *Stellungnahme zu dem Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes (BT-Drs. 18/9041)*, A-Drs. 18(4)653 G, 23 September 2016, available at: <http://www.bundestag.de/blob/459630/1ddfe2451c0fd067872976d0f0467882/18-4-653-g-data.pdf>.
- Bundesrat (2016), *Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes: Empfehlungen der Ausschüsse*, Drucksache 420/1/16, 12 September 2016, available at: <http://www.bundesrat.de/SharedDocs/drucksachen/2016/0401-0500/430-1-16.pdf?blob=publicationFile&v=1>.
- Deutscher Anwaltverein (2016), *Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Gefahrenabwehrrecht und Informationsrecht zum Entwurf eines Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes*, Berlin, October 2016, available at: https://anwaltverein.de/de/newsroom/sn-65-16-zum-entwurf-eines-gesetzes-zur-ausland-ausland-fernmeldeaufklaerung-des-bundesnachrichtendienstes?file=files/anwaltverein.de/downloads/newsroom/stellungnahme/2016/DAV-SN_65-16.pdf.

⁵¹ Personal communication from staff of Reporter without Borders, 17 June 2017.

⁵² Reporter ohne Grenzen (2017), 'Verfassungsbeschwerde gegen BND-Überwachung', Press release, 2 March 2017, available at: <https://www.reporter-ohne-grenzen.de/presse/pressemitteilungen/meldung/verfassungsbeschwerde-gegen-bnd-ueberwachung/>

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Other academic publications

In 2017, the following academic books have been published which discuss issues of German intelligence law:

- 1) Hochreiter, M. (2017), *Die heimliche Überwachung internationaler Telekommunikation. Eine rechtsvergleichende Untersuchung zur Rechtsstaatlichkeit der Arbeit von Auslandsnachrichtendiensten in Deutschland und dem Vereinigten Königreich unter besonderer Berücksichtigung der Europäischen Menschenrechtskonvention*, München, Herbert Utz Verlag.

Comparative analysis of the legal regimes for the surveillance of international telecommunication in Germany and the United Kingdom in the light of the European Human Rights Convention which was published in January 2017.

- 2) Dietrich, J.-H.; Eiffler, S.-R., eds. (2017), *Handbuch des Rechts der Nachrichtendienste*, Stuttgart, Richard Boorberg Verlag.

The handbook of intelligence law was published in late May 2017: It is a collection of 33 contributions, organised in nine chapters, that cover topics which range from the history of German intelligence authorities to the intelligence law in selected other countries. Key chapters focus on the locus of German intelligence agencies in the national and international “security architecture”, the agencies’ mission, their modes of activity and their powers, and oversight regimes. Authors are legal experts from academia, the federal government and the judiciary.

ANNEX – Court decisions

Case I

Thematic area	Powers of G 10 Commission
Decision date	20 September 2016
Reference details	Federal Constitutional Court (<i>Bundesverfassungsgericht</i>) BVerfG, Beschluss des Zweiten Senats vom 20. September 2016, - 2 BvE 5/15 - Rn. (1-61) ECLI:DE:BVerfG:2016:es20160920.2bve000515 http://www.bverfg.de/e/es20160920_2bve000515.html
Key facts of the case (max. 500 chars)	The G10 Commission of the German Bundestag complained that the Federal Government refused to allow an independent investigation of a list of 40,000 so-called “selectors” (search terms) fed by the U.S. National Security Agency into a joint signal intelligence activity with the Federal Intelligence Service (<i>Bundesnachrichtendienst</i> , BND) for which the G10 Commission had authorised data collection by the BND at a communications hub in Frankfurt/Main. Lacking other legal options, the G10 Commission tried to challenge the non-disclosure policy as an institution (<i>Organ</i>) of the German Bundestag, hence, making use of a type of legal procedure reserved for conflicts between the institutions of the constitution (<i>Organstreitverfahren</i> , Article 93 I of the Basic Law, Sections 13 para. 5, 63 ff Federal Constitutional Court Act, <i>Bundesverfassungsgerichtsgesetz</i> - BVerfGG).
Main reasoning/argumentation (max. 500 chars)	The Federal Constitutional Court confirmed earlier decisions that the G10 Commission is not part of the German Bundestag and does, therefore, not execute parliamentary oversight. Rather the Commission belongs to the functional sphere (“Funktionsbereich”) of the executive branch of government by procedurally warranting the legality of covert surveillance of intelligence services. Though the Commission shall protect fundamental rights of individuals, the protection of fundamental rights is not decided in the domain of conflicts between the institutions. Rather individuals may exercise their rights to lodge a constitutional complaint which – in cases of covert surveillance – is admissible if an individual can demonstrate a certain likelihood of being affected.

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The key issue of the case was the question if the G10 Commission has to power to legally challenge decisions by the Federal Government that inhibit the commissions' work.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Federal Constitutional Court rejected the complaint as inadmissible, arguing that the G10 Commission is lacking the status of a party because it does not qualify as an "organ" in accordance with Article 93 (1) of the Basic Law.</p>
<p>Key quotation in original language and translated into English with reference details (max. 500 chars)</p>	<p>“Die G 10-Kommission ist ein Kontrollorgan eigener Art. Sie ist weder oberstes Bundesorgan, noch ist sie eine andere durch das Grundgesetz oder die Geschäftsordnung eines obersten Bundesorgans mit eigenen Rechten ausgestattete Beteiligte.” (Randnummer 34)</p> <p><i>The G10 Commission is a control body of its own kind. It is neither a supreme federal institution nor is it another party being equipped with distinct rights by the Basic Law or the internal regulations of a supreme federal institution. (Para. 34)</i></p>

Case II

Thematic area	Powers of parliamentary inquiry committee
Decision date	13 October 2016
Reference details	<p>Federal Constitutional Court (<i>Bundesverfassungsgericht</i>)</p> <p>BVerfG, Beschluss des Zweiten Senats vom 13. Oktober 2016, - 2 BvE 2/15 - Rn. (1-190)</p> <p>ECLI:DE:BVerfG:2016:es20161013.2bve000215</p> <p>http://www.bverfg.de/e/es20161013_2bve000215.html</p>
Key facts of the case (max. 500 chars)	<p>The opposition parties in German Bundestag and two of their members in the NSA Inquiry Committee (<i>NSA-Untersuchungsausschuss</i>) took legal action against the non-disclosure of the same NSA “selectors” which had been kept secret also from the G10 Commission (see case I). The plaintiffs legally challenged the policy of the Federal Government to dismiss the Inquiry Committee’s application to take evidence by arguing that this would violate the “third party rule” and disrupt intelligence cooperation with the USA. Rather the Federal Government ordered a kind of proxy investigation by a “competent person of trust” (<i>Sachverständige Vertrauensperson</i>), namely a retired judge of the Federal Administrative Court (<i>Bundesverwaltungsgericht</i>).</p>
Main reasoning/argumentation (max. 500 chars)	<p>The Federal Constitutional Court argued that the disclosure of the NSA selectors would seriously disrupt the international cooperation of the German intelligence services and, thus, pose a significant risk to national security. The court reasoned that the division of power entails distinct functions of both the parliament and the government, in which the protection and maintenance of internal and external security (among others by intelligence cooperation) is a function of the government. As the government provided at structural information on the “selectors” while arguing that international intelligence cooperation would be seriously disrupted by a disclosure of the detailed list of “selectors”, the court concluded that the government’s function to protect and maintain national security limits the right of the parliamentary inquiry committee to take evidence.</p>
Key issues (concepts, interpretations) clarified by the	<p>The key issue of the case was the question where the right of the parliament to hold the government accountable ends when it comes to national security.</p>

<p>case (max. 500 chars)</p>	
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Federal Constitutional Court decided that the complaint was ill-founded and, thus, dismissed the request of the opposition parties to directly investigate the list of “selectors” in the NSA Inquiry Committee.</p>
<p>Key quotation in original language and translated into English with reference details (max. 500 chars)</p>	<p>“Das Geheimhaltungsinteresse der Bundesregierung überwiegt das parlamentarische Informationsinteresse, weil die vom Beweisbeschluss erfassten NSA-Selektorenlisten aufgrund völkerrechtlicher Vereinbarungen nicht ihrer Verfügungsbefugnis unterfallen, ihre Einschätzung, eine nicht konsentierende Herausgabe dieser Listen könne die Funktions- und Kooperationsfähigkeit deutscher Nachrichtendienste erheblich beeinträchtigen, nachvollziehbar ist und sie dem Vorlageersuchen in Abstimmung mit dem Untersuchungsausschuss durch andere Verfahrensweisen so präzise, wie es ohne eine Offenlegung von Geheimnissen möglich gewesen ist, Rechnung getragen hat.” (Leitsatz Nr. 5)</p> <p><i>The interest in secrecy of the Federal Government prevails the parliamentary interest in information as the lists of NSA selectors to be taken as evidence does not fall under its [the Federal Government's] control due to international agreements, as the [government's] assessment that a non-consented disposal of these lists could significantly damage the functioning of German intelligence services and their capability to cooperate is comprehensible and as it [the government] has accommodated the request for presentation in consultation with the Inquiry Committee as precisely as possible without compromising secrecy by other means of procedure. (Head Note No. 5)</i></p>

Case III

Thematic area	Legal remedies available to individuals against strategic surveillance
Decision date	14 December 2016
Reference details	<p>Federal Administrative Court (Bundesverwaltungsgericht)</p> <p><i>Lawyer vs. BND</i> BVerwG 6 A 9.14 [ECLI:DE:BVerwG:2016:141216U6A9.14.0] http://bundesverwaltungsgericht.de/entscheidungen/entscheidung.php?lang=de&ent=141216U6A9.14.0</p> <p><i>Reporter without Borders vs. BND</i> BVerwG 6 A 2.15 [ECLI:DE:BVerwG:2016:141216U6A2.15.0] http://bundesverwaltungsgericht.de/entscheidungen/entscheidung.php?lang=de&ent=141216U6A2.15.0</p>
Key facts of the case (max. 500 chars)	<p>A lawyer, who had already lost a similar case in 2014, and the German section of the NGO Reporters without Borders (RoG) took legal action against the strategic surveillance of international telecommunication by the Federal Intelligence Service (Bundesnachrichtendienst) in 2012 respectively 2013, arguing that their privacy was violated by both the interception of their international email communication (lawyer: around 1,000 emails in 2012; RoG: around 280,000 emails in 2013) and by the collection, storage and analysis of metadata in the so-called VERAS system. Detailed information on VERAS became public by documents from the NSA Inquiry Committee which were leaked by the platform Wikileaks in late November 2016 and had been submitted by the plaintiffs as additional evidence shortly before the oral proceedings.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The court argued that even if emails of the plaintiffs had been intercepted by the dragnet of strategic surveillance, the Federal Intelligence Service had filtered them out as irrelevant as proven by the fact that no emails of the plaintiffs are found among the communications stored as “relevant” by the BND in 2012 and 2013. Therefore, a privacy infringement cannot be determined by the court. Thus, the complaint was found to be inadmissible. The judges conceded that the right to individual remedy is limited but they argued that, on the one hand, any storage of irrelevant data for the purpose to notify affected persons would be disproportionate and that, on the other hand, the permanent and comprehensive oversight of the G10 Commission compensates for the lack of legal remedy.</p>

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>As in the case which was decided in 2014, it was at stake the question if effective legal remedies against strategic surveillance are available for individuals who cannot prove that their communication was intercepted as their communications was not stored as “relevant” information. The court confirmed the reasoning of 2014.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>Whereas the court will examine the implications of the VERAS system in more detail before deciding on these aspects of the complaints, the judges found that the complaints against the strategic surveillance of email communication was inadmissible.</p>
<p>Key quotation in original language and translated into English with reference details (max. 500 chars)</p>	<p><i>“Der Beurteilung, dass aus diesem Grund eine zulässige Feststellungsklage nicht erhoben werden kann, steht die Garantie effektiven Rechtsschutzes in Art. 19 Abs. 4 Satz 1 GG [...] berufen kann, nicht entgegen. Diese Gewährleistung wird durch das auch grundrechtlich verankerte Gebot zur Löschung erfasster, aber für die Aufgabenerfüllung des Bundesnachrichtendienstes nicht erforderlicher E-Mails und die Bestimmungen des Artikel 10-Gesetzes zur erforderlichen Unterrichtung der von Beschränkungsmaßnahmen nach § 5 G10 Betroffenen in zulässiger Weise begrenzt [...]. Die damit verbundene Erschwerung des gerichtlichen Individualrechtsschutzes ist auch deshalb hinnehmbar, weil die G10-Kommission die Rechtmäßigkeit von Beschränkungsmaßnahmen nach § 5 G10 laufend und umfassend kontrolliert und dadurch einen kompensatorischen Grundrechtsschutz gewährleistet.”</i> (BVerwG 6 A 2.15, Rn. 11)</p> <p>“The assessment that no admissible declaratory action can be taken does not contradict the warrant of effective legal remedy by Article 19 (4) Sentence 1 of the Basic Law [...]. This warrant is limited in a valid form by the command, anchored in fundamental rights, to delete intercepted emails which are not relevant for the achievement of tasks by the Federal Intelligence Service and the provisions of the Article 10 Act on the necessary notification of persons who were affected by interfering measures in accordance with Section 5 G10 [...]. It is acceptable that individual legal remedy is complicated by this, as the G10 Commission does permanently and comprehensively oversee the legality of interfering measures, thus, ensuring the compensating protection of fundamental rights.” (BVerwG 6 A 2.15, para. 11)</p>