

Written in 2014 as guest-editor for the ABA-SIL Europe Committee Hot Topics Newsletter # 10, **not accepted for publication**

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A German Perspective

A recent editorial in the "*Frankfurter Allgemeine Zeitung*" (FAZ) proclaimed that "**Chancellor Merkel is not Obama's poodle**", but it looks as if she may aspire to become that **poodle**. Please understand that, in this context, Germans visualize not the impressive standard-size poodle, but a cute little toy poodle. Please read Jörg Rehder's very interesting article titled "*The EU's Data Privacy Regulation and Chancellor Merkel's Political Tightrope*", a bombshell for unsuspecting Germans. It is all about POWER, isn't it?

This newsletter issue provides insights into recent developments in the European Union and its member states, with particular emphasis on democratic and social issues, banking, data privacy/NSA and TTIP. Additionally you will find articles about the EU Works Council Directive and the newly updated German Commercial Code, the „Handelsgesetzbuch“ (HGB).

I hope that you will enjoy reading. If not, please let us know. We strive for customer satisfaction. If there are subjects that need to be addressed in future newsletters, we want to know. Since we won the 2014 ABA Award for Outstanding Committee Newsletter (we are sharing the award with the India Law News) we need to keep up the standard.

The German-U.S. Relationship

In July 2009, after many years in the U.S.A. I returned with my husband to Hamburg where I grew up and went to school. We are both U.S. citizens.

Germans ask us many questions about the U.S.A. to which we do not have an answer: Why don't the Americans recognize German and European financial statements based on the European International Financial Reporting Standards (IFRS) as valid while Germany and the EU recognize U.S. financial reporting standards? Why do I need to apply for a travel document (ESTA) to visit the U.S.A. as a tourist or business traveler when we do not require the same of Americans who come to Germany? What is up with the special pre-flight checking of mobile phones for U.S.-bound flights? Will my cell phone be registered and/or monitored by U.S. authorities? Are people in Atlanta really allowed to take a loaded gun into a bar, school or airport?

If critical voices were heard before, it is obvious that in 2014 the U.S.-German relationship has suffered since Edward Snowden's revelations about global NSA surveillance. The overall assessment is that the Americans just went too far with their global syphoning of all contact data, telephone and internet communications, including the surveillance activity of the NSA who had been monitoring Chancellor Angela Merkel's cell phone for years. Upon discovering that an employee of the

German Federal Intelligence Agency, the "*Bundesnachrichtendienst*" (BND), had passed secrets to the CIA, Germany expelled the CIA supervisor from the U.S. Embassy.¹ German newspaper headlines reflected disdain about Washington's refusal to comment on the expulsion. The *Frankfurter Allgemeine Zeitung* (FAZ) of July 11, 2014 emphasized that „Washington continues to refuse to comment on the spy affair“.² Three days later the FAZ called for Germany to take a stronger stance towards the U.S.A.³ and in light of the spying activities, stating that „solidarity in intelligence matters should not be more important than our sense of justice“. These headlines can be seen as an expression of the fact that the German-U.S. confidence crisis has intensified. Even though, to give a fair report, the FAZ informed Germans that our BND has been transferring up to 60 million meta data per day to the NSA. The author called for the German government to assert itself towards the USA: "Are we afraid to be considered weak? On the contrary, supporting fundamental citizen and human rights shows strength. Solidarity with secret service organizations should not be more important than a sense of justice (*Rechtsempfinden*)."

Additionally, seeing recent images of police violence and race riots in Ferguson, Missouri, with footage of police officers dressed in camouflage, using military equipment, and aiming machine guns at the backs of citizens who congregate in the streets, many Germans say "this is too much". It led them to ask: "Has the USA become a police state?" The fact that two German reporters were arrested in Ferguson, hand-cuffed and kept in jail for a several hours, did not go over well. Another reporter who was investigating the Ferguson events for the "Spiegel" magazine, a well-regarded weekly publication, reported on August 25, 2014 that he experienced pervasive "every-day racism".⁴ He described how he was driving with two young black citizens of Ferguson through the city streets. They were repeatedly stopped by the police. He said that only when the officers noticed that a white man was in the car were they waved on.

Germans treasure privacy. NSA activities are compared to the comprehensive "Stasi" surveillance of citizens in the former DDR and the Nazi surveillance using "Blockwarts" (wardens who snooped on the inhabitants within a particular city block) to spy on and denounce citizens. Naturally, everyone agrees that the NSA surveillance is much more efficient, more thorough and all-encompassing than the Stasi and the Nazi efforts. The pros and cons of a suspension of the **Safe Harbor Treaty** are discussed.⁵ Loud voices call for the suspension of the Transatlantic Trade and Investment Partnership (**TTIP**) negotiation.⁶

¹ *Berlin tells CIA station chief to leave in spy scandal*, euractiv.com, July 11, 2014, <https://www.euractiv.com/section/global-europe/news/berlin-tells-cia-station-chief-to-leave-in-spy-scandal/>; *Germany order CIA station chief to leave over spying allegations*, *Washington Post*, July 10, 2014

² *Merkel's öffentliche Kritik verärgert Washington*, *Frankfurter Allgemeine Zeitung*, July 11, 2014

³ *Ich bin stolz auf die German Angst*, *Frankfurter Allgemeine Zeitung*, July 14, 2014

⁴ *An American City's Daily Racism*, *Der Spiegel*, August 26, 2014

⁵ *US/EU Safe Harbor Agreement: What It Is and What It says About the Future of Cross Border Data Protection*, Federal Trade Commission, Public Statement, Jan. 1, 2003, <https://www.ftc.gov/news-events/news/public-statements/useu-safe-harbor-agreement-what-it-says-about-future-cross-border-data-protection>

⁶ *Transatlantic Trade and Investment Partnership (TTIP) – Documents*, European Commission, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/united-states/eu-negotiating-texts-ttip_en

It is sad to say that being American in Germany does not always feels good. One expatriate now explicitly clarifies that he is not working for the NSA when he is introduced as a U.S. citizen. Others limit speaking English in the street or in cafes and restaurants as to avoid being recognized as American by their accent. I wish things were different.

Changes in Attitude about the EU and Financial Institutions

The EU parliament elections of this spring with the lowest voter participation ever (43%) brought the rise of populist parties and more discussion about the democratic legitimacy of the EU Commission and EU Parliament. The centralization of power in Brussels and the loss of national competencies have evolved as big themes.

The wrangling for the EU Presidency and Commissioners' post has disillusioned even some hard core Europeans. The election of Jean-Claude Juncker as EU Commission President is not necessarily seen as promising better times or more democracy.

Mr. Juncker is considered a washed up career politician by many, burdened by a secret service (SREL) scandal the investigation of which led Mr. Juncker to resign as President of Luxemburg in 2013. Luxemburg secret service agents were involved in a series of bombings in the 80's. "Together with military and intelligence agents from multiple European countries, they were part of Operation Gladio, a clandestine illegal paramilitary organization. They worked as a parallel police force within the country and did whatever they liked, including spying on whomever they wanted, whenever they wanted".⁷ A parliamentary investigative committee determined that political responsibility for the bombings and paramilitary activity fell to the government. Also, as late as 2009, Juncker fought hard against EU-member demands to discontinue Luxemburg's practice of being a tax haven for international investors.

The slogan "More Europe" (*Mehr Europa*) no longer carries much weight. Romantic references to celebrating "European Peace", "European Unity", or "the European Citizen replacing the National Citizen" are juxtaposed with factual references to the EU's lack of democratic legitimation, a lack of trust in the EU Commission, and a call for more national competencies.

On August 10, 2014, the FAZ published a full page article authored by Dieter Grimm, a highly regarded former judge of the German Federal Constitutional Court who has taught law at the universities of Frankfurt, Harvard and Yale. Mr. Grimm addressed the question of the legitimacy of the EU and its executive and judicative organs, the EU Commission and European Court of Justice (EuGH) under the headline "The Strength of the EU lies in a Prudent Limitation" ("*Die Staerke der EU liegt in einer klugen Begrenzung*").⁸

Mr. Grimm describes how the necessary connection between election and parliamentary action is not existent, since voters can only vote for national parties

⁷ Jean-Claude Juncker May Be Back Soon, Der Spiegel, July 11, 2013, <https://www.spiegel.de/international/europe/luxembourg-prime-minister-juncker-resigns-amid-spying-scandal-a-910589.html>

⁸ Die Stärke der EU liegt in einer klugen Begrenzung, Frankfurter Allgemeine Zeitung, August 10, 2014, <https://www.faz.net/aktuell/politik/europa-debatte-die-staerke-der-eu-liegt-in-einer-klugen-begrenzung-13090815.html>

who are not involved in the actual activity of parliament, but cannot vote for European parties whose representatives sit in the parliament. Delegation and accountability are interrupted. He lays out the disconnection ("*Verselbstständigung*") of the EU Commission and the European Court of Justice from the democratic processes in the EU and its member states: **"They render decisions of the highest political importance in a non-political modus while being immunized from political redirection by the fact that the underlying European contracts were constitutionalized. They are more independent and freer than any national executive power and every national jurisdiction."** Mr. Grimm makes the case for allowing a new and improved EU where the course of jurisdiction can be altered by political legislative action.

ECB and EU Banks

EU citizens are more and more concerned about a sustained European Central Bank (ECB) policy of near zero interest rates which has resulted in an expropriation of depositors ("*Enteignung der Sparer*"). Germans understand that low interest rates have helped the German government reducing the national debt and debt payments by billions of euros, but at the same time are concerned about financial security/stability upon retirement and the future livelihood of their children. Cautioning remarks like Raghuram Rajan's warning about global financial risks are received with alarm and a general distrust in the financial industry. Rajan, the governor of the Reserve Bank of India, had accurately predicted the 2007 financial crisis. He recently warned about the effects of cheap money, invoking the volatility of markets, an increased pressure on stocks and real estate and increased financial stability risks.

Worries about another bank crash have resurfaced. The pending EU bank stress test is doubted by some to result in valid findings. (The prior bank stress test was a flop in terms of credibility.) There has been criticism that state bonds carried by banks on their balance sheets will be excluded from consideration. Banks will not begin paying into the joint bank bail-out fund until 2018, with full funding expected in 2024.⁹ The final amount envisioned is only €55 billion. Taxpayer bailouts are expected to recur.

The Federal Reserve and the FDIC consider the emergency plans of eleven (11) large banks, including Deutsche Bank, as lacking credibility and as not suitable for an insolvency without a repeat government bail-out. The cost of saving the Portuguese bank Banco Espírito Santo (\$4.9 billion) is expected to fall at least partially on tax payers.

Minimal big bank capitalization rates and huge bank fines for violations of U.S. sanctions, exchange rate manipulation, Libor and Euribor manipulation, U.S. mortgage fraud, etc. continue to burden banks like Deutsche Bank. Deutsche Bank has been in the headlines in connection with fraud, criminal investigations and criminal charges against top management (Co-CEO Fitschen, Rolf Breuer, Josef Ackermann), shareholder complaints and an overall public distrust towards bankers.

⁹ *Leaked ,issue note': Who pays for EU bank bailouts?*, Financial Times, Feb. 14, 2014, <https://www.ft.com/content/53458ae8-ef05-36be-8857-ad9aac9caa64>

Increased immigration from EU countries and asylum applications

Poverty immigration ("*Armutseinwanderung*") from poor EU member countries and steadily increasing numbers of asylum applications (Syria, Eritrea and Irak comprise the top 3) stress national welfare systems, such as the comprehensive German "Hartz IV" program and the program for monthly child benefits ("*Kindergeld*"). All parents, whether they reside in Germany temporarily or permanently, have the right to apply for *Kindergeld* for each child, no matter whether the child lives in Germany or another country. For each of the first two children parents receive €184 per month, for the 3rd child €190 per month and for every additional child €215 per month.

It is not uncommon in Germany for long-time German Hartz IV recipients to say that they rather receive government benefits than take a job, since a job would only pay them a few more Euros than Hartz IV. The extent of this social program would be unthinkable in the USA. It is clearly not comparable to U.S. social welfare programs like AFDC or food stamps. The financial and political burden of providing housing, healthcare, and general living expenses to all foreigners who apply is currently being addressed by adding safeguards and checks and balances to the process of application.

Outlook

The Ukraine crisis and German military engagement in Iraq, even though limited, add further to the worries and insecurities of Germans. Seventy percent (70%) of Germans are against any international military engagement and would prefer to emulate Switzerland's neutrality.

The German GPD ("BIP") contracted by 0,2% in the second quarter when compared to the first quarter. Merkel's government supposedly still has an approval rating of 60%. However, political apathy is rampant. Discontent rules. Still, there will not be any demonstrations or any uprising against Chancellor Merkel and her cabinet. Germans have always been an obedient kind of people and accept their government's decisions.

There is hope that the EU will heal its lack of democratic legitimacy. However, "Fears accompanying both, the dramatic asymmetries between the North and the South and the increasing balance within European society provide fertile breeding ground for further Euroscepticism".¹⁰

¹⁰ EU Commission President: Who and what did we actually vote for? <http://www.verfassungsblog.de/en/eu-kommissionspraesident-wen-und-wollten-wir-eigentlich-waehlen/#.U8UmwT3ZafQ>