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COMMISSION STAFF WORKING DOCUMENT

**2020 Rule of Law Report
Country Chapter on the rule of law situation in Germany**

Accompanying the document

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**2020 Rule of Law Report
The rule of law situation in the European Union**

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ABSTRACT

The German justice system is characterised by the country's federal structure and the important role of the *Länder* in the administration of justice. The level of perceived judicial independence is high. Safeguards for the independence of prosecutors have recently been under discussion. The German justice system is mostly performing efficiently, although some indicators have been showing a decline in overall performance. Particular efforts are ongoing to further develop the digitalisation of the justice system, which would contribute to enhancing its efficiency and quality. The 2019 'Pact for the Rule of Law' between the federal level and the federal states will lead to additional funding for the justice system and the creation of 2000 new posts for judges and prosecutors by end-2021. This is also relevant in view of the increasing number of judges and prosecutors who will retire in the coming years.

The legal, regulatory and institutional anti-corruption framework is broadly in place, with the implementation of repressive anti-corruption policies and criminal cases prosecution lying with the *Länder*. A 'revolving doors' policy exists at the federal level and in most *Länder*. As regards lobbying, the mandatory registration of contacts with both members of the Federal Parliament and members of the Federal Government is missing, although reforms in this area are being considered. Whistleblowers protection in Germany relies on a system which is integrated within businesses, allowing for people to rely on a reporting channel which is additional to the institutional one.

Germany has well-established regulation on media freedom and pluralism, which mostly falls under the competence of the *Länder*. The fourteen media regulatory authorities are public agencies, with a legal guarantee of independence from political and commercial interference. Transparency of ownership of media outlets is high and safeguards are in place to prevent political interference with the media. The constitution and secondary legislation expressly guarantee the right of journalists to protect the confidentiality of their sources and regulate the right of access to information. In recent years, some concerns about increasing attacks on journalists have arisen.

The system of checks and balances is well established. An impact assessment framework and the involvement of stakeholders contribute to the quality of the legislative process. Constitutional review takes place at both the federal level as well as at the level of the *Länder*. An enabling framework for civil society and a policy for making information accessible to citizens are in place. Civil society organisations can operate freely in Germany. Regular discussions on rule of law topics, both from a domestic as well as an European perspective, are promoted, including through a nationwide information and publicity campaign conducted in 2019 in the context of the 'Pact for the Rule of Law', focussing on communicating the significance of the rule of law and the guarantees it provides for the individual citizen as well as for a democratic society.

I. JUSTICE SYSTEM

The court system in Germany is structured in a federal manner. Jurisdiction is exercised by federal courts and by the courts of the 16 federal states (*‘Länder’*). The main share of competence and workload regarding the administration of justice lies with the *Länder*. The court structure is divided between the ordinary jurisdiction and specialised courts. The ordinary jurisdiction consists of the civil and criminal jurisdiction. The specialised courts are the administrative courts, the finance courts, the labour courts and the social courts. The courts of the *Länder* are generally administered by their respective ministries of justice. Appointment of judges and prosecutors, except for the federal courts, falls within the competence of the *Länder*. While appointment procedures differ in detail between the *Länder*, all share common core elements, in particular the principle of merit (*Leistungsprinzip*)¹ and the judicial review of the process and decision relating to appointment. For the Federal Courts, a judges’ selection committee (*Richterwahlausschuss*) selects judges for appointment by the executive and Councils of judges (*Präsidentialräte*) of the relevant courts have to be consulted in this process.² There are currently 638 local courts, 115 regional courts and 24 higher regional courts as part of the ordinary jurisdiction. There are further 51 administrative courts, 15 higher administrative courts, 18 financial courts, 108 labour courts, 18 higher labour courts, 68 social courts and 14 higher social courts across the 16 *Länder*³. At the federal level, the Federal Minister of Justice is responsible for the Federal Court of Justice, the Federal Administrative Court and the Federal Finance Court. The Federal Ministry of Labour and Social Affairs is responsible for the Federal Labour Court and the Federal Social Court. Constitutional review is ensured by the Federal Constitutional Court and the constitutional courts of the *Länder*. The prosecution services in Germany are part of the executive, at federal level with the Prosecutor General at the Federal Court of Justice. At the level of the *Länder*, each has its own public prosecution service. There are 27 regional Bars in Germany⁴. The umbrella organisation of all 28 Bars in Germany is the German Federal Bar in Berlin.

Independence

The perceived independence of courts and judges among the general public and companies remains high. Overall, 76% of the general population and 73% of companies perceive the level of independence of courts and judges as ‘fairly or very good’⁵. This high level of perceived judicial independence has remained stable over the last years⁶. This was also confirmed by stakeholders such as the German Association of Judges and Prosecutors,

¹ This is anchored in Article 33 para. 2 of the Basic Law; mainly on the basis of the grades in the two legal state exams.

² The judges’ selection committee (*Richterwahlausschuss*) is composed in equal parts of the responsible ministers of the federal states and members selected by the Federal Parliament. See Law on Election of Judges (*Richterwahlgesetz*) and German Law on Judges (*Deutsches Richterergesetz*), Art. 54-55. Similar committees exist in certain *Länder*. Moreover, the process and decision of appointment or non-appointment is fully subject to judicial control before the administrative courts.

³ Federal Ministry of Justice and Consumer Protection (2020).

⁴ In addition, there is a special bar for the lawyers with rights of audience in civil matters at the Federal Court of Justice.

⁵ Figures 44 and 46, 2020 EU Justice Scoreboard. The level of perceived judicial independence is categorised as follows: very low (below 30% of respondents perceive judicial independence as fairly good and very good); low (between 30-39%), average (between 40-59%), high (between 60-75%), very high (above 75%).

⁶ 2013 to 2020 EU Justice Scoreboard.

the German Bar Association and the German Federal Bar⁷. The independence of the German justice systems is ensured by multiple safeguards, which include in particular judicial control over the legality of any decision relating to the judiciary, such as appointments, professional appraisals, promotions, disciplinary sanctions and dismissals⁸. Furthermore, the German justice system contains a number of elements of judicial self-administration⁹.

The right of Ministers of Justice to instruct prosecutors in individual cases is under discussion. An amendment to abolish this right had been proposed as a reaction to the judgment of the Court of Justice of the European Union concerning the application of the European Arrest Warrant¹⁰, which found that German public prosecutor's offices do not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European Arrest Warrant. This amendment was rejected by the Federal Parliament on 28 May 2020¹¹. Structurally, the prosecution services form part of the executive. Therefore and as stipulated in the relevant provisions of the Law on the Judicial System¹², the Ministers of Justice of the *Länder* and the Federal Minister of Justice have the possibility to give instructions to prosecutors in individual cases. This power is subject to legal safeguards. In addition to the principle of legality¹³, which circumscribes any action of prosecution services, and the constitutional principle of the rule of law¹⁴, there are additional safeguards at federal and *Länder* level¹⁵. The overall effect is to ensure that any instructions in a specific case cannot in any event exceed the limits of the law¹⁶. Moreover, both authorities and stakeholders explained that only in very rare cases this right of instruction is actually exercised¹⁷. This practice, combined with the legal safeguards in place, appears to mitigate the risk of misuse of the right of instruction¹⁸.

⁷ Information received in the context of the country visit and the consultation process for the report, e.g. contribution from the German Federal Bar.

⁸ In particular, Art. 97 Basic Law on Judicial Independence.

⁹ Input from Germany for the 2020 Rule of Law Report, under point 5.

¹⁰ Judgment of the Court of Justice of the European Union of 27 May 2019, *OG and PI*, Joined Cases C-508/18 and C-82/19 PPU. In response to the judgment, European Arrest Warrants are now issued by a judge in Germany. See also the Report by the European Commission on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2020) 270 final, p. 5-6.

¹¹ The amendment was proposed by an opposition party and did not find a parliamentary majority. Deutscher Bundestag, *Plenarprotokoll 19/163*, 28 May 2020.

¹² In particular, paras. 146 – 147 of the German Law on the Judicial System (*‘Gerichtsverfassungsgesetz’*).

¹³ Para. 152 of the German Code of Criminal Procedure (*‘Strafprozessordnung’*).

¹⁴ Art. 20 para. 3 of the Basic Law.

¹⁵ Figure 55, 2020 EU Justice Scoreboard; e.g. the Federal Ministry of Justice and the Government parties of Saxony issued commitments not to exercise their rights to give instructions. The ministry of Thuringia committed itself not to give instructions in individual cases, the ministry of North Rhine-Westphalia and the Government of Lower Saxony committed to give individual instructions only in exceptional cases. While there are no federal laws, there are certain state laws as well as federal and state regulations and guidelines setting forth rules on instructions. Instructions of the Federal Ministry of Justice and the ministries of North Rhine-Westphalia and Thuringia need to be in writing, in Thuringia they must also be reasoned, in Lower Saxony they need to be in written form if no agreement is reached and in Schleswig-Holstein they need to be documented in written form and reported to the president of the Parliament.

¹⁶ Input from Germany for the 2020 Rule of Law Report.

¹⁷ Input from Germany for the 2020 Rule of Law Report, under point 8.

¹⁸ Information received in the context of the country visit and the consultation process for the report, e.g. written contribution by the German Bar Association.

¹⁹ See also Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe, para. 13(d): “where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law”. As regards the safeguards, see para. 13 (points d to e).

Quality

Digitalisation of the court system is advancing, but remains a longer-term challenge. On 1 January 2018, the Act on the Introduction of Electronic Files in the Judiciary and the further Improvement of Electronic Legal Communication came into force. According to this law, courts and public prosecutors will be obliged to keep court files and procedural files exclusively as electronic files from 1 January 2026 at the latest. Stakeholders explained that currently the use of IT-tools may differ from one court to another, regardless of the federal state¹⁹. The *Länder* are engaging in three large-scale networks to implement the full digitalisation of court files (*‘elektronische Akte’*)²⁰. The federal level is participating in some of these networks, depending on the respective federal court. Further digitalisation will reinforce the efforts to promote the quality of the justice system. In particular, Germany provides for arrangements for producing machine-readable judicial decisions, the promotion of and incentives for using Alternative Dispute Resolution methods, arrangements that make the justice system more child-friendly, training for judges, as well as the use of and follow-up on court users’ surveys²¹. However, Germany appears to have comparatively high court fees for certain categories of cases, such as low-value consumer claims or specific commercial cases involving a cross-border element²².

The justice system will see an elevated number of judges and prosecutors reaching retirement age in the coming years. Both authorities and stakeholders indicated that in many *Länder*, particularly in the eastern parts, upcoming retirements will increase significantly over the next years. This will require the attention of both Ministries of Justice and Finance to ensure that sufficient numbers of new judges and prosecutors are recruited. Stakeholders have voiced some concerns on what is considered a lack of competitive entry grade salaries for new judges and prosecutors, in particular when compared to private practice, which increases the difficulties to attract sufficient numbers of qualified graduates for the courts and prosecution services²³. This challenge may be more pronounced in some parts of the country, given that salary levels can differ between the *Länder* up to 17%²⁴.

To strengthen the justice system and the rule of law, Germany is implementing a ‘Pact for the Rule of Law’²⁵, which includes additional resources, both at the federal level and the level of the *Länder*. The federal level and the *Länder* on 31 January 2019 agreed on a ‘Pact for the Rule of Law’. The latter foresees additional funding of EUR 220 million from the federal level for the *Länder* to create 2000 additional posts for judges and prosecutors, including the necessary administrative staff by 31 December 2021. In addition, the federal level is creating, within its competence, 24 additional posts at the Federal Court of Justice

¹⁹ Information received in the context of the country visit and the consultation process for the report, e.g. written contribution by the German Bar Association.

²⁰ eAS (*Baden-Württemberg, Sachsen, Schleswig-Holstein, Thüringen*), eIP (*Bayern, Berlin, Brandenburg, Hamburg, Rheinland-Pfalz, Mecklenburg-Vorpommern*), e²A (*Bremen, Hessen, Niedersachsen, Nordrhein-Westfalen, Sachsen-Anhalt, Saarland*).

²¹ Figures 29, 30, 31, 38, 39, 41, 2020 EU Justice Scoreboard.

²² See previous note, Figures 24 and 25.

²³ Information received in the context of the country visit and the consultation process for the report, e.g. the written contribution from the German Association of Judges and Prosecutors, p. 7.

²⁴ Authorities and stakeholders stressed that the wage gap has closed in recent years, following a relevant decision by the Federal Constitutional Court of 5 May 2015 (2 BvL 17/09), but can still represent up to 17% at the entry grade of R1; see in this respect the contribution from the German Association of Judges and Prosecutors for the 2020 Rule of Law Report, p. 7.

²⁵ *Pakt für den Rechtsstaat*. Federal Ministry of Justice and Consumer Protection (2019), Pact for the Rule of Law.

and 71 posts at the Prosecutor General of the Federal Court of Justice to strengthen the justice system²⁶. The ‘Pact for the Rule of Law’ is perceived very positively by stakeholders, in particular the German Association of Judges and Prosecutors, as it responds to long-voiced demands to strengthen resources in the justice system²⁷, which is also relevant in view of the expected additional challenges related to the upcoming wave of retirements.

Efficiency

The German justice system is mostly performing efficiently, although some indicators have been showing a decline in overall performance. First instance courts in litigious civil and commercial cases largely manage to deal with their workload, as indicated by a clearance rate close to 100%. However, in 2018, the clearance rate fell to 97.2%²⁸. The length of proceedings in first instance litigious civil and commercial cases has been steadily increasing since 2012²⁹. This has also been indicated by stakeholders³⁰. Administrative courts mostly perform efficiently, in particular at third instance where the time needed to resolve cases is considerably lower than in first and second instance administrative courts³¹. However, administrative courts have seen a comparatively high level of incoming cases³², which is also reflected in a comparatively high number of pending cases³³.

II. ANTI-CORRUPTION FRAMEWORK

Germany has several authorities responsible for corruption prevention and prosecution, which include the Federal Ministry of the Interior, Building and Community, Federal Ministry of Justice and Consumer Protection, Supreme Audit Institution, Financial Intelligence Unit, Federal Office for Justice, Federal Criminal Police Office, and the competent authorities (prosecution offices and courts) of the federal states. Some *Länder* have specialised prosecution offices on corruption offences, others have specific corruption-related expertise distributed across all prosecution offices. The Directive concerning the Prevention of Corruption in the Federal Administration provides the legal framework as regards the prevention. It is complemented by detailed guidelines and comprehensive codes of conduct, which aim at preventing corruption at federal level.

Germany scores 80/100 in the Transparency International Corruption Perception Index and was ranked 5th in the European Union and 9th globally. 53% of respondents to the 2020 Eurobarometer on corruption consider corruption widespread in their country (EU average 71%) but only 9% of people feel personally affected by corruption in their daily lives (EU average 26%). As regards businesses, 31% of companies consider corruption to be widespread (EU average 63%). According to the surveys, 22% of companies consider that that corruption is a problem when doing business (EU average 37%). 33% of people find that there are enough successful prosecutions to deter people from corrupt practices (EU average 36%) while 41% of companies believe that people and businesses caught for bribing a senior official are appropriately punished (EU average 31%).

²⁶ Input from Germany for the 2020 Rule of Law Report, under point 13.

²⁷ Contribution from the German Association of Judges and Prosecutors for the 2020 Rule of Law Report, p. 9.

²⁸ Figure 11, 2020 EU Justice Scoreboard.

²⁹ Figure 6, 2020 EU Justice Scoreboard.

³⁰ Information received in the context of the country visit and the consultation process for the 2020 Rule of Law Report, e.g. contribution from the German Bar Association.

³¹ Figure 9, 2020 EU Justice Scoreboard.

³² Figure 4, 2020 EU Justice Scoreboard.

³³ Figure 15, 2020 EU Justice Scoreboard.

Germany has a comprehensive institutional framework to fight corruption. The federal anti-corruption institutional framework comprises the Federal Ministry of the Interior, Building and Community, the Federal Ministry of Justice and Consumer Protection, the Supreme Audit Institution and the Federal Criminal Police Office. A network of contact persons for corruption prevention has also been established, which the OECD has labelled as ‘good practice’ at the international level³⁴. These contact persons provide citizens and employees with assistance and advice for corruption-related questions or concerns³⁵.

The implementation of repressive anti-corruption policies and criminal cases prosecution lies with the *Länder*. The official police report on corruption reports 4 894 police-registered corruption cases in 2017³⁶. Compared to the previous year, this is a decrease of 25 %. The number of suspects, however, increased by 15%. The financial damage caused through corruption amounted to EUR 291 million, which represent an increase of 137%. Some *Länder* have specialised prosecution offices on corruption offences, others have specific corruption-related expertise distributed across all prosecution offices. As regards foreign bribery investigations, the country has been evaluated as one of the highest enforcers of the Anti-Bribery Convention³⁷.

Germany has a thorough regulatory framework to prevent corruption. The prevention framework of corruption is included in several provisions at both federal and state level. The Directive concerning the Prevention of Corruption in the Federal Administration (CPD) provides the legal framework as regards the prevention of corruption in the Federal Government.³⁸ Its implementation is monitored by different bodies, such as the leading unit within the Federal Ministry of the Interior and the Federal Court of Audit. A revision of the CPD is currently foreseen by the Federal Ministry of Interior. The CPD is complemented by detailed guidelines for implementations (Code of Conduct, Guide for Superiors and Public Authorities, Focus on Risk Assessment). In addition, ministries develop their own implementation guideline (*Umsetzungsrichtlinie*).

Germany has put in place integrity and prevention measures for civil servants and public employees. Rules governing contacts with third parties, the acceptance of gifts, secondary employment and post-employment activities are contained in the Code of Conduct against Corruption and the Guide for Principals and Heads of Administration, further backed up by provisions in the Criminal Code, the Act on Federal Civil Servants and the Federal Civil Servant Status Act and the Collective Agreement for the Public Service (TVöD). Bribery offences are broadly defined and in particular, criminal liability can be triggered by the mere acceptance of gifts³⁹.

Rules on conflicts of interest and asset declarations for members of the Federal Parliament have been revised. Disclosure of remunerated side activities and other outside ties with respect to members of the Federal Parliament is governed by the Act on Members of

³⁴ Federal Ministry of the Interior, Building and Community (2019), Prevention of Corruption in the Federal Administration: Annual report for 2018.

³⁵ Federal Ministry of the Interior, Building and Community (2019), Prevention of Corruption in the Federal Administration: Annual report for 2018.

³⁶ *Bundeskriminalamt, Bundeslagebild Korruption 2017, Bundeskriminalamt, 2019, p. 2.*

³⁷ Implementing the OECD anti-bribery convention, phase 4 report, 2018.

³⁸ *Die Bundesregierung, Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung, 2004.*

³⁹ *Die Bundesregierung, Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung, 2004.*

the Federal Parliament⁴⁰, the Code of Conduct for Members of the Federal Parliament and the Provisions Implementing the Code of Conduct for Members of the Federal Parliament⁴¹. Most *Länder* require the disclosure of remunerated activities for the members of the parliament, which are not prohibited, but some *Länder* are still missing legislation in this regard⁴². As regards financial interests and contracts with state authorities, there is no prohibition or restriction on the holding of financial interests by members of the Federal Parliament or on them entering into contracts with state authorities⁴³. Members of the Federal Parliament must disclose their shareholdings, however only if they exceed 25% of the voting rights in a company. The number of staff of the administration of the Federal Parliament responsible for monitoring conflict of interests and asset declarations was increased in 2019. GRECO noted the need to strengthen the resources to allow for an effective check on the implementation of the rules⁴⁴. As regards members of the Federal Government, relevant provisions are contained in the Act governing the legal status of the members of the Federal Government⁴⁵. Under this Act, members of the Federal Government cannot hold secondary positions and they have to declare gifts received in relation to their office⁴⁶. The disclosure of assets and properties is not regulated. Similarly, for member of the federal parliament, the possession of assets or financial interests is not subject to notification.

A policy to regulate ‘revolving doors’ exists at the federal level and in most *Länder*. A legal cooling-off period was introduced in 2015 for outgoing Federal Chancellors, Ministers and Parliamentary State Secretaries. Current and former members of the Federal Government must notify the Federal Government if they intend to work outside the public sector within 18 months of leaving the Federal Government. Parliamentary State Secretaries shall make the notification to the Member of the Federal Government responsible⁴⁷. Some *Länder* have also introduced cooling-off periods. Overall, such provisions are in place in seven *Länder*, whereas discussions on their introduction are ongoing in three⁴⁸.

Lobbying is regulated in different rules governing contacts with third parties for members of the Federal Parliament, federal ministries and civil servants of the federal administration. As regards contacts between members of the federal parliament and lobbyists, Germany does not have a lobby register yet. A public list is maintained by the President of the Federal Parliament and representatives of associations lobbying the Federal Parliament or the Federal Government shall only be heard by the Federal Parliament committees if they have entered themselves therein. However, registration is on a voluntary basis and foresees a registration obligation only for representatives of associations, which do not include enterprises, self-employed lobbyists and other categories⁴⁹. As regards civil

⁴⁰ *Bundesministerium der Justiz und für Verbraucherschutz, Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages, Bundesamt für Justiz: Gesetze im Internet.*

⁴¹ *Deutscher Bundestag, Verhaltensregeln für Mitglieder des Deutschen Bundestages as promulgated on 18 June 2013 (BGBl. I, S. 1645).*

⁴² Baden-Württemberg, Brandenburg, Mecklenburg-Vorpommern, Rheinland-Pfalz, Thüringen.

⁴³ However, pursuant to Rule 2 of the Code of Conduct for Members of the Federal Parliament, members who are lawyers shall inform the President of the Federal Parliament of a representation of the Federal Republic of Germany in court or out of court when such representation is provided against remuneration.

⁴⁴ GRECO Fourth Evaluation Round – Second Compliance Report, recommendation IV, p. 6.

⁴⁵ *Bundesministergesetz* (BGBl. I S. 1328).

⁴⁶ World Bank, Country Profile Germany.

⁴⁷ Input from Germany for the 2020 Rule of Law Report, point 21.

⁴⁸ Brandenburg, Hamburg, Hessen, Niedersachsen, Nordrhein-Westfalen, Schleswig-Holstein and Thüringen have provisions in place. Discussions are ongoing in Berlin, Mecklenburg-Vorpommern and Sachsen.

⁴⁹ GRECO Fourth Evaluation Round – Evaluation Report.

servants in the federal administration, the Corruption Prevention Strategy contains guidelines for contacts between civil servants and third parties.

Whistleblower protection provisions and reporting procedures for whistleblowers exist in various sector-specific laws. Under the current rules, there is for example an obligation to establish reporting channels for receiving and handling certain information from whistleblowers in the health sector⁵⁰. Moreover, many companies have put in place whistleblower protection systems, following recommendations of the German Corporate Governance Codex⁵¹. Stakeholders have raised concerns with regard to the risk of an insufficient level of protection for whistleblowers, depending on the applicable set of laws.

III. MEDIA PLURALISM

Freedom of expression, freedom of the press⁵² and the right to information are guaranteed in the Constitution (Basic Law)⁵³. The independence of the fourteen media authorities is enshrined in interstate treaties at a national level and in state-specific broadcasting and media acts of the *Länder*⁵⁴. German law provides for transparency rules requiring the disclosure of ownership in the news media sector and the disclosure of any involvement in media entities by political parties.

Content-related media regulation is a matter of competence of the *Länder*. Private radio and television broadcasters are regulated by the 14 different independent state regulatory authorities (*Medienanstalten*), who are responsible for granting licences, allocating frequencies and supervising private radio and television broadcasters⁵⁵. They monitor compliance with advertising rules and provisions on youth protection, and promote projects to enhance media literacy. They further support the introduction of new broadcasting technology and contribute to securing diversity in private broadcasting⁵⁶. The fourteen media authorities are public agencies, with a legal guarantee of independence from political and commercial interference. They have wide regulatory powers at their disposal and their decisions may be challenged before administrative courts. According to the Media Pluralism Monitor 2020 ('MPM 2020'), the indicator on independence and effectiveness of the media authority scores at very low risk in Germany⁵⁷.

The German Press Council is a self-regulatory body founded by media publishers⁵⁸. The effective implementation of the Basic Law, which guarantees the freedom of the press and prohibits censorship, ensures the independence of the press and its self-regulatory bodies from political interference. The Press Council is organised as a registered association comprised of two publishing and two journalist organisations: German Newspaper Publishers Association (BDZV), German Federation of Journalists (DJV), German Journalists Union (dju) within the German United Trade Services Union (dju in ver.di) and the Association of German Magazine Publishers (VDZ). Through addressing complaints about press behaviour,

⁵⁰ Input from Germany for the 2020 Rule of Law Report, p. 15.

⁵¹ Input from Germany for the 2020 Rule of Law Report, p. 14.

⁵² Germany ranks on 11th place on the 2020 World Press Freedom Ranking of Reporters without Borders.

⁵³ Art. 5 para. 1 Basic Law.

⁵⁴ Medienanstalten, Legal basis of media authorities web page.

⁵⁵ Public Service Broadcasters are monitored by their own supervisory boards.

⁵⁶ Medienanstalten, The media authorities web page.

⁵⁷ Media Pluralism Monitor 2020. Regulators' good reputation and independence were further confirmed by the information received in the context of the country visit.

⁵⁸ The relevant German Press Codex is a self-regulatory framework established by the German Press Council.

the Press Council monitors compliance with the ethical rules for the daily work of journalists laid down in the German Press Code and may publicly reprimand the respective press outlet for breaching the press code. The work of the Press Council is financed from contributions from member associations and the board of complaint is funded by the German Federal Government.

As regards transparency of ownership, German law contains specific provisions requiring the disclosure of ownership in the media sector⁵⁹. Commercial broadcasters must report ownership information in order to apply for and hold a broadcasting license and they must report on plans affecting the shareholders' structure. Online media entities have to make their ownership information transparent via its imprint information on their websites. For the press, these transparency obligations for imprints are stipulated in the respective state press laws. Political parties must disclose their involvement in media entities in accordance with the Act on Political Parties Act of 1967⁶⁰. According to the Media Pluralism Monitor 2020, the indicator on transparency of media ownership scores low on the risk scale⁶¹.

Germany has functioning safeguards against the formal control by political parties over the media. The indicator on political independence of media scores at a low risk⁶². The Interstate Treaty on Broadcasting and Telemedia generally prohibits advertising of a political, ideological or religious nature in radio, television and video-on-demand services⁶³. Political advertising is only allowed during elections periods, where airtime must be given to all parties participating in the election according to the principle of equal opportunities⁶⁴. Airtime for political adverts is free of charge and no additional airtime can be purchased. The distribution of online political advertising (beyond video-on-demand-services) is currently not regulated. However, the new Interstate Treaty on Media will include a transparency provision on political advertising. Politicians and parties commonly do not report on their spending for advertising on online platforms.

The framework for the protection of journalists is in place although there are some concerns about increasing attacks on journalists. The framework for the protection of journalists is defined by the freedom of the press and broadcasting freedom guaranteed under the Basic Law⁶⁵. This is further complemented by the relevant press and media acts of the *Länder*. Journalists have the right to protect their sources and refuse to testify in criminal, civil and administrative cases. Based on a legitimate interest, the right of access to information is guaranteed by the Constitution and access to Federal Government information is regulated by the Freedom of Information Act. Thirteen *Länder* have enacted similar frameworks. Journalists are protected against criminal offenses based on the criminal laws applicable to all citizens. Currently, there is no specific law in Germany to protect journalists from crime or to investigate the relevant crime. Police crime statistics do not evaluate attacks on journalists separately, but account for criminal offenses against media in general. Nevertheless, the German authorities consider that a separate law for the protection of journalists and a separate record of attacks do not appear to be necessary against the

⁵⁹ Section 26 of the Interstate Treaty on Broadcasting and Telemedia.

⁶⁰ *Gesetz über die politische Parteien* (BGBl. I S. 149).

⁶¹ 2020 Media Pluralism Monitor, p. 12. This finding was also confirmed by information received in the context of the country visit.

⁶² 2020 Media Pluralism Monitor, p. 13.

⁶³ Sections 7, 58 para.3 of the Interstate Treaty on Broadcasting and Telemedia.

⁶⁴ Section 42 of the Interstate Treaty on Broadcasting and Telemedia.

⁶⁵ Art. 5 Basic Law.

background of the available statistics on the extent of the problem⁶⁶. In Germany defamation may be punished with imprisonment, though it has to be noted that this occurs only very rarely in practice⁶⁷. According to the Media Pluralism Monitor 2020, the overall basic protection indicators relating to the journalistic profession, standards and protection demonstrates a low risk. However, the relevant Media Pluralism Monitor 2020 indicator on physical safety shows a high risk. Reporters without Borders stated that in 2018, at least 22 and in 2019 at least 13 violent attacks on journalists were reported⁶⁸. In 2019 and 2020, the Council of Europe Platform to promote the protection of journalism and safety of journalists published five alerts for Germany, concerning cases of attacks on the physical safety, harassment and intimidation of journalists and other acts having chilling effects on media freedom⁶⁹.

IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

Germany is a federal, democratic republic comprised of sixteen federal states (*Länder*). Power is distributed between the federal and state Governments. The separation of powers is enshrined in the Basic Law⁷⁰ and the constitutions of the *Länder*. At the federal level, federal legislative power is vested in the Federal Parliament (*Bundestag*) and the representative body of the *Länder* (*Bundesrat*)⁷¹. The Government, the *Bundesrat* or members of the *Bundestag* can submit legislative proposals.⁷² The German Human Rights Institute and the Federal Anti-Discrimination Agency contribute to upholding fundamental rights.

Conducting impact assessments and consulting stakeholders are established practices for enacting legislation. In Germany, a national better regulation body exists since 2006, to advise the Federal Government on these issues. To strengthen transparency of the legislative process at the federal level, the Federal Government decided in November 2019 to publish all stakeholder contributions concerning federal legislative proposals online. This development was also welcomed by the Council of Europe's Group of States against Corruption as '*a significant step in improving transparency of the legislative process on the side of the Federal Government*'⁷³. It is further planned to unify this in a single platform, as currently, each federal ministry is publishing such contributions on their respective websites⁷⁴.

Respect for fundamental and constitutional rights is ensured in several ways. Constitutional review takes place at both the federal level as well as at the level of the *Länder*. At the federal level, the Basic Law provides for a number of different procedures that allow for the constitutional review by the Federal Constitutional Court⁷⁵. These include the abstract judicial review of statutes, the specific judicial review of statutes, the disputes between the federal level and the *Länder*, the disputes between constitutional organs and

⁶⁶ Input from Germany for the 2020 Rule of Law Report, point 34.

⁶⁷ Media Pluralism Monitor 2020, MPM 2020, p. 9.

⁶⁸ Intimidation campaigns, especially via social media, attacks from right wings extremists, police preventing journalists from working during some demonstrations. Reporters without Borders (2019, 2020) World Press Freedom Index, p. 3.

⁶⁹ Council of Europe, Platform to promote the protection of journalism and safety of journalists.

⁷⁰ Art. 20 Basic Law.

⁷¹ Articles 70 *et seq.* Basic Law.

⁷² Proposals by the *Bundestag* can be submitted by (at least) 5% of its members. In practice, most proposals emanate from the Government.

⁷³ GRECO Fourth Evaluation Round – Second Compliance Report, para. 38.

⁷⁴ Information received in the context of the country visit and the input from Germany for the 2020 Rule of Law Report, point 21.

⁷⁵ Arts. 93 and 100 Basic Law; also *Bundesverfassungsgericht*, Types of proceedings web page.

individual constitutional complaints, which may, in exceptional cases, also include the constitutional review of statutes. The Federal Constitutional Court may also issue preliminary injunctions. Review of constitutionality also exists at the level of the *Länder*. For state laws, it is exercised by the respective Constitutional Courts of the *Länder*. The general regime in place for constitutional review is generally considered as effective. However, the recent judgment of the Federal Constitutional Court of 5 May 2020⁷⁶ has raised concerns regarding the scope of its constitutional review in relation to the legal order of the European Union⁷⁷. Stakeholders also pointed to specific aspects regarding the mechanisms in place for monitoring the satisfactory implementation of judgments of the Federal Constitutional Court. There are some concerns that no effective mechanism exists to ensure that judgments are implemented within a set period of time, as witnessed in the lack of legislative follow-up in the implementation of a landmark judgment on inheritance tax law from 2014⁷⁸ or at the level of some *Länder* where the executive has not implemented administrative court rulings in the area of EU law concerning air quality⁷⁹. Another aspect raised is the lack of any fast-track constitutional review of new laws, where their constitutionality is in doubt and where there are reasons to believe that the legislator is not fully implementing previous judgments of the Federal Constitutional Court. The only available remedy in this particular case is to launch a new complaint, which may lead to significant burdens for the complaining party⁸⁰. In the context of the COVID-19 pandemic, the Federal Constitutional Court has been seized with regards to certain of the measures adopted to combat the pandemic⁸¹, and ordered preliminary injunctions⁸² against some measures. Moreover, administrative courts across Germany were seized in proceedings for preliminary relief or injunctions as regards certain public measures related to the COVID-19 pandemic, in some cases with success, while main proceedings are ongoing⁸³.

Independent authorities play a role in safeguarding fundamental rights. The German National Human Rights Institute has been accredited with *A-Status* by the Global Alliance of National Human Rights Institutions in line with the so-called Paris Principles⁸⁴. As regards the Federal Anti-Discrimination Agency, which is the national equality body, the nomination procedure for its leadership appears to be prone to extended delays and frictions. Since April

⁷⁶ Judgment of the Federal Constitutional Court of 5 May 2020, 2 BvR 859/15.

⁷⁷ Court of Justice of the European Union, Press release No 58/20 of 8 May 2020; Statement by President von der Leyen, Statement/20/846 of 10 May 2020.

⁷⁸ Judgment of the Federal Constitutional Court of 17 December 2014, 1 BvL 21/12.

⁷⁹ E.g. the contribution from the German Association of Judges and Prosecutors for the 2020 Rule of Law Report, p. 14 with further references or the contribution from the German Bar Association for the 2020 Rule of Law Report, p. 14 with further references.

⁸⁰ Information received in the context of the country visit and the consultation process for the report, e.g. the written contribution from the German Bar Association.

⁸¹ Germany did not declare a state of emergency or adopt a specific emergency regime, measures were taken at Federal Level based on the Epidemics Law as well as at *Länder* level. Constitutional Court.

⁸² This included the temporary suspension of a total ban of religious services, Decision of the Federal Constitutional Court, 29 April 2020, 1 BvQ 44/20; see also decision of the Federal Constitutional Court, 15 April 2020, 1 BvR 828/20, concerning the freedom of assembly. A number other submissions have been declared inadmissible.

⁸³ See for such successful challenges e.g. Higher Administrative Court Baden-Württemberg (VGH Baden-Württemberg), 5 May 2020, case no 1 S 1623/20 concerning the indicative criterion for the permitted number of customers [20m² per person including staff] considered as likely unlawful; Higher Administrative Court Baden-Württemberg (VGH Baden-Württemberg), 30 July 2020, case no. 1 S 2087/20 concerning an unconditional testing obligation for staff of a slaughterhouse (twice per week) found to be disproportionate.

⁸⁴ UN Human Rights Office of the High Commissioner (1993), Principles relating to the Status of National Institutions (The Paris Principles).

2018, it is managed only on an *ad interim* basis.⁸⁵ Next to the Federal Anti-Discrimination Agency, eight *Länder* have also established anti-discrimination agencies.

There is an enabling framework for civil society and a policy for making information accessible to citizens. Civil society organisations can operate freely in Germany.⁸⁶ There is some discussion concerning a 2019 ruling of the Federal Financial Court concerning the criteria for civil society organisations to benefit from tax privileges for non-profit associations with a public benefit purpose.⁸⁷ Stakeholders, including the National Human Rights Institute, consider that this ruling is narrowing civil society space.⁸⁸

Regular debates and publications on rule of law topics, both from a domestic and a European perspective contribute to fostering a dynamic rule of law culture. A widely-read platform for discussions on rule of law related topics⁸⁹ has gained in importance over recent years and has become a forum for both domestic as well as European discussions on the rule of law. In 2019, the Federal Ministry of Justice and Consumer Protection as part of the ‘Pact for the Rule of Law’ conducted a nationwide information and publicity campaign. This campaign focussed on communicating the significance of the rule of law and the guarantees it provides for the individual citizen as well as for a democratic society and this is further reflected in the programme of the German Council Presidency (2020).

⁸⁵ Contribution from the Federal Discrimination Agency for the 2020 Rule of Law Report, p. 11.

⁸⁶ The civic space is rated as open. Rating given by CIVICUS; ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed.

⁸⁷ Judgment of the Federal Financial Court of 10 January 2019, V R 60/17.

⁸⁸ Contribution from the European Network of Human Rights Institutions for the 2020 Rule of Law Report, p. 109.

⁸⁹ *Verfassungsblog*.

Annex I: List of sources in alphabetical order*

* The list of contributions received in the context of the consultation for the 2020 Rule of Law report can be found at (COM website).

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Annex II: Country visit to Germany

The Commission services held virtual meetings in June 2020 with:

- Bavarian State Chancellery
- European Committee of the Conference of Justice Ministers of the Federal States
- Federal Criminal Police Office
- Federal Ministry of Justice and Consumer Protection
- Federal Ministry of the Interior
- German Association of Judges
- German Chamber of Lawyers (BRAK)
- German Lawyers' Association (DAV)
- Joint Management Office of the Media Authorities
- Transparency International Germany

* The Commission also met the following organisations in a number of horizontal meetings:

- Amnesty International
- Civil Liberties Union for Europe
- Civil Society Europe
- Conference of European Churches
- EuroCommerce
- European Center for Not-for-Profit Law
- European Centre for Press and Media Freedom
- European Civic Forum
- Free Press Unlimited
- Front Line Defenders
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Press Institute
- Lifelong learning Platform
- Open Society Justice Initiative/Open Society European Policy Institute
- Reporters without Borders
- Transparency International EU