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Country Chapter on the rule of law situation in Germany

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2021 Rule of Law Report
The rule of law situation in the European Union

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ABSTRACT

The German justice system, characterised by the important role of the *Länder* in the administration of justice, continues to benefit from a very high level of perceived judicial independence. A legislative proposal is under discussion to limit the rarely used, power of Ministers of Justice to issue instructions to prosecutors in individual cases, in light of the case law of the European Court of Justice. Discussions are on-going regarding the selection criteria for some presiding judges at the Federal Courts following some criticism by judges of the proposed removal of experience requirements. The creation of the additional posts for judges and prosecutors under the 2019 'Pact for the Rule of Law' is advancing. As noted in the 2020 Rule of Law Report, long-term challenges as regards recruitments in the judiciary persist, also in light of upcoming retirement waves of judges. Initiatives continue to further improve the digitalisation of justice. Specialised commercial courts focussed on international matters which can work in English, are being created in several *Länder*. The justice system continues to perform efficiently, showing improvements for administrative cases.

The strategic response to corruption prevention saw further positive developments, complementing the anti-corruption framework already in place. Germany is modernising its strategic framework for the prevention of corruption in the federal administration. A new law introduces a lobby register by January 2022, not envisaging, however, a 'legislative footprint'. Shortcomings remain in the regulation of secondary activities of parliamentarians and in the rules on asset disclosures, although some improvements are underway. Political party financing rules contain some legal gaps, including on sponsoring, while ceilings for donations are considered too high. The financial damage of corruption decreased significantly with classical cash bribery on the decline. Other forms of non-monetary bribery such as free event tickets and potential undue influence through private dinners for business and politics are coming into focus. Germany leads globally in the prosecution of individuals who commit foreign bribery, but there is no legal provision for criminal liability of companies.

Germany has a well-functioning regulatory framework on media freedom and pluralism. In the course of the transposition of the revised Audiovisual Media Services Directive, the German media law framework was updated, notably through the State Media Treaty, which entered into force in November 2020. The degree of independence of the media and the relevant regulatory authorities remains high. German law guarantees a good level of transparency of media ownership. Notwithstanding a solid legal framework, a main concern remains the physical safety of journalists, notably when covering protests. In this regard, 2020 was marked by a significant number of recorded cases of aggression against journalists.

The system of checks and balances has played an active role during the COVID-19 pandemic. Restrictive measures have been taken primarily by the *Länder* Governments on the basis of the Infection Protection Law, which has been amended several times, including in November 2020 to increase oversight by the Federal Parliament. These measures have been subject to extensive judicial review. Some concerns have been raised regarding a broader trend of shortened stakeholder consultation periods. On 9 June 2021 the Commission initiated infringement proceedings against Germany for breach of the principle of primacy of EU law in relation to the 5 May 2020 judgment of the Federal Constitutional Court. Civil society continues to benefit from a robust framework, but is facing uncertainty regarding the tax-exempt status of non-profit organisations. According to stakeholders, concerns over losing this status can lead them to refrain from taking positions on potentially sensitive issues.

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 sixteen federal states ('*Länder*'). The main share of competence and workload regarding the administration of justice lies with the *Länder*[1]. The court structure is divided between the ordinary jurisdiction (civil and criminal) and specialised courts (administrative, finance, labour and social courts). Appointment of judges and prosecutors, except for the Federal Courts and the Prosecutor General at the Federal Court of Justice, falls within the competence of the *Länder*. While appointment procedures differ in details between the *Länder*, all share common core elements, in particular the principle of merit[2] and the judicial review of the process and decision relating to appointments. For the Federal Courts, a judges' selection committee (*Richterwahlausschuss*) selects judges for appointment by the executive and Councils of judges (*Präsidialräte*) of the relevant courts have to be consulted in this process[3]. There are currently 638 local courts, 115 regional courts and 24 higher regional courts as well as 51 administrative courts and 15 higher administrative courts across the 16 *Länder*[4]. There are five Federal Courts: the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, 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 *Land* has its own public prosecution service. Germany participates in the European Public Prosecutor's Office. There are 27 regional Bars in Germany[5], which are organised under the umbrella of the German Federal Bar.

Independence

The level of perceived judicial independence continues to be high. Overall, 80% of the general population and 69% of companies perceive the level of independence of courts and judges as 'very good' or 'fairly good' in 2021[6]. This high level of perceived judicial independence has shown a stable trend over the past five years and represents a slight further increase compared to 2020 as regards the general public, while for companies it has somewhat decreased compared to the stable level of previous years.

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1 As explained in the 2020 Rule of Law Report, the independence of the German justice systems is ensured by multiple safeguards, which include judicial control over appointments, professional appraisals, promotions, disciplinary sanctions and dismissals, and by a number of elements of judicial self-administration.

2 The principle of merit (*Leistungsprinzip*) is anchored in Article 33 para. 2 of the Basic Law; mainly on the basis of the grades in the two legal state exams.

3 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 Richtergesetz*), Art. 54-55. Similar committees exist in certain *Länder*, though not all of them. Moreover, the process and decision of appointment or non-appointment is fully subject to judicial control before the administrative courts.

4 There are also 18 financial courts, 108 labour courts, 18 higher labour courts, 68 social courts and 14 higher social courts. Input from Germany for the 2021 Rule of Law Report.

5 There is also a special bar for the lawyers with rights of audience in civil matters at the Federal Court of Justice.

6 Figures 48 and 50, 2021 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%).

Changes to the power of Ministers of Justice to issue instructions to prosecutors in individual cases is being considered. In January 2021, a draft proposal for amending the system of instructions to prosecutors in individual cases, which has been under discussion in past years[7], was submitted to consultation to the *Länder* and stakeholders. The proposal *inter alia* reacts to the case law of the European Court of Justice concerning the application of the European Arrest Warrant[8]. The proposal would codify the obligation to respect the principle of legality and introduce a requirement that instructions in individual cases must be reasoned and issued in writing[9]. Such envisaged safeguards would be consistent with Council of Europe recommendations[10]. In addition, the proposal would abolish the possibility of instructions in individual cases for the area of EU judicial cooperation in criminal matters, while maintaining it otherwise[11]. While the proposed safeguards have been broadly welcomed by stakeholders[12], reactions to the latter element of the proposal have been mixed. Some *Länder*[13] and stakeholders[14] consider that the current system of instructions has to be maintained to comply with the constitutional democracy principle and thereby the accountability of the prosecution service. Other stakeholders[15] consider that the power to issue instructions in individual cases should be fully abolished and that the proposal would create an artificial separation of national matters and those involving EU judicial cooperation. The Government is reviewing the consultation responses to decide whether and how to move forward with the proposal[16].

The selection criteria for presiding judges at the Federal Courts are subject to ongoing discussions, following some criticism on the proposed removal of specific experience requirements. Promotions to positions of president, vice-president and presiding judge of a senate[17] at the Federal Courts are decided by the Federal President upon proposal of the responsible Minister[18]. The proposal is based on a procedure which includes the mandatory involvement of the Council of Judges of the court concerned. The principle of merit for the selection of candidates is specified through requirements established by law and, particularly,

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7 As noted in the 2020 Rule of Law Report, the fact that this right is rarely used in practice, combined with the legal safeguards in place, appears to mitigate the risk of misuse of the right of instruction; 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 3.

8 Judgments 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 and of 24 November 2020 – C-510/19.

9 Ministry of Justice and Consumer Protection (2021), Draft law to strengthen the independence of public prosecutors and criminal law cooperation with the member states of the European Union.

10 See Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe, para. 13 (d-e). Further safeguards recommended by the Council of Europe are to include the instruction in the case file and allow it to be accessed by the parties.

11 Concretely, the draft refers to parts eight to eleven and thirteen of the law on international legal assistance in criminal matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*), which , inter alia, cover EU judicial cooperation in criminal matters.

12 See the contributions referenced in footnotes 13, 14 and 15.

13 Joint letter by Hessen, Bayern, Brandenburg, Nordrhein-Westfalen, Mecklenburg-Vorpommern, Saarland, Niedersachen and Schleswig-Holstein of 3 February 2021.

14 Contribution by the German Bar Association for the 2021 Rule of Law Report, p. 7.

15 Contribution from the German Association of Judges and Prosecutors for the 2021 Rule of Law Report, p. 7.

16 Information received by the Ministry of Justice in the context of the country visit to Germany.

17 While presiding judges have the same vote as the other judges in the senate, they lead hearings and write professional assessments for promotions; the position also carries a higher salary.

18 The Minister of Justice is responsible for the Federal Court of Justice, the Federal Finance Court and the Federal Administrative Court, while the Minister of Labour is responsible for the Federal Social Court and the Federal Labour Court.

in case of the position of presiding judges, through the selection criteria for the position[19]; and applications are assessed, in particular, on the basis of their professional evaluation by their court president. In September 2020, the Ministry of Justice revised its selection criteria for the position of presiding judges at all Federal Courts within its responsibility, in particular removing a requirement of usually five years of experience at the respective Federal Court for becoming a presiding judge[20]. The Presidents of the Federal Courts[21] and stakeholders[22] have criticised this, arguing that such experience is necessary to be able to fulfil the tasks of a presiding judge and regretting their lack of involvement[23] in preparing the changes[24]. The Ministry was also criticized for reviewing the selection criteria during an ongoing recruitment procedure. Following the criticism, the Ministry of Justice is engaging in dialogue with the Federal Courts. In early 2021, the Ministry proposed two candidates to the Federal President for the vacant posts of vice-president and president at the Federal Finance Court, who were elected by the Federal judges' election committee, but do not fulfil the five years of experience at the Federal Finance Court[25]. Appeals against the promotion procedure for the president and the vice-president position are currently pending[26], with a suspensive effect on the appointment. According to the Council of Europe, procedures for the appointment of Supreme Court Presidents should be defined by law, based on merit and formally rule out any possibility of political influence[27].

Quality

The implementation of the 2019 'Pact for the Rule of Law' is in progress, but longer-term challenges regarding recruitments in the judiciary persist[28]. The creation and filling of the 2000 posts for judges and prosecutors in the *Länder* foreseen in the Pact for the Rule of Law is progressing. In the majority of the federal states all allocated posts have been created (with some going beyond their obligations), and in the remaining federal states all outstanding posts are set to be created by December 2021. The posts foreseen at Federal level have also been created[29]. A joint report by the Federal Government and the *Länder* on the

[19] The case law of the Federal Constitutional Court has defined the application of the principle of merit for Federal judges, see e.g. Judgment of the Federal Constitutional Court of 29 November 2016, 2 BvR 2453/15.

[20] Thus, under the former criteria, exceptions from the five years of experience were possible.

[21] See e.g. SWR (2021), Bettina Limperg: "Das muss sich unbedingt ändern" and information received in the context of the country visit to Germany.

[22] Contribution from the German Association of Judges and Prosecutors for the 2021 Rule of Law Report, p.6. The Judges Association cites a risk that a perception of political considerations impacting promotions could negatively impact public trust in the judiciary. Deutsche Richterzeitung (4/21), "Ein verstörender Verdacht".

[23] While such involvement is not legally required, the previous selection criteria had been established in 2016 in agreement between the Ministry of Justice and the Federal Courts.

[24] The Ministry of Justice considers that the experience can also be acquired at other relevant courts.

[25] Whether criteria for presiding judges apply to court presidents and vice-presidents is a point of debate. Stakeholders consider that in particular vice-presidents have primarily judicial responsibilities and should therefore fulfil the experience criteria. The Ministry of Justice considers that due to the administrative responsibilities of presidents and vice-presidents, the five years experience should not be considered as a compulsory criterion; Information received in the context of the country visit to Germany.

[26] LTO (2021), Urgent appeals against replacements at the top of the Federal Finance Court.

[27] Consultative Council of European Judges (2016), Opinion N°19 The role of court presidents, para 53. Under German law any promotion decision, including those of Supreme Court Presidents, must be based on merit (Art. 33 (2) Basic Law, § 46 German Judges Act, §§ 9, 22 (1) Federal Civil Servants Act). In addition, every such decision is subject to judicial review.

[28] 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, pp. 4-5.

[29] 24 posts at the Federal Court of Justice and 71 posts at the Federal Prosecutor General, input from Germany for the 2021 Rule of Law Report, p. 9.

state of implementation of the pact was presented on 10 June 2021, which concluding that the implementation has well progressed, noting in particular that over 2 700 post for judges and prosecutors have been created so far, with 2 500 being filled[30]. However, stakeholders[31] consider that further investments are needed especially in view of increasing new tasks for the judiciary, and have therefore proposed an extension of the Pact on the Rule of Law. In a decision of the Conference of Justice Ministers of 16 June 2021, the 16 *Länder* jointly requested a continuation and expansion of the Pact for the Rule of Law beyond 2021, including for financing investments in the digitalisation of the justice system[32]. As already noted in the 2020 Rule of Law Report, challenges remain regarding the long-term situation of recruitments for courts and prosecution services in light of upcoming retirement waves[33]; stakeholders continue to point to the issue of competitiveness of entry-level salaries for judges and prosecutors and persisting differences in the salary levels in the different *Länder* in this context[34]. The *Länder*, in particular in the eastern part of Germany, are undertaking a number of initiatives to attract graduates to judicial professions in anticipation of retirements in the coming years of judges hired post-reunification[35].

Efforts to improve the digitalisation of the justice system are continuing, including in the context of the COVID-19 pandemic[36]. Comprehensive procedural rules for the use of digital tools are in place in Germany for civil and administrative proceedings. However, they are less developed in main hearings in criminal proceedings, especially as regards the possibility to carry out oral proceedings via distance communication with the accused person[37]. Electronic communication tools for courts and prosecution services are fully implemented[38]. While digital solutions to initiate and follow proceedings in civil and administrative cases are well-developed, this is in practice less the case for criminal cases[39]. The three projects at *Länder* level to introduce electronic files are advancing in view of the overall goal to fully transition to e-files by 2026. The Federal Government, in cooperation with the *Länder* and Federal Courts, is developing a number of further digitalisation projects, including setting up a common videoconferencing platform for all courts and an IT application allowing citizens to receive assistance when submitting claims to court[40]. The Government and stakeholders report that in the context of the COVID-19 pandemic, existing

[30] Joint Report by the Federal Government and the Länder on the implementation of the measures agreed on 31 January 2019 on the 'pact for the rule of law'; see also Federal Ministry of Justice and Consumer Protection (2019), Pact for the Rule of Law.

[31] The German Association of Judges and Prosecutors points to additional gaps in posts of approx. 2000 judges and prosecutors and suggests prolonging the pact until 2025. Deutsche Richterzeitung (2021), Pact with middling interim results (*Pakt mit durchwachsener Zwischenbilanz*).

[32] Conference of the Justice Ministers (2021), Decision – Continuing to sustainably increase personnel and advancing the digitalization of the judiciary – Pact for the rule of law 2.0.

[33] 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 4.

[34] A 2021 survey by the German Association of Judges and Prosecutors shows a difference of 685 Euros between the *Länder* with the highest and lowest monthly entry-level salaries for judges. DRB (2021), Significant differences in salaries between the Federal States (*Große Besoldungsunterschiede zwischen den Bundesländern*).

[35] Information received by Ministries of Justice of the *Länder* in the context of the country visit to Germany.

[36] 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 4.

[37] Figure 40, 2021 EU Justice Scoreboard. According to the Government, this is related to the emphasis on the principle of oral hearings and the presence of the accused in the main hearing.

[38] Figures 42-43, 2021 EU Justice Scoreboard.

[39] Figures 44-45, 2021 EU Justice Scoreboard.

[40] Input from Germany for the 2021 Rule of Law Report, p. 14.

possibilities for digital hearings foreseen in the civil procedural code facilitated the continued activity of the courts[41].

Specialised commercial courts with a focus on international disputes have been created in several *Länder*. In November 2020, a new commercial court, with jurisdiction for high-value commercial cases, especially with an international dimension[42], has taken up activity in Baden-Württemberg, with seats in Mannheim and Stuttgart[43]. Proceedings at the court can be conducted exclusively in English at the parties' request. Similar specialised chambers dealing with commercial disputes with the possibility to conduct proceedings in English had already been created at courts in Hessen, Nordrhein-Westfalen and Saarland[44]. The overall aim of these initiatives is to increase the attractiveness of Germany as a place for international commercial litigation. In a position paper adopted by the Conference of the Justice Ministers of the *Länder* in November 2020, the *Länder* are calling for the creation of the legal conditions for the optional introduction of commercial courts dealing exclusively with commercial cases with an international dimension above a value of EUR 2 million, conducted in English[45]. A draft law tabled in the Bundesrat by Nordrhein-Westfalen and Hamburg was submitted to the Bundestag in May 2021, proposing amendments to the Court Constitution Act to allow for such courts to be created[46].

Efficiency

The justice system continues to perform efficiently and shows improvements as regards efficiency in administrative cases[47]. Both the disposition time (from 435 days in 2018 to 397 days in 2019) and the clearance rate (from 97.1% in 2018 to 109% in 2019) have improved as regards administrative cases in 2019, reversing a trend from previous years, when efficiency in administrative cases had declined[48]. This increase in efficiency has also led to a reduction in the number of pending administrative cases, although it remains relatively high at 1.0 cases per 100 inhabitants[49]. Regarding civil and commercial litigious cases, performance indicators have remained stable (with the clearance slightly improving from 97.2% in 2018 to 98.8% in 2019)[50]. According to stakeholders, there appears to be no significant impact of the COVID-19 pandemic on the efficiency of the justice system so far[51]. To understand why the figure of incoming civil cases is steadily decreasing, the Ministry of Justice has commissioned a study on the topic[52].

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41 Input from Germany for the 2021 Rule of Law Report, p. 14; Contribution from the German association of Judges and Prosecutors for the 2021 Rule of Law Report, p. 9.

42 Especially corporate disputes, corporate acquisitions and significant financial disputes in the B2B sector.

43 The Commercial Court: https://www.commercial-court.de/.

44 In the Saarland, a chamber for (cross-border) commercial disputes as well as a chamber for cross-border consumer disputes had been created in 2019, with the possibility to conduct proceedings in French.

45 Conference of the Justice Ministers (2020), Report of the country working group "Germany as a Justice Location: Strengthening the Courts in Economic Disputes/Commercial Courts"

46 Bundesrat (2021), Draft law to strengthen the courts in economic disputes.

47 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 5;

48 The number of incoming administrative cases remains very high. Figures 5, 9 and 13, 2021 EU Justice Scoreboard.

49 Figure 16, 2021 EU Justice Scoreboard.

50 Figure 12, 2021 EU Justice Scoreboard.

51 Deutsche Richterzeitung (2020), Corona leads to advancements in digitalization (*Corona führt zu Digtialisierungsschub*) and information received in the context of the country visit to Germany.

52 Contribution from the German Federal Bar for the 2021 Rule of Law Report, p. 10.

II. ANTI-CORRUPTION FRAMEWORK

Germany has several authorities responsible for the prevention of corruption at the federal level, including the Federal Ministry of the Interior, Building and Community and the Supreme Audit Institution. The 2004 Directive Concerning the Prevention of Corruption in the Federal Administration, providing the strategic legal framework on corruption prevention in the federal public administration, is currently under revision. The complementing detailed rules on gifts and favours for federal public officials and, as part of the Corruption Prevention Directive, also the comprehensive Codes of Conduct, which aim at preventing corruption at the federal level, are currently being revised. As to the repression of corruption, Germany has a decentralised approach. The sixteen states (*Länder*) are in charge of the investigation and prosecution of corruption offences across Germany. Some *Länder* have specialised police and prosecution offices on corruption in place. The Federal Criminal Police Office plays a role in the information-exchange between the international level and the local level as well as among police offices at the *Länder* level.

The perception among experts and business executives is that the level of corruption in the public sector remains low. In the 2020 Corruption Perceptions Index by Transparency International, Germany scores 80/100 and ranks 4th in the European Union and 9th globally[53]. This perception has been relatively stable[54] over the past five years[55].

Germany has initiated a revision of its comprehensive strategic framework for the prevention of corruption at the federal level. Within that context, updates under the 2004 'Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration'[56], which is the main regulatory framework for the prevention of corruption, are planned, among others, with regard to corruption risk analyses[57]. The 2004 rules on the prohibition to accept favours and gifts are also currently under revision to assess whether more up-to-date and harmonised rules and increased legal certainty would be required[58]. For the first time, Germany will publish a comprehensive compilation report on integrity in the federal public administration in 2021[59].

Due to the federal structure, Germany's institutional anti-corruption framework for the repression of corruption is decentralised. The sixteen German states are responsible for the

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53 Transparency International, Corruption Perceptions Index 2020 (2021), pp. 2-3. The level of perceived corruption is categorised as follows: low (the perception among experts and business executives of public sector corruption scores above 79); relatively low (scores between 79-60), relatively high (scores between 59-50), high (scores below 50).

54 In 2015 the score was 81, while, in 2020, the score is 80. The score significantly increases/decreases when it changes more than five points; improves/deteriorates (changes between 4-5 points); is relatively stable (changes from 1-3 points) in the last five years.

55 The Eurobarometer data on corruption perception and experience of citizens and businesses as reported last year is updated every second year. The latest data set is the Special Eurobarometer 502 (2020) and the Flash Eurobarometer 482 (2019).

56 Directive of the Federal Government regarding corruption prevention in the Federal administration (2004).

57 Information received by the Ministry of Justice in the context of the country visit to Germany.

58 Input from Germany for the 2021 Rule of Law Report, p. 18.

59 This report will compile information from three pre-existing sources, including from: (i) the Report on corruption prevention developments and results in the public administration, including the number of suspected corruption cases and department-specific corruption prevention measures; (ii) amounts of the sponsoring accepted by the public administration; and (iii) the extent of the use of external staff in Germany's public administration. Input from Germany for 2021 Rule of Law Report, p. 19.

repression of corruption[60]. Competences of the sixteen Ministries of Interior at the *Länder* level depend on the legislative framework of the respective *Land*. They can include policy coordination and corruption prevention as well as, in some instances, investigative tasks[61]. The police, including the State Criminal Police Offices (*Landeskriminalämter*) and local police, is subject to the law of the sixteen states. Some states have established specialised police units and specialised prosecution services focusing specifically on economic crime and corruption investigations and prosecutions[62]. Dedicated criminal divisions in regional courts specialised in white-collar crime, including corruption, exist for the adjudication of corruption cases. The Federal Criminal Police Office (*Bundeskriminalamt*) plays an essential role in the cooperation and information-exchange between the states and with international partners in criminal investigations.

The number of reported cases of corruption has increased but the overall financial damage of corruption on society is decreasing. Information on Germany's police efforts to repress corruption, which is broadly criminalised[63], is publicly available The latest official federal police report on corruption reports 5,428 police-registered corruption cases in 2019[64]. This is a significant increase of 42.7% compared to 2018. The report also indicates a slight increase of 3.3% in the number of suspects. Of those who accepted a bribe, 67% have been public officials. Public procurement is the most affected sector. Classical bribe payments in cash are on the decline and as such the financial damage caused by corruption has notably decreased by 61.2% amounting to EUR 47 million in 2019. Instead other forms of non-monetary bribery and potential undue influence are coming into focus, including primarily the provision of free event tickets that are otherwise not accessible to the public and of private dinners where business meets politicians. Parliamentary investigation committees call for and hold committee meetings on a regular basis to address high-level corruption cases involving members of Government or federal ministries. Some concerns exist as to the capacity to detect and investigate allegations of corruption-related financial crime[65]. To address concerns of backlogs, Germany's Financial Intelligence Unit announced an increase of its capacities to 800 staff over the next three years and to introduce a dedicated software to identify risk areas[66]. In foreign bribery cases, Germany's enforcement in holding companies

[60] At the federal level, the Ministry of Interior, Building and Community is in charge of the overall policy coordination on the prevention of corruption in the federal administration. As such, the Ministry adopts guidelines for the implementation of corruption prevention rules for all federal administrative bodies and issues Codes of Conducts for staff and superiors. Citizens and employees can reach out to dedicated contact points regarding corruption-related questions or concerns. The Ministry of Justice leads on the criminal law relating to corruption. Neither the Federal Prosecution Office nor the Federal Criminal Police have the mandate to tackle corruption.

[61] For instance, the Ministries of Interior of the city states Bremen and Hamburg have investigative tasks.

[62] Specialised prosecution offices ('*Schwerpunktstaatsanwaltschaften*') exist in Brandenburg, Niedersachsen, Nordrhein-Westfalen, Thüringen, Schleswig-Holstein with varying mandates covering corruption cases for the entire respective state or just a specific, locally limited jurisdiction within a state.

[63] Corruption is comprehensively criminalised in Germany, including active and passive bribery (see sections 331-337 of the Criminal Code). Private sector bribery is further penalised in sections 299-300 of the Criminal Code, while bribery of public officials is specifically criminalised in section 108e. Germany has a specific law for the fight against bribery of foreign officials in place, and has also regulated criminal responsibility of legal persons with sanctions of up to EUR 10 million.

[64] Bundeskriminalamt, Bundeslagebild Korruption 2019 (2020), p. 2/

[65] Cf. Transparency International-Deutschland, Stellungnahme zum Entwurf eines Gesetzes zur Stärkung der Finanzmarktintegrität (Nov. 2020).

[66] H. Steinharter, Financial Intelligence Unit: Anti-Geldwäsche-Behörde FIU plant Hunderte neue Stellen, Handelsblatt (23 December 2020).

liable remains critically low, despite its leading role in investigating, prosecuting and sanctioning individuals who commit foreign bribery[67].

A new federal law to introduce a lobby register for interest representatives was adopted in March 2021 and will become operational on 1 January 2022. The legislation[68] aims at increasing transparency in the federal decision-making process. It introduces rules for lobbying activities toward the German Federal Parliament, the Government and ministries. Stakeholders acknowledge the wide personal scope envisaged, also including lawyers and clients of consultancies who lobby on their behalf[69]. Actors such as trade unions, employer associations, churches and religious communities, as the most important lobby actors in Germany, are however exempt from the mandatory registration requirement. The provision of financial information on amounts invested in the lobbying activities also remains voluntary. Further, the requirement to register concerns only meetings with top-level government officials. The technical level in the ministries, where most of the lobbying regularly takes place, is not included, with the consequence that no track record will exist of such meetings. Failure to comply can be sanctioned with up to EUR 50 000. The electronic lobby register will be operational by 1 January 2022 and will be administered by the Parliament (*Bundestag*). The introduction of a 'legislative footprint' that would allow for the monitoring and tracing of all interest representatives who seek to influence and contribute to specific legislative texts has not received the support of the political majority at the federal level in the debate around the lobby register. The Group of States against Corruption (GRECO) has also recommended to improve transparency of external inputs to legislative proposals[70]. Concerns also remain as to the consistent application of Germany's 'revolving doors' rules, including varying cooling-off periods and the large discretion in the decision of superiors regarding future employments of state secretaries and directors general[71].

Germany is strengthening the rules on potential conflicts of interest for parliamentarians and for members of its financial supervisory body. To restrict secondary activities of members of the Federal Parliament, amendments to the Act on Members of the Federal Parliament[72] were presented to Parliament in December 2020 and adopted in June 2021[73]. The reform includes a prohibition of remunerated lobby activities as side jobs of parliamentarians as well as remunerated lectures that are in connection to their

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67 OECD, Phase 4 Two-Year Follow-Up Report: Germany (2021), p. 3: "The continued discrepancy in the prosecutorial approach to holding natural as opposed to legal persons liable across Länder, the fragmented investigative approach, coupled with the alternative use of forfeiture orders has continued to greatly hinder Germany's ability to hold companies liable in foreign bribery cases."

68 Gesetz zur Einführung eines Lobbyregisters für die Interessenvertretung gegenüber dem Deutschen Bundestag und gegenüber der Bundesregierung (Lobbyregistergesetz – LobbyRG), (16. April 2021), Bundesgesetzblatt 2021 Teil I Nr. 19 vom 27. April 2021, p. 818, https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s0818.pdf%27%5D__1625212991548.

69 Transparency International Germany (2020), position paper on the draft law introducing a lobby register and information received in the context of the country visit to Germany.

70 GRECO, 5th Evaluation Round evaluation report - Germany (2020), para. 60. See also pillar IV on other institutional issues related to checks and balances for more information on the transparency in the decision-making process. See also section IV.

71 Cf. GRECO, 5th Evaluation Round evaluation report – Germany (2020), paras. 89 and 91. Political servants and Directors-General are subject to cooling-off regulations stipulated in section 105 Civil Servants Act.

72 Gesetz über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages (Abgeordnetengesetz – AbgG).

73 Gesetz zur Änderung des Abgeordnetengesetzes – Verbesserung der Transparenzregeln für Mitglieder des Deutschen Bundestages, https://dserver.bundestag.de/btd/19/287/1928784.pdf

parliamentary work. Secondary activities of more than EUR 1 000 per month, or EUR 3 000 per year, would need to be disclosed publicly. The amendments would not entail the disclosure of the actual time spent for the engagement in the side job. The Act on the enhancement of the financial market integrity (FISG), which has come into force on 1 July 2021, further prohibits private trading in financial instruments for employees of the Federal Financial Services Supervisory Authority[74].

Germany's rules on asset declarations are under review. The amendment of the Act on Members of the Federal Parliament foresees a provision for members of the Federal Parliament to disclose their financial holdings in unincorporated companies and companies with share capital above 5% as well as the revenues of such holdings[75]. The assets and financial interests of parliamentarians will be subject to notification, if the respective member of the parliament is in charge of an issue in a parliamentary committee and, at the same time, remunerated through a secondary activity. However, concerns remain with regard to the lack of regulation for members of the Federal Government to disclose assets and properties[76].

New rules on whistleblower protection are under preparation. The draft legislation for the protection of whistleblowers aims at protecting disclosures of breaches of EU and national law and covers both the private and the public sector[77]. In practice, several contact points for whistleblower disclosures are in place at the federal and state level, including the Anti-Corruption Appointees, the Specialised Ombudspersons, such as the Armed Forces Ombudsman at the federal level, and the Citizen Ombudsmen and Confidence Lawyers at the state level, who facilitate the disclosure and investigation of corruption offences. The fragmentation across institutions and administrative levels has been criticised, as potential whistleblowers and complainants might have difficulties in identifying the appropriate disclosure channels[78].

The financing of political parties is regulated in a specific law with reasonably dissuasive sanctions. Political parties are obliged to submit annual financial reports to the President of the Federal Parliament including on political party assets, liabilities, income and expenditure in both campaign and off-campaign periods[79]. In case of inaccuracies, the respective party can be sanctioned with an amount of twice as much as the corresponding incorrect information[80]. Concerns have been raised regarding the significant time lapse between the party income and its reporting[81]. Donations above EUR 50 000 must be reported without delay and published on the website of the Federal Parliament. Donations above EUR 10 000 must be disclosed publicly in the annual report, while the ceilings for

[74] Gesetz zur Stärkung der Finanzmarktintegrität (Finanzmarktintegritätsstärkungsgesetz – FISG), Bundesgesetzblatt Teil I vom 3. Juni 2021, p. 1534.

[75] Information received during the country visit to Germany.

[76] GRECO, 5th Evaluation Round (2020), para. 95, and as previously reported in the 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 7.

[77] Input from Germany for the 2021 Rule of Law Report, p. 21 and information received in the context of the country visit to Germany.

[78] Transparency International-Deutschland, Comments and Recommendations to UNCAC Second Review Cycle (2018), p. 3.

[79] The German Political Parties Act.

[80] Pursuant to Section 23(a) of the Political Parties Act. Furthermore, where the inaccuracies relate to property or holdings in companies in the balance sheet or in the accompanying part of the explanatory note, the claim shall be 10 per cent of the assets not listed or incorrectly stated.

[81] Information received by LobbyControl in the context of the country visit to Germany, indicating that data for the year 2019 was still not published in April 2021.

anonymous donations are EUR 500 and for donations in cash EUR 1 000. International reviewers have repeatedly pointed out the need for lower thresholds and strengthened record-keeping[82]. Sponsoring remains largely unregulated despite its potential to buy access to important government officials[83].

The COVID-19 pandemic impacted the fight against corruption in Germany highlighting pandemic-specific corruption risks. The Financial Intelligence Unit has received an increased number of reports in the context of COVID-19 support measures offered by the Government, including on corruption and mostly on fraud[84]. Further, the alleged reception of kickbacks for parliamentarians who have brokered facemask deals for the Government have led to public debates and the launch of corruption investigations[85]. To enhance the prevention of corruption, including during and aftermaths of the COVID-19 pandemic, Germany will launch its electronic competition register in support of public procurement processes in the course of 2021[86]. Once operational, the register will host and flag information for public contracting authorities that is relevant for the exclusion of bidders from the procurement, including on final convictions, penalty orders and fines for corruption, bribery, money laundering, tax evasion, and other serious crimes.

III. MEDIA PLURALISM AND MEDIA FREEDOM

Germany has a well-established framework on media freedom and pluralism, mostly falling under the competence of the federal states (*Länder*). The fourteen media authorities are independent regulatory authorities, with legal guarantees ensuring their political independence[87]. The Constitution (*Grundgesetz*) and secondary legislation expressly guarantee the rights of journalists to protect the confidentiality of sources and the right of access to information[88]. The new State Media Treaty (*Medienstaatsvertrag*) and further legislative acts[89] were adopted to transpose the revised Audiovisual Media Services Directive[90] into German law[91].

[82] Most recently, see UNCAC, Review of implementation of the United Nations Convention Against Corruption, Review Cycle 1 (Chapter III and IV), Executive Summary: Germany, Implementation Review Group (July 2020), and Review Cycle 2 (Chapter II and V), Executive Summary: Germany, Implementation Review Group, January 2019.

[83] Information received in the context of the country visit to Germany.

[84] Information received by the Financial Intelligence Unit in the context of the country visit to Germany.

[85] Two politicians are accused of having received six-figure kick-backs after recommending facemask manufacturers to the federal government. Information received in the context of the country visit to Germany.

[86] Input from Germany for the 2021 Rule of Law Report, p. 23.

[87] The 14 media authorities are responsible for private broadcasters, while public service media are each under the supervision of specific broadcasting councils.

[88] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany.

[89] In particular the Act amending the Telemedia Act and other Acts, of 19 November 2020.

[90] Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[91] In the 2021 World Press Freedom Index, Germany ranks 13th globally and 9th among EU Member States (Reporters without Borders, Germany). Over the last years, the situation is stable, and the country continues to enjoy a high degree of media freedom and journalist protection. The 2021 Media Pluralism Monitor assesses the overall risk for media pluralism in Germany as rather low (2021 Media Pluralism Monitor, p. 8).

The degree of independence of the media authorities and broadcasting councils remains high[92]. With the entry into force of the revised State Media Treaty, the media authorities have gained new competences, in particular on media intermediaries. However, the media authorities will only gradually start the full application of the new rules, as they progressively adopt their joint statutes required by the State Media Treaty and detailing some of its provisions (e.g. on the findability of content deemed relevant for the formation of public opinion)[93].

The self-regulation of the press continues to work well, with some issues signalled regarding the publication of reprimands[94]**.** The German Press Council is composed of journalists and publishers associations. Its yearly report for 2020 highlights a strong increase in complaints related to a small number of controversial press articles (4 085 single complaints received in 2020, compared to 2 175 in 2019)[95]. At the same time, the report concludes that concerned publishers published only 34 out of a total of 53 public reprimands issued by the Press Council in 2020. As the Press Code obliges publishers to publish such public reprimands, this could signal potential issues as regards the effectiveness of this aspect of the self-regulatory Press Code.

German laws continue to ensure a good level of transparency of media ownership information[96]**.** This is due to provisions requiring commercial broadcasters to report ownership information and plans affecting the shareholders' structure[97]. In addition, online media entities have to make their ownership information transparent in the imprint information on their websites. For the press, transparency obligations for imprints are stipulated in the respective state press laws[98]. The Commission on Concentration in the Media (KEK) of the state media authorities monitors concentration in the private broadcasting sector and maintains a public database on media ownership information covering television, radio, press and online media[99]. The 2021 Media Pluralism Monitor indicates a low risk on the transparency of media ownership and a medium risk regarding news media concentration[100]. Media concentration is regulated in the State Media Treaty and is subject to regulatory supervision by the Commission on Concentration in the Media[101].

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92 2021 Media Pluralism Monitor, p. 11. See also 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 8.

93 Information received in the context of the country visit to Germany. State Media Treaty, s. 84.

94 2021 Media Pluralism Monitor, p. 13. A public reprimand (*öffentliche Rüge*), obliging the concerned media outlet to publish a correction is the most far reaching sanction of the German Press Council (to protect those affected, the Council may also decide to pronounce a non-public reprimand).

95 German Press Council (2021), Annual Report 2020.

96 2021 Media Pluralism Monitor, p. 12; 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 9.

97 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, p. 9.

98 2021 Media Pluralism Monitor, p. 12; 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, p. 9.

99 KEK (2021), Media concentration.

100 According to the 2021 Media Pluralism Monitor: "The audience concentration of the top 4 audiovisual media owners in Germany (ProSiebenSat.1, Mediengruppe RTL, ARD, ZDF) is 89%. The market share of the Top 4 newspaper owners (Springer, KKR, Media Union, Funke) is 60% and the market share of the Top 4 online news media (Bertelsmann, Burda, Springer, United Internet) is 34%". While the state media laws contain provisions on media concentration across the press and broadcasting sector, the State Media Treaty regulates ownership concentration in television, under the regulatory supervision of the Commission on Concentration in the Media (KEK).

101 State Media Treaty, s. 60 and 2021 Media Pluralism Monitor, p. 12.

Media organisations have benefitted from COVID-19 related support schemes. The overall level of media pluralism in Germany remains high. At the same time, stakeholders point to increasing economic difficulties of many regional and local press outlets, putting at risk the diversity of opinion at regional level[102]. Media actors were able to apply for the general relief programmes of the German government aiming to address the economic impact of the COVID-19 pandemic on companies and freelancers. In addition, a targeted support programme was addressed to the radio broadcasting sector[103]. While public support schemes were able to alleviate the impact of the COVID-19 pandemic, the Media Pluralism Monitor points to concerns as regards the long-term sustainability of the sector, even if media actors are slowly able to generate more revenues from digital offers[104].

Safeguards against the control of media entities by political parties are in place[105]. The 2021 Media Pluralism Monitor indicator on the political independence of media shows a low risk[106]. Political advertising is not permitted in television broadcasting nor in radio and broadcast-like telemedia[107], with the exception of a short period prior to elections which is strictly regulated as regards the division of airtime among political parties[108]. With regard to media content that is not covered by these rules for broadcast-like telemedia, the revised State Media Treaty has extended transparency provisions regarding online political advertising, requiring such advertisement to be appropriately labelled[109].

The framework for the access of journalists to information is in place, but certain shortcomings have been criticised. The Constitution, the Freedom of Information Act and the press laws in place in most federal states ensure access to information by journalists[110]. However, in global comparison, this framework is seen as relatively weak by Reporters without Borders[111]. GRECO has recommended that the Freedom of Information Act should be independently evaluated and possible improvements should be considered on this basis, notably as regards exceptions allowing to decline requests under the Act[112].

Concerns have increased as regards the physical safety of journalists, notably when covering protests[113]. Notwithstanding the existing framework for the protection of journalists[114], stakeholders are reporting an increase in aggressions against journalists and

[102] Reporters without Borders, Germany and information received in the context of the country visit to Germany.
[103] Minister of State for Culture and the Media (2020), 'Neustart Kultur': Private Broadcasters.
[104] 2021 Media Pluralism Monitor, p. 12-13 and pp. 20-22.
[105] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, p. 9.
[106] 2021 Media Pluralism Monitor, p. 14.
[107] The State Media Treaty defines broadcast-like telemedia as "telemedia with content that is similar to radio or television in terms of form and design and which is made available from a catalogue specified by a provider for individual demand at a time selected by the user (audio and audiovisual media services on demand); contents include, in particular, radio plays, feature films, series, reports, documentaries, entertainment programmes, information programmes, and children's programmes" (State Media Treaty, s. 2).
[108] Input from Germany for the 2021 Rule of Law report, pp. 31-32.
[109] State Media Treaty, s. 22.
[110] Basic Law, Art. 5(1).
[111] Reporters without Borders, Germany.
[112] GRECO (2020), Fifth evaluation round, Evaluation Report Germany, p.23.
[113] Contribution from ZDF for the 2021 Rule of Law Report, p. 5; Contribution from the European Centre for Press and Media Freedom for the 2021 Rule of Law Report, pp. 3-4; Council of Europe, Platform to promote the protection of journalism and safety of journalists; European Centre for Press and Media Freedom, Platform on mapping media freedom.
[114] 2020 Rule of Law Report, Country Chapter on the rule of law situation in Germany, pp 9-10.

media workers when covering protests[115]. In particular, protests related to the COVID-19 pandemic were marked by recurring reports of violence against journalists[116]. By December 2020, police statistics counted 252 incidents against media representatives for the year[117] (compared to 104 cases in 2019 and 93 cases in 2018[118]). The 252 incidents included 29 cases of threats and 30 violent offences, 22 of which qualified as personal injuries[119]. Since October 2020, the Council of Europe platform to promote the protection of journalism and safety of journalists published one alert concerning Germany, regarding aggressive acts against journalists during a demonstration[120]. Journalist associations and unions point to a lack of protection and support for journalists provided by the police during protests[121]. The German Press Council calls for a stronger protection of the freedom of the press and has proposed to update existing principles of conduct for the media and the police[122]. The *Länder* are currently assessing such an update of these principles of conduct. In addition, some *Länder* have taken measures to improve the relationship between journalists and the police[123]. In April 2021, journalist associations published a code of conduct for media houses asking publishers to self-commit to a range of measures aimed at protecting journalists from violence and threats[124]. While the 2021 Media Pluralism Monitor's indicator on journalistic profession, standards and protection shows a low risk, the respective indicator on the physical safety of journalists shows a high risk[125].

Some concerns exist regarding privacy of journalists in the context of legal action. Associations of journalists point to concerns about journalists' private data and, in particular, their private address becoming public if they take legal action against harassment, both physical and online[126]. NGOs and journalist associations see potential risks of journalists being subject to electronic surveillance measures by intelligence services, in particular when interacting with potential informants, and call for stronger safeguards in the respective laws, notably the revised Federal Intelligence Service (BND) Act[127]. Generally, pre-litigation

[115] Contribution from RSF for the 2021 Rule of Law Report, p. 29; Information received in the context of the country visit to Germany.

[116] German Federation of Journalists (03.08.2020), Improve security.

[117] German Bundestag, Reply of the Federal Government, Drucksache 19/25940, p. 5. The respective crime statistics do not account for attacks on journalists separately, but report on criminal offences against media in general.

[118] European Federation of Journalists (21.01.2021), Germany: 252 attacks against media workers in 2020.

[119] German Bundestag, Reply of the Federal Government, Drucksache 19/25940, p. 5.

[120] Council of Europe, Platform to promote the protection of journalism and safety of journalists. At the time of writing, German authorities had not yet provided a reply to this case, which was registered in May 2021 under the category "Attacks on physical safety and integrity of journalists".

[121] E.g. German Journalists Union (08.11.2020), dju in ver.di condemns attacks on media workers in "Querdenken" demo in Leipzig); Information received in the context of the country visit to Germany.

[122] German Press Council (2020), Principles of conduct for the media and the police to prevent obstacles in the performance of police duties and the free exercise of reporting; Information received in the context of the country visit to Germany.

[123] E.g. Press Code of the Police of Baden-Württemberg (Ministry of the Interior, for Digitisation and Municipalities (21.04.2021), State-wide standards for press relations. Information received in the context of the country visit to Germany.

[124] German Federation of Journalists (2021), Code of conduct for media houses.

[125] 2021 Media Pluralism Monitor, p. 10.

[126] Contribution from RSF for the 2021 Rule of Law Report, p. 29; Information received in the context of the country visit to Germany. On 24 June 2021, the German Parliament passed a law that penalises the distribution of so-called 'enemy lists', however this does not address the issue of personal data of journalists becoming available during legal proceedings.

[127] Contribution from GFF for the 2021 Rule of Law Report, p. 4; Reporters without Borders (26.03.2021) Missed opportunity for freedom of the press; German Federation of Journalists (19.02.2021), BND-law:

mechanisms lead to potential cases of strategic lawsuits against public participation (SLAPPs) being dismissed before reaching court[128]. However, while there may not be many prominent cases, stakeholders and studies point out that the problem of pre-emptive legal actions or threats against journalists is also present in Germany[129].

IV. OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

Germany is a federal, democratic republic, with powers distributed between the federal and the sixteen state Governments. The separation of powers is enshrined in the Basic Law[130] 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*)[131]. The Government, the *Bundesrat* or members of the *Bundestag* can submit legislative proposals[132]. The German Human Rights Institute and the Federal Anti-Discrimination Agency contribute to upholding fundamental rights.

Concerns have been expressed about the transparency of the legislative process and a tendency for shortened consultation periods. Generally, a robust framework for consultation of stakeholders in the legislative process exists[133]. In September 2020, the Federal Government has also created a platform that brings together the websites of different Ministries, where information about possibilities for (early) stakeholder involvement is hosted[134]. However, a position paper by the Conference of Justice Ministers of the *Länder* from November 2020 has stressed the need for sufficient time for consultations of the *Länder* on draft legislation and requested that legislative proposals by the *Bundesrat* should be considered by the *Bundestag* without undue delay[135]. In addition, stakeholders have raised concerns over regular occurrences of shortened consultation periods to examine lengthy and complex proposals, and raised concerns over an overall lack of transparency of inputs influencing the legislative process before the formal consultation procedure[136]. GRECO has also recommended in December 2020, that substantive external inputs to legislative proposals received before the formal launching of consultations should also be identified and

Better protect informants. The revision of the Federal Intelligence Service Act in 2021 followed a judgement of the Federal Constitutional Court of 19 May 2020 which declared the powers of the BND to conduct surveillance of foreign telecommunications to be in violation of fundamental rights enshrined in Germany's Basic Law (Federal Constitutional Court (19.05.2020), Press Release No. 37/2020.

128 Contribution from the European Centre for Press and Media Freedom for the 2021 Rule of Law Report, p. 5.

129 Contribution from the European Centre for Press and Media Freedom for the 2021 Rule of Law Report, p. 5; Contribution from RSF for the 2021 Rule of Law Report, pp. 33-34; Gostomzyk T. and Moßbrucker D. (2019), 'If you write that, I'll sue you!' Study on preventive attorney strategies towards the media, Otto Brenner Foundation Workbook 99.

130 Article 20 Basic Law.

131 Articles 70 *et seq*. Basic Law.

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

133 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 10.

134 Website 'Participation at the Federal level' (*Beteiligung auf Bundesebene*): https://www.bundesregierung.de/breg-de/service/gesetzgebungsverfahren-beteiligung. Such a platform also exists linking to formal consultation procedures of different Ministries.

135 Conference of the Justice Ministers (2020), Strengthening federalism in practice - The participation of countries in federal legislative proposals and the treatment of legislative initiatives by the Federal Council by the Federal Government

136 Contribution by ENNHRI for the 2021 Rule of Law Report, p. 153; see also contributions from the German Bar Association and the German Federal Bar for the 2021 Rule of Law Report.

disclosed[137]. While shortened consultation periods have also occurred in the context of the COVID-19 pandemic, stakeholders consider this to be a broader trend[138].

The framework for adopting measures related to the COVID-19 pandemic has been amended several times, and measures have been subject to comprehensive judicial review. Measures related to the pandemic are taken based on the Infection Protection Law (IfSG), which enables the Governments of the *Länder* (who are competent to enact measures under the IfSG) to introduce restrictions by ordinance. In the context of the COVID-19 pandemic, in March 2020, the powers of the Federal Government to take measures under the IfSG have also been extended[139]. Most of these empowerments can only be exercised as long as the *Bundestag* has declared a "state of epidemic", which it can revoke at any point and which needs to be re-confirmed every three months[140]. Following discussions over the lack of role of the Federal Parliament[141], in November 2020, amendments were adopted to increase parliamentary control, primarily by introducing a standard list of measures that can be taken by ordinance, which were previously not specified by law[142]. Further amendments adopted in April 2021, have introduced a so-called "emergency brake", which foresees the automatic introduction of certain restrictive measures by federal law if a specific threshold of COVID-19 cases is reached over three days in a city or district[143]. This has been subject to significant debate regarding the constitutionality and proportionality of such provisions[144]. To adapt to the conditions of the pandemic, the Federal Parliament has changed its rules of procedure, allowing for electronic votes in committees and reducing the quorum required for a vote in plenary[145]. Measures taken in the context of the pandemic have been subject to comprehensive judicial review, primarily by the higher administrative courts and constitutional courts of the *Länder*, with over 6000 cases having been registered by the end of 2020[146]. Many of these cases so far have only been handled in emergency proceedings, with the main decision still outstanding. As of March, the Constitutional Court has received 321 constitutional complaints related to the COVID-19 measures and has closed 273 of them[147].

The Commission has initiated infringement proceedings against Germany for breach of fundamental principles of EU law in light of the 5 May 2020 judgment of the Federal Constitutional Court. On 9 June 2021, the Commission decided to send a letter of formal notice to Germany for violation of the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European

[137] GRECO (2020), Fifth evaluation round – evaluation report Germany, recommendation iv).
[138] Contribution from the German Bar Association for the 2021 Rule of Law Report and information received in the context of the country visit to Germany.
[139] First Law on the protection of the population in cases of epidemic situations of national relevance.
[140] Initially the changes had been time-limited to 31 March 2021. See §5 (1) IfSG.
[141] To be noted that in this context scrutiny is also exercised by the Parliaments of the Länder, who in some cases have adopted laws requiring an involvement of their Parliaments in the COVID-19 related measures.
[142] See new §28a IfSG. Third law on the protection of the population in cases of epidemic situations of national relevance, adopted on 18 November 2020.
[143] See new §28b IfSG. Fourth Law on the protection of the population in cases of epidemic situations of national relevance adopted on 21 April 2021.
[144] The automatic measures foreseen in the "emergency brake" had already been limited compared to the initial Government proposal following these reactions. A number of challenges have already been filed with the Federal Constitutional Court, especially as regards the competence of the Federal Government and the automatic rules on curfews.
[145] These changes are currently limited until June 2021, see §126a of the rules of procedure of Parliament.
[146] Deutsche Richterzeitung (2020), Corona-Krise sorgt für tausende Verfahren.
[147] All closed cases have been rejected or otherwise closed; 48 cases remain pending. See also 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p.11 for further details.

Court of Justice under Article 267 TFEU[148]. With its judgment of 5 May 2020[149], the Federal Constitutional Court has deprived a judgment of the European Court of Justice of its legal effect in Germany[150]. The order of the Federal Constitutional Court of 29 April 2021 that found a request for enforcement of the judgment inadmissible[151] does not reverse the legal situation created by the judgment of the Federal Constitutional Court particularly in relation to the principle of primacy of EU law.

The position of the director of the Federal Anti-Discrimination Agency remains vacant. According to the German law, the director of the Federal Anti-Discrimination Agency is appointed by the Federal Government on proposal of the Ministry for Family Affairs, Senior Citizens, Women and Youth and is independent in the exercise of his or her function[152]. Since April 2018, the function has been exercised *ad interim*, as the outcome of the selection procedure for the new director has been annulled in court due to a lack of compliance with the constitutional principle of merit[153]. According to the responsible Ministry there were several diverging court decisions on the selection procedure which lead to uncertainty on the selection criteria[154].

Uncertainty regarding the tax-exempt status for civil society organisations continues to be a challenge[155] despite some slight improvements to the framework. Generally, civil society space continues to be considered 'open'[156] and a robust framework for civil society remains in place[157]. A reform of the Fiscal Code in December 2020 introduced further categories of civil society actors to the activities covered by the tax-exempt status for non-profit organisation with a public benefit purpose[158]. However, this reform has not addressed the uncertainty created by a 2019 ruling of the Federal Finance Court[159] and which was further confirmed by a ruling in December 2020[160] regarding the scope of the tax-exempt status. According to case law, civil society organisations must not engage in political matters more generally, but are only allowed to do so if strictly necessary to pursue the activities included in the Fiscal Code. While they may provide information to the public in a neutral manner, in practice the interpretation of these conditions creates a significant uncertainty for civil society organisations, especially those active in human rights and democracy

[148] European Commission (9 June 2021), June infringement package – key decisions.
[149] Judgment of the Federal Constitutional Court of 5 May 2020, 2 BvR 859/15.
[150] As regards the concerns raised by the judgment see: 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 2020.2020. See also 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 11.
[151] Decision of the Federal Constitutional Order of 29 April 2021 2 BvR 1651/15, 2 BvR 2006/15. In its decision the Constitutional Court considered among others that the request is also unfounded given that the Federal Government and the *Bundestag* substantially addressed and appraised the monetary policy decisions taken by the ECB Governing Council following the judgment of 5 May 2020, including the proportionality assessment conducted and substantiated by the ECB in its decisions of 3-4 June 2020 in that regard.
[152] Article 26, General Act on Equal Treatment.
[153] Judgment of the Administrative Court Berlin of 8 February 2019, 7 L 218.18.
[154] Written contribution received by the Ministry for Family Affairs, Senior Citizens, Women and Youth in the context of the country visit.
[155] 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.
[156] Rating given by CIVICUS. Ratings are on a five-category scale defined as: open, narrowed, obstructed, repressed and closed.
[157] 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.
[158] E.g. climate protection and the protection of vulnerable groups. Annual Tax Law 2020 (*Jahressteuergesetz*).
[159] Judgment of the Federal Financial Court of 10 January 2019, V R 60/17.
[160] Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.

advocacy[161]. According to stakeholders, concerns over losing tax-exempt status can lead civil organisations to refrain from taking positions on potentially sensitive issues and they report that threats of legal action related to the tax status can also be used as a political tactic[162]. Beyond this, the newly established Federal German Foundation for Civic Engagement and Volunteering, which took up its operations in July 2020 and is based on a joint initiative of several Federal Ministries, has set up a support programme to help civil society organisations cope with the effects of the COVID-19 pandemic, with a budget of EUR 20 Million in 2020[163].

[161] Contributions from ENNHRI and the Gesellschaft for Freiheitsrechte for the 2021 Rule of Law Report.

[162] Contribution from Gesellschaft für Freiheitsrechte for the 2021 Rule of Law Report, p.5. The contribution points to several cases where a right-wing political party has requested that the tax-exempt status and/or public funding for civil society organisations working in the field of anti-discrimination be withdrawn, as they considered their work to be political in nature. For further example, see Gesellschaft für Freiheitsrechte and Open Society Foundations (2020), Shrinking spaces in Germany; shrinking spaces in Europe.

[163] Federal German Foundation for Civic Engagement and Volunteering, Förderprogramm 2020: Gemeinsam wirken in Zeiten von Corona, https://www.deutsche-stiftung-engagement-und-ehrenamt.de/foerderung/

Annex I: List of sources in alphabetical order*

** The list of contributions received in the context of the consultation for the 2021 Rule of Law report can be found at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report-targeted-stakeholder-consultation.*

Participation at Federal Level (*Beteiligung auf Bundesebene*) (https://www.bundesregierung.de/breg-de/service/gesetzgebungsverfahren-beteiligung).

Bundeskriminalamt (2020), Bundeslagebild Korruption 2019, (https://www.bka.de/SharedDocs/Downloads/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruptionBundeslagebild2019.html;jsessionid=BB07C9D8DF5A361AB3C08080C0AC57C7.live0612?nn=28078)

Centre for Media Pluralism and Media Freedom (2021), *Media pluralism monitor 2021*

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Annex II: Country visit to Germany

The Commission services held virtual meetings in March 2021 with:

- European Affairs Committee of the Justice Minister's Conference
- Federal Administrative Court
- Federal Bar
- Federal Criminal Police
- Federal Supreme Court
- Financial Intelligence Unit
- German Association of Judges and Prosecutors
- German Bar Association
- German Institute for Human Rights
- Gesellschaft für Freiheitsrechte
- Joint Office of the Media Authorities
- Lobbycontrol DE
- Minister of State for Culture and Media
- Ministry of Health
- Ministry of Justice
- Ministry of the Interior
- Press Council
- Specialised prosecution service for corruption and economic crime Munich
- Transparency International Germany

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

- Amnesty International
- Center for Reproductive Rights
- CIVICUS
- 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
- European Federation of Journalists
- European Partnership for Democracy
- European Youth Forum
- Front Line Defenders
- Human Rights House Foundation
- Human Rights Watch
- ILGA-Europe
- International Commission of Jurists
- International Federation for Human Rights
- International Planned Parenthood Federation European Network (IPPF EN)
- International Press Institute
- Netherlands Helsinki Committee
- Open Society European Policy Institute
- Philanthropy Advocacy

- Protection International
- Reporters without Borders
- Transparency International EU