



# Position Paper

**of the German Bar Association by the  
Committee on European Law, Committee on  
Civil Prodecural Law, Committee on Criminal  
Law, Committee on Administrative Law,  
Committee on Constitutional Law, Committee  
processing of cases and e-communication with  
courts**

**on the targeted stakeholder consultation of the  
European Commission on the 2022 Rule of Law  
Report**

Position Paper No.: 02/2022

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 61.000 German lawyers and lawyer-notaries in 252 local bar associations in Germany and abroad. Being politically independent the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level.

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## 2022 Rule of Law Report – targeted stakeholder consultation

### **Questions on horizontal developments**

*In this section, you are invited to provide information on general horizontal developments or trends, both positive and negative, covering all or several Member States. In particular, you could mention issues that are common to several Member States, as well as best practices identified in one Member State that could be replicated. Moreover, you could refer to your activities in the area of the four pillars and sub-topics (an overview of all sub-topics can be found below), and, if you represent a Network of national organisations, to the support you might have provided to one of your national members.*

*Please provide any relevant information on horizontal developments here  
5000 character(s) maximum*

There is a general need to increase the protection of lawyers globally. The fact that the UN Special Rapporteur on the Independence of Judges and Lawyers is currently preparing a report on the topic of “Attacks on Lawyers” for the June 2022 session of the UN Human Rights Council underlines that it is indeed a global phenomenon. The DAV contribution to the UN consultation can be found [here](#). It is against this background that the DAV calls once again upon the European Commission to advocate in its conversations with member states that the newly established drafting committee of the Council of Europe for an instrument on the protection of lawyers will in fact elaborate a Convention and not a soft-law instrument.

### **Questions for contribution**

*The following four pillars (I.-IV.) are sub-divided into topics (A., B., etc.) and sub-topics (1., 2., 3., etc.). For each of the topics and sub-topics, you are invited to provide (1) feedback and progress made and developments with regard to the points raised in the respective country chapter of the 2021 Rule of Law Report and (2) any other significant developments since January 2021[1]. This would also include significant rule of law developments in relation to the COVID-19 pandemic falling under the scope of the four pillars covered by the report. Please always include a link to and reference relevant legislation /documents (in the national language and/or where available, in English). Significant developments can include challenges, positive developments and best practices, covering both legislative developments or implementation and practices. If there are developments you consider relevant under each of the four pillars that are not mentioned in the sub-topics, please add them under the section "other - please specify". Only significant developments should be covered.*

## **I. Justice Systems**

### **A. Independence**

*Appointment and selection of judges, prosecutors and court presidents (incl. judicial review)*

*(The reference to 'judges' concerns judges at all level and types of courts as well as judges at constitutional courts)*

*3.000 characters maximum*

There are no new significant developments to report on. The points addressed in our [contribution](#) to last year's report are still valid.

*Irremovability of judges, including transfers, (incl. as part of judicial map reform), dismissal and retirement regime of judges, court presidents and prosecutors (incl. judicial review)*

*3.000 characters maximum*

The points raised in last year's [consultation](#) remain valid.

*Promotion of judges and prosecutors (incl. judicial review)*

*3000 character(s) maximum*

The points raised in last year's [consultation](#) remain valid.

*Allocation of cases in courts*

*3000 character(s) maximum*

No specific comments.

*Independence (including composition and nomination and dismissal of its members), and powers of the body tasked with safeguarding the independence of the judiciary (e.g. Council for the Judiciary)*

*3000 character(s) maximum*

The points raised in last year's [consultation](#) remain valid.

*Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal/civil (where applicable) liability of judges (incl. judicial review)*

*3000 character(s) maximum*

No specific comments.

*Remuneration/bonuses/rewards for judges and prosecutors, including changes (significant increase or decrease over the past year), transparency on the system and access to the information*

*3000 character(s) maximum*

No specific comments.

*Independence/autonomy of the prosecution service*

*3000 character(s) maximum*

No specific comments.

*Independence of the Bar (chamber/association of lawyers) and of lawyers  
3000 character(s) maximum*

The general observations from last year are still valid.

Furthermore, the DAV is deeply concerned by the legislative package with regard to anti-money laundering of the European Commission of 20 July 2021 as recently expressed in its [position paper](#). The establishment of a European supervisory agency with competences and control options with regard to self-governing bodies, including the respective bars, directly impairs the independence of the bar and the independent exercise of the legal profession.

In addition, two applications with regard to the 2017 search and seizure measures conducted at the offices of the law firm Jones Day in Munich, Germany are currently pending before the ECHR with the BRAK and the CCBE intervening as amicus curiae.

*Significant developments capable of affecting the perception that the general public has  
of the independence of the judiciary  
3000 character(s) maximum*

No new developments since last year.

B. Quality of Justice

*Accessibility of courts (e.g. court/legal fees, legal aid, language)  
3000 character(s) maximum*

Administrative judicial proceedings are mostly still too long, which has a negative impact on effective legal protection. In some cases, the courts do not use electronic media (in some cases there is no access to the special electronic lawyer's mailbox (beA); postal deliveries), which further extends the decision-making time.

Taking into account the ongoing Covid-19 pandemic, our general observations with regard to oral and written court proceedings and access to the Courts are as follows:

- It is increasingly difficult to reach judges with regard to questions related to proceedings.
  - Many court offices are overloaded.
  - In particular, legal prosecution against Corona protective measures is made more difficult, and main proceedings rarely arise due to the overhaul. The restrictive sanitary rules (only vaccinated/recovered persons) or (vaccinated/recovered/tested persons) make the access to the court difficult. Recently, access to a hearing of the German Federal Constitutional Court was only possible for vaccinated/recovered persons who could present both a negative PCR and a negative antigen test of the very same day.
  - Plaintiffs and defendants from abroad, who did not receive a vaccine recognized by the EU, are even not allowed to enter Germany and thus prevented from access to justice in Germany.
  - The replacement of in-person oral proceedings by videoconferencing in civil law cases is oftentimes problematic. Oral proceedings based on § 128a German Code of Civil Procedure (Zivilprozessordnung, "ZPO") are widely considered insufficient and cannot be a permanent solution.
- Generally, it is hard to predict as to whether there will be a return to the previous status.

The legislator has also adopted an amendment to the code of criminal procedure that provides for the expansion of the retrial options to the detriment of the acquitted. Pursuant to this amendment a retrial is possible if evidence that becomes available after an acquittal shows a high probability that the person acquitted will be convicted in a retrial. The new law stands in contrast to the principle of ne bis in idem and, therefore, in the opinion of the DAV, violates Art. 103 (3) of the basic law ("Grundgesetz" = GG) which provides that no person may be punished for the same act more than once under the general criminal laws.

*Resources of the judiciary (human/financial/material)*

*(Material resources refer e.g. to court buildings and other facilities)*

*3000 character(s) maximum*

As mentioned in last year's [contribution](#), the so-called Pact for the Rule of Law as concluded between Federal Government and the Laender expired at the end of 2021. The Pact was not fully implemented and courts are still understaffed and lack the



required state-of-the-art IT equipment. A renewed version of the Pact is urgently needed. It can only be negotiated and entered into with the participation of the legal profession. Lawyers are the first point of contact for citizens in legal matters of all kinds, thus the legal profession must be able to co-determine the requirements of this new Pact. The lack of such an obligation for courts is possibly also explained by the fact that the courts are understaffed (see above).

*Training of justice professionals (including judges, prosecutors, lawyers, court staff)*  
*3000 character(s) maximum*

No new developments since 2021.

*Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)*  
*3000 character(s) maximum*

From January 2022 onwards, court briefs must be submitted only in electronic format by certain professional groups: More specifically, as of January 2022, there is an obligation for lawyers, public authorities or legal persons under public law, including associations formed by them for the performance of their public duties, to submit briefs to the courts only electronically. In turn, however, such an obligation to exclusively use electronic communication does not yet exist for the courts. The DAV regrets that.

*Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)*  
*3000 character(s) maximum*

No new developments since last year's [contribution](#).

*Geographical distribution and number of courts/jurisdictions (“judicial map”) and their specialization, in particular specific courts or chambers within courts to deal with fraud and corruption cases*

*3000 character(s) maximum*

No new developments since last year’s [contribution](#).

### C. Efficiency of the justice system

*Length of proceedings*

*3000 character(s) maximum*

The observations made in the two previous reports remain valid. Due to the pandemic, the duration of the proceedings has been extended in many cases; electronic media (digital court hearings) are underused.

*Other - please specify*

*3000 character(s) maximum*

No specific comments.

## **II. Anti-Corruption Framework**

### A. The institutional framework capacity to fight against corruption (prevention and investigation / prosecution)

*List any changes as regards relevant authorities (e.g. national agencies, bodies) in charge of prevention detection, investigation and prosecution of corruption and the resources allocated to each of these authorities (the human, financial, legal, and technical resources as relevant), including the cooperation among domestic authorities. Indicate any relevant measure taken to effectively and timely cooperate with OLAF and EPPO (where applicable).*

*3000 character(s) maximum*

No specific comments.

*Safeguards for the functional independence of the authorities tasked with the prevention and detection of corruption.*

*3000 character(s) maximum*

No specific comments.

*Information on the implementation of measures foreseen in the strategic anti-corruption framework (if applicable). If available, please provide relevant objectives and indicators.*

*3000 character(s) maximum*

No specific comments.

## **B. Prevention**

No specific comments to this whole Chapter.

## **C. Repressive measures**

No specific comments to this whole Chapter.

## **III. Media Freedom and Pluralism**

No specific comments to this whole Chapter.

## **IV. Other institutional issues related to checks and balances**

### **A. The process for preparing and enacting laws**

*Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary and other relevant stakeholders on judicial reforms), and transparency and quality*

*of the legislative process*

*3000 character(s) maximum*

In last year's [contribution](#), the DAV criticised the shortened deadlines by the Federal Government for reviewing and commenting on draft bills, a point that was taken up in the Germany Country Chapter 2021 of the Rule of Law Report. In the coalition

agreement of the New Federal Government, the three governing parties agree to improve the quality of legislation, including the public participation into the process. The DAV will closely monitor the further development with regard to this issue.

*Rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions)*

*3000 character(s) maximum*

The points outlined in our [contribution](#) to last year's report are still valid.

The Minister Presidents' Conference constituting of the heads of Government of all 16 Länder continued to meet regularly with the Chancellor and other representatives of the Federal Government to shape pandemic policy. The continuation of this forum for coordination and decision-making on pandemic related was problematic as some of the problems actually stemmed from the fact that the pandemic response was carried out by this informal institution.

While these summits were often followed by debates both in the Bundestag and in Laender parliaments, the primary decisions had already been made at these summits without prior parliamentary or public input. Furthermore, the results of these summits were often implemented not via legislation but through executive orders. These factors continued to lead to a reduction in the legitimacy of measures aimed at fighting the pandemic.

Furthermore, the Minister President's Conference as a venue for coordination and decision-making proved to be prone to gridlock and inefficiency. This was exemplified by the decision to impose a strict lockdown over the Easter weekend which was made by the Minister President's Conference and the Chancellor seemingly without input from other stakeholders, especially economic actors, and then had to be withdrawn hastily as it proved impossible to implement.

The legislative package surrounding the expiration of the epidemiological situation of national scope (see below) passed in both the Bundestag and Bundesrat within one week, a very short amount of time for legislation with such far-reaching impacts. Such

fast-tracking of legislation is admissible both constitutionally and under the Bundestag's rules of procedure. However, this led to a drastic shortening of the committee stage of the legislative process and put significant pressure on outside experts invited to consult on the planned legislation as both preparation time and the actual consultation period were shortened.

*Regime for constitutional review of laws*

*3000 character(s) maximum*

The points addressed in our [contribution](#) to last year's report are still valid.

*COVID-19: provide update on significant developments with regard to emergency regimes in the context of the COVID-19 pandemic*

*judicial review (including constitutional review) of emergency regimes and measures in the context of COVID-19 pandemic oversight (incl. ex-post reporting/investigation) by Parliament of emergency regimes and measures in the context of COVID-19 pandemic*

*3000 character(s) maximum*

One significant development was the introduction of a federal regime of emergency measures through the so-called "Bundesnotbremse" (emergency brake=BNB) in April 2021. This new framework posed a significant shift in authority towards the federal level and away from the Laender as it was the first time the federal level implemented measures directly and without the need for further execution by the latter.

With the BNB, the German federal government wanted to ensure that the same measures would take effect everywhere as soon as the pandemic situation in a region worsened. Since 24 April 2021, the emergency brake had to be pulled automatically if the so-called seven-day incidence in a district or a city exceeded 100 per 100.000 inhabitants on three consecutive days. The BNB was a temporary measure and expired on 30 June 2021. It was used to tighten COVID measures and introduced, among others, significant restrictions on allowable contacts, nightly curfews between 10pm and 5am as well as strict prerequisites for in-person schooling that resulted in school closures.

The Federal Constitutional Court (BVerfG) rejected applications for interim injunctions against the BNB and let the measures come into effect.

In November 2021 the BVerfG, in response to several constitutional complaints, upheld the measures and deemed the law constitutional. The BVerfG held that the dangerous situation of the pandemic and the uncertainties about the facts of the disease justified taking harsh measures that infringed on fundamental rights in a significant way (cf. BVerfG 1 BvR 781/21; BVerfG 1 BvR 971/21).

The epidemiological situation of national scope remained in place for most of the year. Following a change in the Infection Protection Act in March 2021 the situation was no longer of indefinite length but would lapse unless extended every 3 months. These extensions took place continually. Therefore, in addition to the BNB framework Federal and Laender governments were entrusted with far reaching powers. The DAV criticised this and called for more parliamentary involvement and oversight over pandemic decision-making.

In the meantime, some federal states have passed parliamentary participation laws for corona measures, e.g. the Berlin COVID-19 Parliamentary Participation Act of February 2021 (GVBl. p. 102).

After the federal elections in September 2021, the epidemiological situation of national scope was allowed to expire by the new government, reducing the available measures. The epidemic situation of national scope is a prerequisite for the applicability of the provisions of Section 28a (1) Infection Protection Act. After expiry, the Laender can only make use of Section 28a (7) and (8) Infection Protection Act. They thus have a reduced number of options to intervene than before. However, these are still executive decisions.

The end of the epidemiological situation of national scope was welcomed by the DAV. However, the DAV called for more involvement of the parliaments.

## B. Independent authorities

No specific comments to this whole Chapter.

### C. Accessibility and judicial review of administrative decisions

*Transparency of administrative decisions and sanctions (incl. their publication and rules on collection of related data)*

*3000 character(s) maximum*

No new developments since 2021.

*Judicial review of administrative decisions:*

*short description of the general regime (in particular competent court, scope, suspensive effect, interim measures, and any applicable specific rules or derogations from the general regime of judicial review)*

*3000 character(s) maximum*

Administrative decisions can generally be reviewed by a court; the jurisdiction of the courts is based on their local assignment. Insofar as the judicial contestation does not have a suspensive effect based on a statutory order, this can be sought by way of temporary legal protection. In this respect, there is generally no exception to the judicial reviewability of administrative decisions, with the exception of formal preclusions (expiry of the deadline).

*Follow-up by the public administration and State institutions to final*

*(national/supranational) court decisions, as well as available remedies in case of non-implementation*

*3000 character(s) maximum*

No specific comments.

### D. The enabling framework for civil society

*Measures regarding the framework for civil society organisations (e.g. access to funding, legal framework incl. registration rules, measures related to dialogue between authorities and civil society, participation of civil society in policy development, measures capable of affecting the public perception of civil society organisations, etc.)*

*3000 character(s) maximum*

No specific comments.

*Rules and practices guaranteeing the effective operation of civil society organisations and rights defenders*

*3000 character(s) maximum*

No specific comments.

E. Initiatives to foster a rule of law culture

*Measures to foster a rule of law culture (e.g. debates in national parliaments on the rule of law, public information campaigns on rule of law issues, etc.)*

*3000 character(s) maximum*

No specific comments.

*Other - please specify*

*3000 character(s) maximum*

No specific comments.