DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committee on European Law

on the targeted stakeholder consultation of the European Commission on the 2020 Rule of Law Report

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 62.000 German lawyers and lawyer-notaries in 253 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.

Appointment and selection of judges and prosecutors

3000 character(s) maximum

In the Federal Republic of Germany, judicial power is vested in the Federal Constitutional Court (Bundesverfassungsgericht, “BVerfG”), the Federal Courts and by the courts established by the 16 German Länder (“States”).

The constitutional role and the jurisdiction of these courts vary significantly. In particular, the (even by international standards) eminent role of the BVerfG as (i) a constitutional organ with the power, inter alia, to annul acts of parliament in case of their unconstitutionality and (ii) being exempt from any form of supervision by the Government or otherwise by the executive branch, is reflected in the status and the election of the justices of that Court by other democratically legitimated constitutional organs.

Article 94 of the German Constitution (Grundgesetz, “GG”) (in conjunction with Section 6 et seq. of the Federal Constitutional Court Act (“BVerfGG”)) stipulates that the Federal Constitutional Justices are elected upon proposal of the Justices’ Election Committee half by the Bundestag and half by the Bundesrat, requiring a two-thirds majority (of votes cast in the Bundestag at or at least the majority of the votes of the Members of the Bundestag and two-thirds of the votes of the Bundesrat). Each of the two Senates of the BVerfG consists of eight justices, three of whom must be selected from the judges of the Federal Courts. The Bundestag and the Bundesrat alternately nominate the President and Vice-President of the Court. The Justices of the Federal Constitutional Court must not be (and would cease to be upon their appointment) members of the Bundestag, the Bundesrat, the Federal Government or the corresponding organs on State level.

With regard to the Federal Courts, the Federal Minister responsible for the respective subject area of the Court’s jurisdiction (e.g. the Minister of Finance for the Federal Fiscal Court), together with a Judges' Election Committee, decides on the appointment of the judges of the federal courts in accordance with Article 95 para. 2 GG. This Judges' Election Committee consists of the 16 Ministers of the States responsible for the respective subject area and an equal number of members elected by the Bundestag.

The judiciary of the 16 States comprise the ordinary and specialised courts as well as the constitutional courts at state level. The selection procedures vary from State to State. In some States, it is the Higher Regional Courts which decide on the appointment, in others it is the Ministry of Justice of the State. According to Article 98 para. 4 GG, the States can – optionally – decide that the appointment of judges is to be decided by the respective Ministers of Justice together with a Judges' Election Committee in order to ensure plurality and to represent the diversity of opinions represented in society.

Except for the Chief Federal Prosecutor and the Federal Prosecutors, public prosecutors are appointed in accordance with regulations under the law of the respective Land. Judicial disciplinary proceedings against public prosecutors are allocated to the same Courts for disciplinary proceedings (Dienstgerichte) that would try judges.

There is no uniform regulation for appointment/selection procedures in place, rather different procedures apply at state and at federal level, including the Federal Constitutional Court. The material criterion in accordance with Art. 33 para. 2 GG is the suitability of the candidate from a personal and professional point of view, based on assessments of the candidate that do not concern the content of his or her judicial decisions. The selection requires a substantial, written statement of reasons. The selection decision can be challenged in court as an additional safeguard, which is used relatively often and guarantees an independent decision through review by judges themselves.

In summary, the system of appointment of judges is constitutionally safeguarded and in principle well-functioning. From the DAV's point of view, there are good reasons for the established selection procedures of the German judiciary. As regards Judges' Election Committees there is a tendency for judges to be elected based on the criteria of party proportional representation, thus, in particular candidates who are neutral in terms of party politics are less likely to be elected. However, there is no evidence of a systemic failure in either model. The DAV recommends that the high quorum of a 2/3 majority (of votes cast in the Bundestag) should also be provided for the selection procedures of judges for the federal courts, provided that it is guaranteed that the high quorum does not lead to a blockade by parliamentary minorities in case of new appointments.

Irremovability of judges, including transfers of judges and dismissal

3000 character(s) maximum

Article 97 GG guarantees the objective and personal independence of judges. This means that they are completely exempt from any instructions or other external influence when interpreting and applying the law. All judges are entitled to, and are constitutionally required, to make their decisions independently within the framework of and subject only to the law.

The Justices at the Federal Constitutional Court are irremovable and elected for a twelve-year tenure. In order to ensure their independence, immediate or subsequent re-election is excluded. The mandatory retirement age is 68.

The civil service status of judges is primarily regulated by the German Judges Act (DRiG). Their personal independence is guaranteed by the fundamental irremovability of judges. According to Article 97 GG, judges may be dismissed against their will and before the expiry of their term of office only by judicial decision and only for reasons and according to the forms determined by the law. Subject to the same conditions they may be permanently or temporarily removed from office, transferred to another post or be retired. Personal independence ultimately means freedom from certain personnel policy measures that could jeopardise the freedom of objective independence, meaning the independence to decide on the merits of the case without interference. Judges may not,

either professionally or otherwise, suffer disadvantages as a result of their judicial activity which are likely to call their objective independence into question or hinder him in their judicial task.

Judges are appointed for life and may be transferred or dismissed from office without their written consent only in very exceptional cases. Section 30 (1) DRiG contains an exhaustive list of possible reasons in this respect, namely in proceedings on the charges brought against federal judges (Richteranklage, Article 98 para. 2 and 5 GG, whereas only the Federal Constitutional Court may decide on such matters), in judicial disciplinary proceedings, in the interests of the administration of justice and in the event of changes in the organisation of the courts. Transfer or removal from office is only possible on the basis of a legally binding judicial decision.

Measures taken in the course of disciplinary proceedings have to be proportionate in relation to the violation of the professional duties. The possibilities for dismissal are also conclusively regulated by law and such dismissal is only permissible if and when the confidence in the orderly fulfilment of the professional obligations of a judge is irrevocably destroyed and cannot be restored. In contrast to lifetime judges, judges who are within their first two years of their initial appointment may be dismissed for any material reason, Section 22 (1) DRiG.

Any judge may also take legal action by appealing to specific Judges' disciplinary courts claiming that their independence has been violated by any supervisory or executive act or the judicial administration.

In the view of the DAV, judicial independence is a generally respected value in the German legal system. It must be emphasized that the context of the case constellation is crucial for the exceptional decisions on the principle of the irremovability of judges, and a very strict standard must be applied in order to avert a serious impairment of the administration of justice.

Promotion of judges and prosecutors

3000 character(s) maximum

Generally, the criteria governing the appointment of judges outlined in question 1 also apply to the promotion of judges. As outlined in question 1, justices of the Federal Constitutional Court and judges of the Federal Courts are not promoted but elected. Their election and the appointment of federal judges, as outlined in question 1, involve the relevant democratically legitimised bodies. Appointments to higher or senior positions of judges, also at state level, are primarily based on objective suitability criteria, even though in the higher echelons of the judiciary a certain political dimension of the selection process is undeniable.

The judiciary, in all federal states, has developed a highly differentiated system of informal and formal control as well as a system of assessment. In almost all federal states, there are tests for promotion to higher courts. Candidates are promoted after a period of 6 months followed by an assessment at the end, often related to as “third state examination”. Some states organise the promotion via alternating periods between the office of a public prosecutor and a judge. A candidate who obtains a good assessment can apply for promotion with a subsequent election by a Judges’ Election Committee.

Allocation of cases in courts

3000 character(s) maximum

Independence (including composition and nomination 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

Reference is made again to Article 97 GG that guarantees the objective and personal independence of judges. In the current political debate about the independence of Judges in Europe reference has been made to the German criminal law provision of perversion of justice (Section 339 StGB, Rechtsbeugung). According to the jurisprudence of the Federal Court of Justice, it is a punishable offence to deliberately deviate from the law in a serious manner and to base one's actions on standards that

are not expressed in the law and thus make a decision that is in fundamental a violation of the administration of justice. However, the prerequisites for establishing the facts are very high and there is little case law on this. Undoubtedly, a judge cannot be tried for this offence if he wishes to ascertain the constitutionality of a provision.

Courts responsible for possible disciplinary proceedings against judges or complaints from judges about restrictions on their independence, are themselves composed exclusively of judges. The same applies to complaints against the appointment of judges from federal courts or higher courts at State level.
The order for preliminary reference of the Administrative Court of Wiesbaden in the case 28.03.2019 - 6 K 1016/15.WI to the European Court of Justice shows that the principle of independence is sometimes examined more critically within the German Judiciary. The order states that the mere "functional" independence of judges is not sufficient to protect a court from any external influence. It is said not only to be a matter of instructions, but also of indirect influences that could control a decision of judges. Ultimately- as the Administrative Court states - the Ministry of Justice always decides on the budget allocated, the number of judges at a court and on its equipment. Even the mere danger of political influence on the courts could cause a danger of influencing the decisions of the courts in order to impair their independent performance of their tasks.

In the view of the DAV, the submission of a preliminary question by the VG Wiesbaden on the judicial independence of administrative judges is excessive. However, the discussion shows that the public in Germany is aware of the great importance of judicial independence. It can therefore be reasonably assumed that attempts to influence the independence of the judiciary such as in some Member States, would meet with widespread resistance in Germany.

Accountability of judges and prosecutors, including disciplinary regime and ethical rules

3000 character(s) maximum

Remuneration/bonuses for judges and prosecutors

3000 character(s) maximum

Independence/autonomy of the prosecution service

3000 character(s) maximum

The Public prosecution service in Germany may be subject to instructions from the Ministers of Justice in individual cases on federal as well as State level, Section 146, 147 of the Courts Constitution Act (Gerichtsverfassungsgesetz, “GVG”). On the occasion of the decision of the European Court of Justice of 27 May 2019, case C-508/18, where the Court held, that the Public Prosecutor's Office is not a "judicial authority" within the meaning of the Framework Decision on the European Arrest Warrant and is therefore not authorised to issue a European Arrest Warrant, there was a public discussion in Germany on whether the Public Prosecution service in Germany is sufficiently independent.
The DAV holds that the commitment of those politically responsible to comply with the law and justice, backed by the parliamentary accountability of their actions, ensures that political influence on the actions of the public prosecutor's office, which is desirable and desired within limits, does not violate established legal principles and fundamental rules in the judicial system (see DAV Position Paper 58/2015).

It is apparent from Article 92 GG that in the German system of separation of powers the public prosecution service is to be assigned to the executive and not to the judiciary since only judges are entrusted with judicial power. The executive power is controlled by the parliament. The ministers in turn bear parliamentary responsibility for their actions. They can only bear this responsibility if they have the right of supervision and direction. A public prosecution service not bound by instructions would represent a part of the executive that is not controlled by parliament and is alien to the German system of parliamentary democracy.

In this way, as well as through its commitment to the principle of legality (to which narrow exceptions apply), the public prosecution service is protected against misuse of the right of ministers to give instructions. However, the DAV considers further measures to be necessary in order to ensure that relevant instructions of the Ministers of Justice

on federal level and on State level are linked to adequate guarantees of transparency and fairness. Uncertainties linked to the ambit of an instruction do not justify the abolition of the external right of instruction.

Independence of the Bar (chamber/association of lawyers)

3000 character(s) maximum

Lawyers are free and independent advisors and representatives in all legal matters. They are also independent organs of the administration of justice. Individual freedom and independence are only guaranteed if the legal profession is self-governing. In Germany these essential values are secured by a system of self-administration and self-regulation of independent Bars (regrouped since 1969 under the German Federal Bar, BRAK) in addition to the German Bar Association in which membership is voluntary.

Since 1871 German lawyers have organised themselves within the German Bar Association (“Deutscher Anwaltverein”, DAV) as an independent representation of interest aimed at pronouncing itself as the lawyer of lawyers in all economic, public and professional interests as well as policy related and political questions related to the rule of law and the tasks lawyers fulfil within the rule of law. In contrast to the regional Bars and the BRAK, the DAV has more freedom in choosing to comment or to proactively ask for new legislation even in fields not directly related to professional practice or policy.

The self-regulation and self-administration of lawyers by the Bars in Germany is regulated by the Federal Lawyers Act (BRAO) and is organised according to the constitutional principle of separation of powers with independent legislative, executive and judicial bodies: Under the umbrella organisation of the BRAK) the regional Bars have executive power. The Statutory Assembly drafts and adopts the Rules of Professional Practice (BORA) of the legal profession; the judiciary is exercised by special courts.

Within the scope of their area of responsibility, the bars play a decisive role in professional supervision and in combating money laundering, among other things. The DAV is particularly concerned that, in the context of anti-money laundering and tax

transparency legislation at EU level, doubts are repeatedly raised about the principle of self-regulation of lawyers.
Irrespective of this, it can be stated that the independence of the Bar and the self-regulation in Germany is widely recognised. The DAV considers the independence of lawyers and the freedom of choice of lawyers as important elements of the rule of law. Please see below.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

3000 character(s) maximum

The DAV notes that lawyers are exposed to threats and attacks relating to their professional activities. The public took note of reports on threats against lawyers in connection with legal proceedings, such as the so-called NSU-case or rape proceedings. However, this does not seem to reflect an overall trend. The DAV has often called for such cases of threats and attacks to be fully investigated. Furthermore, it is the state's responsibility to protect the independence of lawyers fully and with all means.

The DAV is concerned about the extension of powers of state authorities in the area of security law at the expense of civil liberties. It is in particular within the police and security acts on State level that the DAV observes worrying tendencies weakening the absolute protection of lawyer-client confidentiality The DAV demands a uniform and absolute protection of the professional secrecy obligation in criminal and security law. According to the DAV there must also be an absolute protection of professional secrecy in the ambit of general risk prevention and security. The free, unhampered communication of clients with their lawyers must be protected in all areas from state investigation in order to guarantee sufficient rights of defence and representation. In particular, the protection of confidential communication must not be subject to a proportionality test in individual cases.

Other - please specify

3000 character(s) maximum

A development which needs to be scrutinised by the DAV relates the forthcoming German Corporate Criminal Law. In April 2020, the Federal Ministry of Justice and Consumer Protection has presented the long awaited draft of an act on combating corporate crime. The proposed new Act on the Sanctioning of Entities ("Verbandssanktionengesetz") will provide for rules on the sanctioning of companies for criminal offences committed in violation of duties incumbent on the entity, or where the entity has been enriched or was to be enriched ("corporate criminal offence"); such offences are not limited to just white-collar offences. The fairly lengthy bill also contains requirements for internal investigations, provides for the seizure of items that are in the possession of lawyers or other professionals who are subject to a statutory duty of confidentiality.
While the draft does not establish any binding rules on internal investigations, this delicate subject is treated in the form of an "incentive system". Substantive rules on how the internal investigation must be conducted are set out as an optional mitigating factor: if the entity has conducted an internal investigation and has met certain conditions, the court may reduce the sanction of the entity. In this case, the draft provides for a reduction of the maximum amount of the sanction to 50% (shift of the sanction range). In order for the court to be able to reduce the sanction, a series of following conditions must be met which comprise inter alia that (i) the internal investigation must have been produced a material contribution to clarifying the corporate criminal offence , (ii) the defence counsel of the corporation must not be involved in the internal investigation, (iii) the entity must cooperate fully and unconditionally with the public prosecutor's office, and (iv) all material documents and a final report must be produced to the prosecution.

Finally, the draft provides for a change of the rules on the prohibition of seizures under procedural criminal law. It will expand the scope of the powers to seize and confiscate counsels' documents. It is currently the subject of debate in case law and in legal literature whether items that are subject to the lawyers' right to refuse to give evidence (professional secrecy) are excluded from seizure only if the lawyer's client is the suspect (or is an entity with a similar status) or whether the prohibition of seizure also protects the relationship of trust between the counsel and other clients that are not suspects (e.g. witnesses or relatives of the suspect, or companies conducting an

internal investigation and not suspects). According to the current wording of the law, these lawyer-client relationships appear to be protected from seizures as well. However, the draft intends to limit the prohibition of seizure expressly to cases where the relationship of trust between the suspect (person or entity) and the person entitled to the right to refuse to give evidence is to be protected. Lawyer-client relationships with persons and companies that are not suspects are not to, and will no longer, be protected. Searching lawyers' offices will become undoubtedly permissible to the extent that the rules on the prohibition of seizure very narrowly defined in the draft do not apply.

All of these proposals will have to be evaluated carefully with a view to what impact they may have on lawyers' rights in criminal proceedings, defendants' rights to freely choose their counsel and to which extent their relationship will remain protected.

Quality of justice

(Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".)

Accessibility of courts (e.g. court fees, legal aid)

3000 character(s) maximum

Access to justice is sometimes subject to a certain territorial barrier. In some German rural regions there are fewer places of jurisdiction and courts. This not only has the effect of limiting access to justice for affected people. It also means that lawyers have to settle where the courts are located. Access to justice in those affected rural areas is thereby endangered. Efforts should be made to avoid an undersupply of access to justice in those rural areas, as is already the case with medical care. The Covid-19 pandemic crisis is a prime example of the need to press ahead with the expansion of the technical and digital infrastructure in the justice system. In general, the German justice system should be better equipped in terms of human, technical and financial resources.

Resources of the judiciary (human/financial)

3000 character(s) maximum

Use of assessment tools and standards (e.g. ICT systems for case management, court statistics, monitoring, evaluation, surveys among court users or legal professionals)

3000 character(s) maximum

Other - please specify

3000 character(s) maximum

As far as the DAV is aware, there is no direct and illegal influence of the other powers on the concrete decision-making process; corruption is also practically non-existent. This is not only due to the regulations mentioned above, but also to the self-image of the judges and the culture of decision-making.

Efficiency of the justice system
(Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".)
Length of proceedings

3000 character(s) maximum

Germany remains very well placed when it comes to the length of proceedings. However, there is already a long-standing trend towards extending the duration of proceedings. In Northrhine-Westphalia, for example, the average duration of proceedings (first instance; “Landgericht”) has increased by approximately two months in the last ten years. Complex proceedings have experienced a much longer extension. A similar picture emerges in other federal states. This trend must be reversed. Therefore, the DAV holds that it is necessary to improve staffing levels, but also to digitise the justice system more comprehensively (including the implementation of electronic files and electronic file management (“e-Akte”). German civil procedural law is

fundamentally suitable for dealing with increasingly complex issues. However, due to a reform of Section 198 et sequ. GVG, which has removed the possibility for complaint, legal remedies against an excessive length of proceedings are virtually non-existent. The damage claim is no remedy for this. A reversal of the reform seems more than appropriate.

For criminal law the length of proceedings is satisfactorily, in particular having the acceleration requirement for criminal proceedings in which the accused are detained.

The length of the proceedings is of considerable importance in terms of the rule of law. Effective law enforcement requires that proceedings be conducted as swiftly and efficiently as possible. The DAV sees this as a weakness in German administrative proceedings. A distinction must be drawn between the legal action for rescission and the action for obligation incumbent on the administrative authority. In proceedings to challenge state actions (e.g. in the case of administrative acts), applicants are entitled to interim measures in addition to the main proceedings. They can apply for interim measures to suspend the effect of administrative decisions. In these proceedings, decisions are usually made promptly and effectively. This has recently been demonstrated in proceedings against so-called Corona Decrees, in which decisions were made within a week. It is frequently the case that such rush decisions have a final character, as the administrative courts usually decide with regard to the legality of the contested decision and thus with a final and conclusive assessment.

According to the established case-law of the administrative courts, there is no such urgent legal protection in the case of a requested obligation to take state action. This is usually justified by the fact that otherwise the main proceedings would be inadmissibly anticipated within the interim proceedings. Thus, anyone who, for example, files an action for the granting of a permit is referred to the lengthy main proceedings, in which the duration of the proceedings varies significantly between 1 and 5 years, depending on the federal state and the administrative court. From the perspective of the person seeking legal protection, such a long duration of proceedings is ineffective and obstructs legal protection and may constitute a violation of the principle of the rule of law within the meaning of Article 20 GG. Although anyone who is affected by an excessive length of court proceedings is entitled to limited compensation under § 198

GVG in conjunction with § 173 sentence 2 Code of Administrative Court Procedure (VwGO), this possibility is not used to any significant extent. Nor is it considered suitable to compensate for the damage caused by the excessive length of the proceedings.
In this respect, in further proceedings before the civil courts, an official liability claim can be lodged against the state authority acting illegally.

In general, the German state liability regime has widely been regarded as insufficient and inadequate in a modern constitutional environment. It rests upon a complex set of legal principles, often derived from pre-constitutional law or very generic equity concepts, which has gradually been developed by the civil courts, and occasionally the Federal Constitutional Court, but in each case very narrowly: Public liability generally requires some degree of negligence or intent by the civil servant who acted unlawfully, which in civil proceedings would have to be proven by the claimant. Moreover, liability is generally excluded if the administration's (purportedly) illegal action has once been found legal by a court consisting of more than one judge, irrespective of whether a higher court would reverse that judgment. State liability claims under sec. 839 of the German Civil Code (Bürgerliches Gesetzbuch) for wrong court decisions even face higher thresholds: The wrong decision can only trigger a claim for compensation if the judge's decision was tantamount to a criminal offence.

It is, therefore, a widely accepted position that the German state liability law is in urgent need of fundamental repair and codification. The attempt at federal level by enacting the State Liability Law (Staatshaftungsgesetz) of 1982 famously failed later that year when the BVerfG found that the Federation (as opposed to the Länder) had not legislative competence and annulled the law. Since a constitutional law amendment of 1994, either the Bund or, in the absence of such federal law, the Länder could enact state liability laws, neither of them has done so ever since. The DAV advocates for a rectification of this constitutionally undesirable status.

Enforcement of judgements

3000 character(s) maximum

Over the past two years, there have been cases in which executive bodes and State institutions have deliberately not implemented court decisions. This concerns, among others, the case of the deportation of Sami A., which has attracted media attention, as well as the non-implemented diesel driving bans following a ruling by the BayVGH (Az.: 22 C 18.1718) or the case of Stadt Wetzlar (Az.: 8 L 9187/18.GI), where the mayor of the city denied a political party access to a public hall.

Initially considered to be an outlier in an otherwise well-functioning separation of powers, there are increasing signs of a new, worrying trend.

The case before the ECJ C-752/18 regarding a request for a preliminary ruling from the Higher Administrative Court of Bavaria, Germany concerned the Land of Bavaria's refusal to comply with the injunction to implement traffic bans in respect of certain diesel vehicles in various urban zones of the city of Munich. The Deutsche Umwelthilfe applied for that injunction to be enforced by ordering the coercive detention of the Minister for the Environment and Consumer Protection of the Land of Bavaria or, failing that, of its Minister-President.

In case of "Stadt Wetzlar", the NPD intended to use the city hall in March 2018, the municipality denied it access. The NPD brought a case to the court and wins in all instances, first before the Giessen Administrative Court (Az.: 8 L 9187/18.GI), then before the Hessian Administrative Court, then before the Constitutional Court. Nevertheless, the mayor of the city maintained his ban on access to the hall.

From the DAV's point of view, the binding of the executive to decisions of the judiciary is an indispensable prerequisite of the rule of law, otherwise court decisions are de facto worthless. The DAV closely observes developments in this area and strongly condemns political statements which demand court decisions based on a "healthy public sentiment" instead of respecting the obligation to comply with law and justice.

It should be noted, however, that these are - although significant - individual cases. A general or an increased reluctance of authorities to implement court decisions cannot be acknowledged. Yet, it is important to keep a careful eye on these developments. That is why the situation is being closely monitored by the DAV.

Other - please specify

3000 character(s) maximum

The corona pandemic is a challenge for the German (civil) justice system. To what extent the crisis will increase duration of proceedings remains to be seen. But it is already clear that the pandemic will lead to a debate in which efficiency must be rebalanced with fundamental principles. For example, court proceedings can and must increasingly be conducted using modern communications technology (including video conferencing). This almost inevitably comes into conflict with elementary principles of the rule of law such as the principle of publicity. Here, the legislature is called upon to strengthen the efficiency of the justice system without weakening the principles of the rule of law. From the DAV's point of view, it is of essence to respect and maintain the principle of oral and public hearings as an important part of the fair trial principle - even in situations as the corona pandemic. Thus, the DAV sees draft legislations critical that allows referring proceedings, at the discretion of the judge solely and without consensus of the parties, to a purely written procedure.

Anti-Corruption Framework - Germany

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

Authorities (e.g. national agencies, bodies) in charge of prevention detection, investigation and prosecution of corruption. Resources allocated to these (the human, financial, legal, and practical resources as relevant).

3000 character(s) maximum

Corruption is not a significant obstacle for rule of law in Germany.

Prevention

Integrity framework: asset disclosure rules, lobbying, revolving doors and general transparency of public decision-making (including public access to information)

3000 character(s) maximum

Rules on preventing conflict of interests in the public sector

3000 character(s) maximum

Measures in place to ensure Whistle-blower protection and encourage reporting of corruption

3000 character(s) maximum

Sectors with high-risks of corruption in a Member State and relevant measures taken/envisaged for preventing corruption in these sectors (e.g. public procurement, healthcare, other).

3000 character(s) maximum

Any other relevant measures to prevent corruption in public and private sector

3000 character(s) maximum

Repressive measures

Criminalisation of corruption and related offences.

3000 character(s) maximum

Application of sanctions (criminal and non-criminal) for corruption offences (including for legal persons).

3000 character(s) maximum

Potential obstacles to investigation and prosecution of high-level and complex corruption cases (e.g. political immunity regulation).

3000 character(s) maximum

Media Pluralism - Germany

Media regulatory authorities and bodies

(Cf. Article 30 of Directive 2018/1808)

Independence, enforcement powers and adequacy of resources of media authorities and bodies.

3000 character(s) maximum

Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media authorities and bodies

3000 character(s) maximum

Transparency of media ownership and government interference

The transparent allocation of state advertising (including any rules regulating the matter)

3000 character(s) maximum

Public information campaigns on rule of law issues (e.g. on judges and prosecutors, journalists, civil society)

3000 character(s) maximum

Rules governing transparency of media ownership

3000 character(s) maximum

Framework for journalists' protection

Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities

3000 character(s) maximum

Law enforcement capacity to ensure journalists' safety and to investigate attacks on journalists

3000 character(s) maximum

Access to information and public documents

3000 character(s) maximum

Other - please specify

3000 character(s) maximum

Other institutional issues related to checks and balances - Germany

The process for preparing and enacting laws

Stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), transparency of the legislative process, 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

Regime for constitutional review of laws.

3000 character(s) maximum

There are, in particular, three possible avenues to launch a constitutional review of (federal and state) laws. The first is the “abstract review of statutes” (“Abstrakte Normenkontrolle”): According to Art. 93 (1) Nr. 2 GG and sections13 Nr. 6, 76 et seq. BVerfGG a request for the abstract review of a law, be it federal or state, can be launched by either the federal government, a state government or by a quarter of the members of the federal parliament (Bundestag). The second is the ‘”concrete review of statutes” (“Konkrete Normenkontrolle”): According to Art. 100 (1) GG and sections 13 Nr. 11, 80 et seq. BVerfGG any court that (1) has a pending case before it and (2) is convinced that the statute on which its decision in that case decisively hinges on is unconstitutional, can launch a review of constitutionality of this statute before either the Federal Constitutional Court (in case of a federal statute) or the relevant State Constitutional Court (for state statutes). The third is a “constitutionality review” through an individual constitutional complaint (“Verfassungbeschwerde”) before the Federal Constitutional Court according to Art. 93 (1) Nr. 4a GG and sections 13 Nr. 8a, 90, 92 et seq. BVerfGG. A review via this avenue presupposes, inter alia, that the statute in question directly and immediately affects the individual, i.e. that the statute is self-executing.

While the general regime in place for the constitutional review of laws has proven largely effective, certain aspects regarding the mechanisms in place for monitoring the satisfactory implementation of judgments of the Federal Constitutional Court could be improved. Specifically two aspects are of interest here: First, no effective mechanism exists to ensure that judgements are implemented within a (set) reasonable period of time, i.e. that the legislative does not delay the enactment of new legislation that is meant to remedy the unconstitutional legal situation that the Court has rebuked in its judgment (see e.g. implementation of judgment to inheritance tax law). Second, no effective mechanism exists to fast-track a constitutional review of such new laws, where their constitutionality is in doubt, i.e. when it is doubtful that they sufficiently address the issues that Court has raised in its judgment (see e.g. federal electoral act; compensation due to nuclear phase out act) The only explicit possibility to review such new legislation that has been enacted following a Court’s judgment is to launch a new complaint, which involves considerable temporal and financial costs for the complaining party.

Independent authorities

Independence, capacity and powers of national human rights institutions, ombudsman institutions and equality bodies;

3000 character(s) maximum

Accessibility and judicial review of administrative decisions

Modalities of publication of administrative decisions and scope of judicial review

3000 character(s) maximum

Access to and judicial review of administrative decisions by concerned parties can be considered effective in Germany. Persons affected by administrative decisions can assert legal remedies (“objection” (“Widerspruch”)) and legal remedies (“complaint”, “review of norms”, (“Normenkontrolle”)) against acts of state authority. The admissibility of such legal remedies requires that the persons affected are restricted in their own subjective rights. However, this does not impede effective means of access to justice as the courts allow it to be sufficient that there is a mere possibility of a violation of rights by the challenged state act. With the implementation of European law requirements, in particular in the UmwRG (Act on the Implementation of Directive 2003/35/EC), effective judicial control is generally guaranteed. Within the context of the judicial review of state acts, there is usually a comprehensive objective legal control in the review of “review of norms” (Normenkontrolle), whereas in the case of actions for annulment the violation of subjective rights is decisive (§ 113 Paragraph 1 Sentence 1 Code of Administrative Court Procedure (VwGO)), unless it is a matter of the violation of environment-related regulations within the meaning of the UmwRG.

Decisions of the administrative authorities are made public in proceedings in which this is provided for by specialised legislation. This includes in particular decisions with far-reaching effects, such as in planning approval law, immission control law or procedures relevant to regional planning law. Other administrative decisions (such as building permits or administrative orders) are not usually published. Some federal states provide for the possibility of making such administrative acts public as well, in order to ensure the issuing of decisions and that deadlines for appeals can be met.

Implementation by the public administration and State institutions of final court decisions

3000 character(s) maximum

See above.

The enabling framework for civil society

Measures regarding the framework for civil society organisations

3000 character(s) maximum

Other - please specify

3000 character(s) maximum