



BUNDESRECHTSANWALTSKAMMER

Stellungnahme Nr. 5/2022

Januar 2022

Registernummer: 25412265365-88

Zur Konsultation zum jährlichen Bericht über die Rechtstaatlichkeit in der EU 2022

Mitglieder des AS Europa

RAuN a.D. Kay-Thomas Pohl (Vorsitzender)

RA Dr. Sebastian Cording

RA Dr. Hans-Joachim Fritz

RAin Dr. Margarete Gräfin von Galen

RA Marc André Gimmy

RA Andreas Max Haak

RA Dr. Frank J. Hospach

RA Guido Imfeld

RA Maximilian Müller

RAin Dr. Kerstin Niethammer-Jürgens

RA Dr. Christian Lemke

RA Jan K. Schäfer, LL.M.

RAin Stefanie Schott

Prof. Dr. Gerson Trüg

RA Dr. Hans-Michael Pott

RA Andreas von Máriaassy

RAuN Dr. Thomas Remmers, Vizepräsident, Bundesrechtsanwaltskammer

RAin Dr. Heike Lörcher, Bundesrechtsanwaltskammer, Brüssel

RAin Astrid Gamisch, LL.M., Bundesrechtsanwaltskammer, Brüssel

Referent Rafael Javier Weiske, Bundesrechtsanwaltskammer, Brüssel

Ass. Jur. Sarah Pratscher, Bundesrechtsanwaltskammer, Brüssel

Verteiler: Europäische Kommission

Die Bundesrechtsanwaltskammer ist die Dachorganisation der anwaltlichen Selbstverwaltung. Sie vertritt die Interessen der 28 Rechtsanwaltskammern und damit der gesamten Anwaltschaft der Bundesrepublik Deutschland mit rund 166.000 Rechtsanwältinnen und Rechtsanwälten gegenüber Behörden, Gerichten und Organisationen – auf nationaler, europäischer und internationaler Ebene.

Stellungnahme

Die Bundesrechtsanwaltskammer bedankt sich für die Möglichkeit, an der öffentlichen Konsultation der Europäischen Kommission zum geplanten jährlichen Bericht über die Rechtsstaatlichkeit in der EU 2022 teilzunehmen. Auf den Fragebogen der Konsultation, der nur in englischer Sprache verfügbar ist, antwortet sie auf Grundlage der Erfahrungen ihrer Experten wie folgt:

2022 Rule of Law Report - targeted stakeholder consultation

Fields marked with * are mandatory.

Introduction

The annual Rule of Law Report is at the core of the European rule of law mechanism, which acts as a preventive tool, deepening multilateral dialogue and joint awareness of rule of law issues. The first Rule of Law Report was published on 30 September 2020, and the second on 20 July 2021.

In the preparation of the first two editions of the Rule of Law Report, the Commission has relied on a diversity of relevant sources, including from Member States, country visits, and stakeholders' contributions collected through the targeted stakeholder consultation [1]. The information provided has informed the Commission's country-specific assessments in preparing the Report. Building on the positive experience from the first two editions of the Rule of Law Report, the Commission is now inviting stakeholders to provide written contributions for the preparation of the 2022 Rule of Law Report through this targeted consultation.

The contributions should cover in particular (1) feedback and developments with regard to the points raised in the country chapters of the 2021 Rule of Law Report and (2) any other significant developments since January 2021 [2] falling under the 'type of information' outlined in the next section. This should, where relevant, also continue to 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.

The input should be short and concise, if possible in English, and summarise information related to one or more of the areas referred to in the template. You are invited to focus on the areas that relate to the scope of work and expertise of your organisation. Existing reports, statements, legislation or other documents may be referenced with a link (no need to provide the full text). Stakeholders are encouraged to make references to any contributions already provided in a different context or to Reports and documents already published. Contributions should focus on significant developments both as regards the legal framework and its implementation in practice.

If you wish to submit information concerning several Member States, you will have to fill-in the questionnaire separately for each Member States (due to the size of the questionnaire). There is no limit to the number of contributions submitted by a single participant. In such cases, you are not required to repeat the information in the section "about you" that is non-mandatory nor the information on horizontal developments.

Please provide your contribution by **24 January 2022**. Should you have any requests for clarifications or encounter difficulties in filling in the questionnaire, you can contact the Commission at the following email address: rule-of-law-network@ec.europa.eu.

[1] https://ec.europa.eu/info/publications/2020-rule-law-report-targeted-stakeholder-consultation_en and 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_en

[2] Unless the information was already submitted in the consultation for the 2020 or the 2021 Rule of Law Reports.

Type of information

The topics are structured according to four pillars: I. Justice system; II. Anti-corruption framework; III. Media pluralism; and IV. Other institutional issues related to checks and balances. The replies could include aspects set out below under each pillar. This can include challenges, current work streams, positive developments and best practices:

Legislative developments

- Newly adopted legislation
- Legislative drafts currently discussed in Parliament
- Legislative plans envisaged by the Government

Policy developments

- Implementation of legislation
- Evaluations, impact assessment, surveys
- White papers/strategies/actions plans/consultation processes
- Follow-up to reports/recommendations of Council of Europe bodies or other international organisations
- Important administrative measures
- Generalised practices

Developments related to the judiciary / independent authorities

- Important case law by national courts
- Important decision/opinions from independent bodies/authorities
- State of play on terms, nominations and expired mandates for high-level positions (e.g. Supreme Court, Constitutional Court, Council for the Judiciary, heads of independent authorities included in the scope of the request for input[1])

Any other relevant developments

- National authorities are free to add any further information, which they deem relevant; however, this should be short and to the point.

Please include, where relevant, information related to measures taken in the context of the COVID-19 pandemic under the relevant topics.

If there are no changes, it is sufficient to indicate this and the information covered in the inputs for the 2020 and 2021 Rule of Law Reports should not be repeated.

[1] Such as: media regulatory authorities and bodies, national human rights institutions, equality bodies, ombudsman institutions, supreme audit institutions and, where they exist, transparency authorities.

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.

Overview topics for contribution

[Overview topics for contributions 2022.pdf](#)

Please provide any relevant information on horizontal developments here

5000 character(s) maximum

-

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.

[1] Unless already covered in the input for the 2020 or the 2021 Rule of Law Reports.

Member State covered in contribution [only one choice possible]

If you wish to submit information concerning several Member States, please fill in the questionnaire.

There is no limit to the number of contributions submitted by a single participant.

I. Justice System

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)

3000 character(s) maximum

-

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)

3000 character(s) maximum

-

Promotion of judges and prosecutors (incl. judicial review)

3000 character(s) maximum

-

Allocation of cases in courts

3000 character(s) maximum

-

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

-

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

-

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

-

Independence/autonomy of the prosecution service

3000 character(s) maximum

-

Independence of the Bar (chamber/association of lawyers) and of lawyers

3000 character(s) maximum

Practising German lawyers (*Rechtsanwälte*) are registered with the respective regional Bar that is competent for the lawyers established in its district. There are 27 regional Bars in Germany. In addition, there is a special Bar for the lawyers with rights of audience in civil matters at the German Federal Court of Justice (*Bundesgerichtshof*). The umbrella organization of all 28 Bars in Germany is The German Federal Bar (*Bundesrechtsanwaltskammer*) in Berlin.

The regional Bars are independent from the State and self-regulatory within the statutory framework set by the federal legislator. They are public bodies (*Körperschaften des öffentlichen Rechts*) which are under the supervision of the legal authorities of the respective Land as regards compliance with the legal duties transferred to them for self-regulation (*Rechtsaufsicht*).

The regional Bars are in charge of admission to the profession, the control of compliance with legal professional rules and regulations and decisions on enforcement of violations within the limitations provided by the law. The regional Bars can issue warnings and even impose sanctions on a lawyer who violates his professional duties. This is in turn controlled by an independent disciplinary jurisdiction for the legal profession. Its highest instance is the Federal Court of Justice (*Bundesgerichtshof*) in Karlsruhe. However, a big part of the everyday work of the regional Bars is to provide professional support and counselling for their members. Furthermore, regional Bars can act as intermediary in case of disputes between their members.

The regional Bars are headed by practising lawyers who are elected by their peers and fulfil their various tasks on an honorary basis. They are supported by a professional administration.

The German Federal Bar (*Bundesrechtsanwaltskammer, BRAK*) is a self-regulatory body incorporated under public law (*Körperschaft des öffentlichen Rechts*) and represents the interests of the regional Bars and thus the interests of all 166,000 German lawyers. It is the umbrella organization of all 28 Bars in Germany. Its role is a purely representative one, i. a. representing the profession vis-à-vis the parliaments in Berlin and Brussels. The German Federal Bar does not have a regulatory function. The legal supervision is exercised by the Federal Ministry of Justice (*Bundesministerium für Justiz, BMJ*). Within the organization of The German Federal Bar, there is a so-called lawyers' parliament (*Satzungsversammlung*) that acts as a legislative body for issues which are delegated for self-regulation to the practicing lawyers. It determines the rules that are applicable to all German lawyers, irrespective of the regional Bar they are registered with. The German Federal Bar is also headed by practising lawyers who are elected and take on their tasks on an honorary basis. Again, they are supported by a professional administration.

In Germany we have had positive experiences with this system comprising supervision of the profession through the regional Bars, control exercised by an independent judiciary and representation of interests through The German Federal Bar.

With regard to the supervision of the bars by the justice ministries – which is considered an obstacle to their independence in this context, we would like to point out that in the field of anti-money-laundering the European Commission complains about a lack of state supervision of the bars and other self-regulatory bodies.

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

German court fees in civil and commercial matters are modest, they are calculated with reference to the amount in dispute and are capped at an amount in dispute of EUR 30 million.

Lawyers in civil litigation are still predominantly paid pursuant to the statutory fee schedule (Act on the Remuneration of Lawyers, Rechtsanwaltsvergütungsgesetz, RVG). Agreed legal fees in court proceedings may not undercut the statutory fee schedule. Alternative fee arrangements are permissible, though. In commercial matters, specialized litigation counsel typically charges for their services by the hour. The hourly rate is a matter of negotiation between the lawyer and the counsel.

However, irrespective of the agreed hourly rate, a prevailing party is only entitled to the reimbursement of the statutory legal fees for the matter. This rule manages the cost risks of the parties. In particular, a claimant can calculate the cost risk involved when bringing a matter. Such risk is capped to the court fees, the claimant's own lawyers' fees as well as the statutory lawyers' fees of the opposing party.

If a person requires legal representation in court proceedings, the plaintiff or the defendant may apply for legal aid. § 114 of the Code of Civil Procedure (Zivilprozessordnung, ZPO) stipulates that parties who, due to their personal and economic circumstances, are unable to pay the costs of litigation, or are only able to pay them in part or only in instalments, will be granted assistance with the court costs upon filing a corresponding application, provided that the action they intend to bring or their defence has sufficient prospects of success and does not seem frivolous. Legal aid may also be granted to parties by virtue of their office as well as to legal persons or an organisation that has the capacity to be a party in legal proceedings pursuant to § 116 ZPO. The decision to grant or refuse legal aid is taken by the judge who is responsible for the main proceedings. The decision is solely based on whether the conditions for granting legal aid are met, irrespective of the amount of legal aid costs previously covered by the state.

Furthermore, another form of financing court proceedings is legal expenses insurance. If a party is unable to finance a litigation by itself, it can apply for legal aid. If the case has chances of success, statutory financing kicks in. In Germany, legal expenses insurance is quite popular current and many legal actions are funded financed by insurance companies. Third-party litigation funding is also increasing. While these mechanisms ease access to justice, it must be noted that for certain parties with sufficient funds of their own, but without insurance, bringing legal action can still be prohibitively costly.

B. 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 section 2)

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

3000 character(s) maximum

German court fees in civil and commercial matters are modest, they are calculated with reference to the amount in dispute and are capped at an amount in dispute of EUR 30 million.

Lawyers in civil litigation are still predominantly paid pursuant to the statutory fee schedule (Act on the Remuneration of Lawyers, Rechtsanwaltsvergütungsgesetz, RVG). Agreed legal fees in court proceedings may not undercut the statutory fee schedule. Alternative fee arrangements are permissible, though. In commercial matters, specialized litigation counsel typically charges for their services by the hour. The hourly rate is a matter of negotiation between the lawyer and the counsel.

However, irrespective of the agreed hourly rate, a prevailing party is only entitled to the reimbursement of the statutory legal fees for the matter. This rule manages the cost risks of the parties. In particular, a claimant can calculate the cost risk involved when bringing a matter. Such risk is capped to the court fees, the claimant's own lawyers' fees as well as the statutory lawyers' fees of the opposing party.

If a person requires legal representation in court proceedings, the plaintiff or the defendant may apply for legal aid. § 114 of the Code of Civil Procedure (Zivilprozessordnung, ZPO) stipulates that parties who, due to their personal and economic circumstances, are unable to pay the costs of litigation, or are only able to pay them in part or only in instalments, will be granted assistance with the court costs upon filing a corresponding application, provided that the action they intend to bring or their defence has sufficient prospects of success and does not seem frivolous. Legal aid may also be granted to parties by virtue of their office as well as to legal persons or an organisation that has the capacity to be a party in legal proceedings pursuant to § 116 ZPO. The decision to grant or refuse legal aid is taken by the judge who is responsible for the main proceedings. The decision is solely based on whether the conditions for granting legal aid are met, irrespective of the amount of legal aid costs previously covered by the state.

Furthermore, another form of financing court proceedings is legal expenses insurance. If a party is unable to finance a litigation by itself, it can apply for legal aid. If the case has chances of success, statutory financing kicks in. In Germany, legal expenses insurance is quite popular current and many legal actions are funded financed by insurance companies. Third-party litigation funding is also increasing. While these mechanisms ease access to justice, it must be noted that for certain parties with sufficient funds of their own, but without insurance, bringing legal action can still be prohibitively costly.

Resources of the judiciary (human/financial/material)

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

3000 character(s) maximum

At the beginning of 2019 the Federal government of Germany and the German state governments rolled out a so-called rule of law package (*Pakt für den Rechtsstaat*). One of its goals was to raise the number of staff employed in the judiciary to strengthen the level of the rule of law in Germany. The creation of 2000 new judge and prosecutor positions (plus the necessary staff for non-judicial and non-prosecutorial areas) was foreseen. This pact expired at the end of the Year 2021. However, the agreements have not been fully fulfilled and implemented until today. While positions have been created for judges and public prosecutors and most of them have also been filled, there are considerable recruitment deficits concerning non-judicial staff. Therefore, the BRAK demands for a new edition of the rule of law package to enter into force in the beginning of 2022 wherein the legal profession is particularly addressed and appropriately included. Furthermore, the BRAK demands for a continuation of the necessary increase of the staff number in the judiciary and for an improvement of the technical equipment by a comprehensive, procurement of the judiciary with technical equipment which is state-of-the-art.¹

¹ <https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/juli/stellungnahme-der-brak-2021-44.pdf>; (as consulted online on 19.01.2022)

Training of justice professionals (including judges, prosecutors, lawyers, court staff)

3000 character(s) maximum

To be admitted as a *Rechtsanwalt* in Germany, you have to be qualified to become a judge in accordance with the German Judiciary Act (*Deutsches Richtergesetz*, DRiG). To obtain this qualification, it is necessary to first study law at a university and pass the First State Examination, then undergo practical legal training and finally pass the Second State Examination. The first examination comprises an elective subject from an academic priority area and a compulsory subject set by the state.

Pursuant to § 43a (6) of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*, BRAO) the lawyer is obliged to regularly pursue continuing training. Pursuant to § 15 FAO (*Fachanwaltsordnung*) Bar-approved specialist lawyers are obliged to pursue continuous training in their field of expertise. Bar—approved specialist lawyers are obliged to provide proof of their continuous training vis-à-vis the Bars. Otherwise, they lose the right to call themselves a specialist lawyer.

§ 43f of the Federal Lawyers' Act will oblige lawyers to undergo mandatory training. Lawyers need to acquire knowledge of professional law in the future. In detail, Lawyers must pursue training in the amount of at least ten hours of professional law by the end of the first year of their admission at the latest.

Deutsches Anwaltsinstitut, *Deutsche Anwaltsakademie* und *Deutsche Richterakademie* provide training for justice professionals.

To prepare law students in addition to their mandatory education at universities for the legal profession as well as professional law issues, The BRAK, the Hans Soldan Foundation, the DAV as well as the *Deutsche Juristen-Fakultätentag* are jointly supporting the Soldan Moot for nine years - a student competition on legal professional law, which is organized by the Institute for Procedural Law and Legal Profession at the University of Hanover.

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

Today, a future-proof state governed by the rule of law is a digital state governed by the rule of law. This means that technical equipment must be in place throughout the country in the judiciary as well as among the legal profession and must be state of the art, so that sound and image transmission can take place successfully. Where videoconferencing tools are introduced at the courts, it is important to make sure that these are compatible with other systems to avoid creating technical access barriers.

The BRAK welcomes the discussions on the digitization of the judiciary in Germany and the willingness of all stakeholders to further advance the digitization in areas where concrete steps towards the digitization already have taken place. The BRAK demands for better technical equipment and infrastructure throughout the country, the consistent implementation and further development of electronic legal transactions, the establishment of a e-justice portal and the use of digital litigation to improve the access to justice. The implementation of structured legal proceedings (*strukturiertes Verfahren*) is rejected, as an alternative, the BRAK recommends to put forward an digital asset analysis (*elektronischer Anlagenspiegel*) which implies a separate document besides the pleading wherein the party submissions including offers of evidence and annexes are presented in chronological order. With regard to AI, there are no vigorous reservations about the use of decision-supporting AI systems as long as the parties involved are sufficiently informed about whether and which AI system will be used to support judicial decision-making. Nevertheless, The BRAK considers the use of AI to replace decision-making to be fundamentally excluded due to the judicial reservation (*Richtervorbehalt*) and the right to the lawful judge. However, in civil or administrative court proceedings the parties involved could be given the option of voluntarily submitting them to an automated decision, provided that the decision is contestable. The use of AI in criminal and law enforcement proceedings must remain excluded.²

With regard to criminal proceedings, however, The German Federal Bar firmly underlines the risks of digital technologies. We reject the digitalization of main proceedings, for example, beyond the current pandemic-related necessities, as promoted in the European Commission's Communication of December 2020, not least because it infringes on the rights of the defence.³

Furthermore, BRAK calls for audio-visual documentation of main proceedings in criminal cases.

² <https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/november/stellungnahme-der-brak-2021-60.pdf> ; (as consulted online on 19.01.2022)

³ <https://www.fairtrials.org/publication/digitalisation-justice-european-union> ; (as consulted online on 19.01.2022)

Furthermore, digitalisation is based on the condition that electronic file inspection is further promoted. Electronic file inspection is pandemic-proof. Therefore, a speedy introduction of the electronic file (e-file) at the courts should be actively pursued; the use of e-files will be mandatory as of 1 January 2026.⁴ The BRAK welcomes the intended early introduction of e-files at the highest federal courts. The BRAK furthermore suggests⁵ that e-filing should also be introduced as soon as possible at the lower instances, and in doing so, the aim should be to make the provisions applying to codes of procedure and individual instances as uniform as possible.

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

Within the German court system, a tracking of cases takes place to check the workload of the judges. A statistic with case numbers is published. There is, however, no quality or satisfaction evaluation of the German courts' performance. The German Federal Bar also does not do any such surveys.

The BRAK has a statutory task to provide for all the members of the Bars a ready-to-receive mailbox for electronic legal transactions (*besonderes Anwaltspostfach - beA*) and to maintain the necessary infrastructure. In Germany, the digitalization of the judiciary and the implementation of secured electronic communication in the field of justice are fairly advanced. Since the Act on the Promotion of Electronic Legal Transactions of 2013 (ERVGerFöG), electronic legal transactions in the field of justice and thus the digitalization of the judiciary has become increasingly established. Since 1 January 2018, all lawyers have been obliged to receive electronic documents sent by other parties to the proceedings in electronic legal transactions, in particular the courts, in their special electronic mailbox (beA). The use of electronic legal transactions will be mandatory as of 1 January 2022 for all professional participants in court proceedings. The courts will have to switch to electronic file management by 2026 at the latest. In addition, digitalization projects for court files are underway in different German Länder. Currently, 2026 is the deadline for the implementation of an electronic organization of court files. Furthermore, the legal foundations for additional electronic legal transactions with courts, public authorities, lawyers and notaries, as well as other "professional" participants in proceedings, are constantly further developed in the framework of legislative procedure.

Law firms have to decide for themselves how to make use of modern technology within their firms. Larger law firms are already well advanced in this respect. For solo practitioners and small law firms, the costs associated with buying state-of-the-art IT equipment and the purchase of software licenses may in individual cases be prohibitively high. However, even the vast majority of small law firms uses standard software for law firms (e.g. RA-Micro, Annotext, Advolux etc.) and online research tools (e.g. Juris, Beck-Online etc.).

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

-

C. 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 section 2)

Length of proceedings

3000 character(s) maximum

⁴ Act on the Introduction of the Electronic Case File in the Judiciary and on the Further Promotion of Electronic Legal Transactions, Federal Law Gazette I 2017, 2208.

⁵ <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/februar/stellungnahme-der-brak-2020-5.pdf> ; (as consulted online on 19.01.2022)

German first instance court proceedings in civil and commercial matters at the district court level can be accomplished within a year.

However, in many complex matters they take much longer, notably if the court appoints an expert. There is a general public sentiment that German civil courts are overworked and that therefore some cases take too long to be decided. Efforts are underway to strengthen the judiciary by increasing the number of judges and supporting the court administration.

German judges traditionally actively assist the parties in amicably settling their dispute. Accordingly, many cases are concluded not by a judgement, but by a pre-judgment settlement. Accordingly, statistics on the length of proceedings do not necessarily properly reflect the actual time span of a dispute from the commencement of the dispute until judgment.

In the last ten years, German civil cases have decreased. The German Federal Ministry of Justice has commissioned a review of the reasons for this development. In the past, alternative dispute resolution has been supported by the State with a view to relieving the courts of their caseload.

Other - please specify

3000 character(s) maximum

On June 10, 2021, the German Bundestag passed the legislative draft of a second law amending the law on the provisional regulation of the law governing chambers of industry and commerce (known as the DIHK Act). The Act transforms the Association of German Chambers of Industry and Commerce (Deutsche Industrie- und Handelskammertag e.V. - DIHK.) into a public corporation with statutory membership of the regional chambers of industry and commerce (IHK). The BRAK had already clearly stated in early April 2021 that in the future it would be mandatory to distinguish between commercial and professional self-government if the DIHK were to become a corporation under public law, as there was a lack of comparability between the umbrella organizations in terms of content. This was considered by the Committee for Economic Affairs and Energy of the German Bundestag. It is emphasized that the German Federal Bar does not pursue a commercial purpose, but serves the public interest for which the lawyer, as part of the judiciary performs a special function in the democratic constitutional state. Therefore, the Chambers of Industry and Commerce neither have the competences of the organizations of the skilled crafts in accordance with the German Crafts Code (*Handwerksordnung - HwO*) nor the competences of the chambers of the liberal professions with regard to the professional duties of their members.⁶

II. Anti-Corruption Framework

Where previous specific reports, published in the framework of the review under the UN Convention against Corruption, of GRECO, and of the OECD address the issues below, please make a reference to the points you wish to bring to the Commission's attention in these documents, indicating any relevant updates, changes or measures introduced that have occurred since these documents were published.

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).

⁶ <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2021/april/stellungnahme-der-brak-2021-32.pdf> ; (as consulted online on 19.01.2022)

In the fight against corruption, the prevention of money laundering plays a decisive role. The financial sector, in particular, is currently the focus of increased public attention. The non-financial sector, by contrast, is very complex, both in terms of law and fact. Unlike the financial sector, it is not a standardized mass business. Its multitude of different sectors and occupational groups is subject to an equally diverse multitude of regulations.

Obligations to prevent money laundering also apply to the legal profession. In Germany, the regional Bars are competent with regard to the supervision of lawyers in this area, and they have been subject to increased obligations since 2017. The Bars have established a joint working group which provides a forum for an intensive exchange of information. The Bars have jointly developed assessment programmes which include record sheets that are used to determine whether lawyers are affected by these special obligations, they contain on-site inspections of law firms and sanctions in the event of violations.

The criticism often voiced by the EU about the lawyers' alleged lack of risk awareness fails to recognize the underlying facts. Even though it is true that lawyers do report a lower number of suspicions, critics fail to appreciate the reasons for this: In most instances, lawyers are only misused for money laundering at the third stage, i.e. to feed illegally acquired assets into the legal cycle. At this stage, the criminal origin of the funds is difficult to recognise, as they have previously been channelled through the banking sector without being recognised there. Furthermore, unlike tax advisors and auditors, for example, lawyers do not have a comprehensive insight into the origins of the funds, as funds hardly ever pass through third-party accounts anymore.

However, the low number of reports filed by lawyers compared to those of the financial sector, for example, is due in particular to the fact that EU legislation itself provides for exceptions from the reporting obligation if information was obtained before, during or after legal proceedings or in the course of assessing the legal situation for a client. Since lawyers are subject to confidentiality under national law, they are, accordingly, not allowed to submit a report in cases where there is no explicit obligation to report, because of the obligation of confidentiality. It is therefore paradoxical to establish far-reaching exceptions to the reporting obligation in order to satisfy the right to a fair trial on the one hand, and to accuse the legal profession of filing a relatively low number of reports on the other. Finally, the criticism is based on incorrect figures. It is correct that there are approximately 166,000 lawyers in Germany. However, only about 30 percent of all lawyers per year participate in transactions that are relevant in terms of anti-money laundering legislation and which qualify them as being subject to reporting obligations.

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

3000 character(s) maximum

-

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

-

B. Prevention

Measures to enhance integrity in the public sector and their application (including as regards incompatibility rules, revolving doors, codes of conduct, ethics training). Please provide figures on their application.

3000 character(s) maximum

With regard to anti-money laundering supervision, the BRAK is currently witnessing the following developments:

GwGMeldV-Immobilien.

In October 2020, the Ordinance on Reporting Obligations under the German Money Laundering Act - Real Estate (*GwGMeldV-Immobilien*) came into force. The Ordinance was adopted on the basis of § 43 (6) of the Money Laundering Act (*Geldwäschegesetz*, GwG). This provision authorizes the Federal Ministry of Finance (*Bundesfinanzministerium*, BMF), with agreement of the Federal Ministry of Justice and Consumer Protection (*Bundesministerium für Justiz* BMJ), to define, by way of a statutory order (*Rechtsverordnung*), "circumstances" in real estate transactions that must always be reported by lawyers and members of other professions of trust pursuant to § 43 (1) GwG. It is intended (only) to define exceptions in the area of real estate transactions where a report pursuant to § 43 (1) nos. 1 to 3 GwG also has to be submitted by professionals that are subject to confidentiality, in violation of their confidentiality obligation. In reality, however, the Ordinance will create partly new substantive reporting requirements.

General transparency of public decision-making (e.g. public access to information, including possible obstacles related to the classification of information, transparency authorities where they exist, and framework rules on lobbying including the transparency of lobbying, asset disclosure rules, gifts and transparency of political party financing)

3000 character(s) maximum

-

Rules and measures to prevent conflict of interests in the public sector. Please specify the scope of their application (e.g. categories of officials concerned)

3000 character(s) maximum

-

Measures in place to ensure whistleblower protection and encourage reporting of corruption.

3000 character(s) maximum

-

List the sectors with high-risks of corruption in your Member State and list the relevant measures taken /envisaged for monitoring and preventing corruption and conflict of interest in these sectors. (e.g. public procurement, healthcare, citizen investor schemes, risk or cases of corruption linked to the disbursement of EU funds, other).

3000 character(s) maximum

-

Measures taken to assess and address corruption risks in the context of the COVID-19 pandemic.

3000 character(s) maximum

-

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

3000 character(s) maximum

German Act implementing DAC-6 – Directive on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

The Directive imposes reporting obligations with regard to cross-border tax arrangements also on intermediaries. The Directive provides for an exemption of the legal profession; the German Act implementing the Directive, however, does not. Thus, lawyers, insofar as they act as intermediaries, are subject to reporting obligations. Such gold-plating is *per se* not prohibited. The German implementing Act provides for the possibility to release the lawyer from professional secrecy obligations in accordance with § 138 f of the German Fiscal Code (*Abgabenordnung, AO*). In this case, the lawyer has to report all the information listed in § 138 f AO. Where the client decides not to lift the obligation of secrecy, the lawyer still has to report some of the information and the client has to report the remainder, even if the client could be identified on the basis of the information that remains to be provided by the lawyer. The BRAK submitted two position papers on this issue, criticizing that the German legislator did not make use of the possibility of exemption as provided for in the Directive.⁷ This reporting obligation is contrary to the relationship of trust between the lawyer and the client.

C. Repressive measures

Criminalisation, including the level of sanctions available by law, of corruption and related offences including foreign bribery

3000 character(s) maximum

In the “Jones Day” case, currently before the European Court of Human Rights, the applicants – three lawyers of the law firm Jones Day and the law firm itself are claiming a violation of Article 8 ECHR due to a search of the law firm and of the seizure of documents and electronic data.

The search was carried out on 15 March 2017 in the Munich premises of the law firm in investigation proceedings targeting the Audi stock corporation for fraud related to the use of unauthorised emissions control devices in diesel vehicles. It was aimed at the discovery of documents which the law firm had collected or created in the context of its internal investigations at the Audi stock corporation regarding the manipulation of emissions of diesel engines. The law firm had carried out these internal investigations at the request of its client, the Volkswagen stock corporation.

In our view, the applicants are affected to a considerable extent in terms of professional law as regards their position as a lawyer and as a law firm. The search and seizure of documents and electronic data by the public prosecutor’s office in the Munich premises of the law seriously affects the applicants’ rights as lawyers and as a law firm, especially in relation to their clients.

Data on investigation and application of sanctions for corruption offences, including for legal persons and high level and complex corruption cases) and their transparency, including as regards to the implementation of EU funds.

3000 character(s) maximum

-

⁷ <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2019/november/brak-positionspapier-in-ergaenzung-der-gemeinsamen-stellungnahme-von-bstbk-wpk-und-brak-zum-regierungsentwurf-eines-gesetzes-zur-einfuehrung-einer-pflicht-zur-mitteilung-grenzueberschreitender-steuergestaltungen-br-drs-489-19.pdf> ; (as consulted online on 19.01.2022)

<https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2019/november/gemeinsame-stellungnahme-zum-gesetzentwurf-zur-einfuehrung-einer-pflicht-zur-mitteilung-grenzueberschreitender-steuergestaltungen-von-bstbk-wpk-und-brak.pdf> ; (as consulted online on 19.01.2022)

Potential obstacles to investigation and prosecution as well as to the effectiveness of sanctions of high-level and complex corruption cases (e.g. political immunity regulation, procedural rules, statute of limitations, pardoning)

3000 character(s) maximum

-

Information on effectiveness of administrative measures and sanctions, in particular recovery measures and administrative sanctions on both public and private offenders.

3000 character(s) maximum

-

Other - please specify

3000 character(s) maximum

-

III. Media Freedom and Pluralism

A. Media authorities and bodies

(Cf. Article 30 of Directive 2018/1808)

Measures taken to ensure the independence, enforcement powers and adequacy of resources of media regulatory 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 regulatory authorities and bodies

3000 character(s) maximum

-

Existence and functions of media councils or other self-regulatory bodies

3000 character(s) maximum

-

B. Transparency of media ownership and safeguards against government or political interference

Measures taken to ensure the fair and transparent allocation of state advertising (including any rules regulating the matter)

3000 character(s) maximum

-

Safeguards against state / political interference, in particular:

- safeguards to ensure editorial independence of media (private and public)
- specific safeguards for the independence of governing bodies of public service media governance (e.g. related to appointment, dismissal) and safeguards for their operational independence (e.g. related to reporting obligations),
- procedures for the concession/renewal/termination of operating licenses
- information on specific legal provisions for companies in the media sector (other than licensing), including as regards company operation, capital entry requirements and corporate governance

3000 character(s) maximum

-

Transparency of media ownership and public availability of media ownership information, including on media concentration (including any rules regulating the matter)

-

C. Framework for journalists' protection

Rules and practices guaranteeing journalist's independence and safety

3000 character(s) maximum

-

Law enforcement capacity, including during protests and demonstrations, to ensure journalists' safety and to investigate attacks on journalists

3000 character(s) maximum

-

Access to information and public documents (incl. procedures, costs/fees, timeframes, administrative /judicial review of decisions, execution of decisions by public authorities)

3000 character(s) maximum

-

Lawsuits (incl. SLAPPs - strategic litigation against public participation) and convictions against journalists (incl. defamation cases) and measures taken to safeguard against abusive lawsuits

3000 character(s) maximum

-

Other - please specify

3000 character(s) maximum

-

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

The German Federal Bar urgently calls for the separation of powers of the legislative, executive and judiciary to be preserved, even and especially in times of crisis, despite all the tension and existing special challenges. The principles of the rule of law must be observed, regardless of whether the country is witnessing a special situation or not. The crisis must not be the 'hour of the executive', even if quick action is required. Greater parliamentary participation in lawmaking is imperative. Otherwise, the impression that will arise is that of the executive branch of government 'overrunning' the legislative and judicial branches. Each power is equally important and fulfils its specific role in a state governed by the rule of law. Anyone who threatens to upset this balance forfeits acceptance and trust in the rule of law.⁸

Therefore, we would like to stress the following with regard to the elaboration of legislative proposals and the course of legislative procedures: Legislative acts must follow parliamentary procedure with all its deadlines and hearings in an orderly and unhurried manner. This is the only way to give all actors involved the opportunity to give the proposed acts sufficient thought. For this reason, the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*, GGO) provide rules for deadlines and participation procedure within the federal government and participation by the *Länder*, local authority organisations, experts and associations.

The coalition agreement of the new German government of the SPD, Grüne and the FDP which were sworn in on 08.12.2021 mentions that stakeholder should be involved in the legislative process already at an early stage. It will be necessary to observe whether there will be concrete action with regard to the implementation.

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

⁸ <https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/november/stellungnahme-der-brak-2020-70.pdf> (as consulted online on 11.02.2021)

-

Regime for constitutional review of laws

3000 character(s) maximum

-

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

The pandemic made a multitude of legislative changes necessary. Particularly relevant for the legal profession are the following:

- Act to mitigate the consequences of the COVID-19 pandemic under Germany's civil law, insolvency law and criminal procedural law ⁹
- Act to ensure proper planning and approval procedures during the COVID-19 pandemic (Planning Assurance Act) (*Planungssicherstellungsgesetz*, PlanSiG)¹⁰
- Second Tax Relief Act in response to the coronavirus COVID-19 pandemic¹¹
- Law on social measures to combat the negative impact of the COVID-19 pandemic, “Social Protection Package II” (*Sozialschutz-Paket II*)¹²
- Decision of the German Constitutional Court (Bundesverfassungsgericht – BVerfG) concerning the German Covid 19 emergency brake (Bundesnotbremse) (BVerfG, decision of the first senate on 19.11.2021 1 BvR 781/21 -, Rn. 1-306) ¹³

Due to the urgency of the matter, the consultation of associations, including the BRAK, was often dispensed with, as was in fact any form of involvement, which would have imposed itself, particularly in view of the crisis. All the more so as the BRAK had offered to provide opinions and organize expert discussions at very short notice in several letters, including to the Federal Ministry of Justice (BMJ). In several cases, the BRAK's expert committees issued own-initiative position papers in order to support

⁹ Letter of the President of the BRAK of 24.03.2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/maerz/schreiben-v-24032020-des-brak-praesidenten-zum-gesetze-zur-abmilderung-covid-19-folgen.pdf>; as consulted online on 19.01.2022) and letter of the BRAK President of 25.05.2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/mai/schreiben-v-25052020-des-brak-praesidenten-an-das-bmjj.pdf>; (as consulted online on 19.01.2022)

¹⁰ Letter of the Treasurer of the BRAK of 27.04.2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/april/schreiben-der-brak-v-27042020-an-das-bmi.pdf>; (as consulted online on 19.01.2022) and BRAK Position Paper no. 20 of May 2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/mai/stellungnahme-der-brak-2020-20.pdf>; (as consulted online on 19.01.2022)

¹¹ Letter of the President of the BRAK of 15.06.2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/juni/schreiben-des-brak-praesidenten-v-15062020.pdf>; (as consulted online on 19.01.2022) and BRAK Position Paper no. 28 of June 2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/juni/stellungnahme-der-brak-2020-28.pdf>; as consulted online on 19.01.2022)

¹² Letter of the President of the BRAK of 16.04.2020 (<https://brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/april/schreiben-v-16042020-des-brak-praesidenten-an-das-bmjj.pdf>; (as consulted online on 19.01.2022)

¹³ BVerfG, Beschluss des Ersten Senats vom 19. November 2021

- 1 BvR 781/21 -, Rn. 1-

306, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/11/rs20211119_1bvr078121.html; (as consulted online on 19.01.2022)

the legislator in his difficult task in the best possible way. This was sometimes associated with the particular challenge that drafts of legislative amendments were issued to the press or individual contacts, but otherwise not published to all stakeholders in a timely manner. In order to ensure effective support in the future, it would be desirable for all drafts to be published on a daily basis, or at least made available to the BRAK as the representative body of the German legal profession, not only by the BMJ, but also by other federal ministries dealing with legally relevant drafting aids or draft laws. With a view to the future, the BRAK calls for more transparency and participation in ongoing legislative procedures.

B. Independent authorities

Independence, resources, capacity and powers of national human rights institutions ('NHRIs'), of ombudsman institutions if different from NHRIs, of equality bodies if different from NHRIs and of supreme audit institutions

(Cf. the website of the European Court of Auditors: <https://www.eca.europa.eu/en/Pages/SupremeAuditInstitutions.aspx#>)

3000 character(s) maximum

The evaluation of the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) once again demonstrated the necessity of establishing an independent contact point for data protection supervision at the legal profession's self-regulatory bodies as well as the need for centralization and sectoral orientation. At present, data protection supervision in Germany is essentially assigned (apart from only a few sectoral supervisory bodies) to 17 different Länder authorities and one federal authority. This leads to inconsistent legal interpretations and divergent supervisory practice. Furthermore, this complicates data protection compliance in law firms and other institutions.

With regard to the supervisory authority's investigative powers, last year, too, data protection supervisory authorities asked lawyers to disclose case contents, threatening to impose a penalty payment - and thus requesting them to behave in a way that is contrary to professional law and punishable by law. This was done even though the requests should have been considered disproportionate in view of the associated breach of lawyer/client confidentiality and the relatively minor importance of the requested information for the protection of other legal interests. This demonstrates the necessity of a comprehensive limitation also for cases of Article 58 (1) (a) to (c) of the General Data Protection Regulation (GDPR) in addition to the limitation of the supervisory rights of public authorities already provided for in Germany in § 29 (3) of the Federal Data Protection Act (BDSG). The BRAK is of the opinion that, notwithstanding the opening clause of Article 90 (1) of the GDPR, which is limited to cases of Article 58 (1) (d) and (e) of the GDPR, the national legislator is authorised to enact corresponding restrictions of powers, provided that this merely implements the principle of proportionality, which is also recognised under European law. Against this background, the BRAK called on the German federal government to promote the enactment of a corresponding provision. Similarly, the BRAK calls for further protection of lawyer/client confidentiality at the European level. To this end, the BRAK called on the federal government to advocate for an extension of the opening clause of Article 90 (1) of the GDPR to the cases of Article 58 (1) (a) to (c) of the GDPR.

Statistics/reports concerning the follow-up of recommendations by National Human Rights Institutions, ombudsman institutions, equality bodies and supreme audit institutions in the past two years.

3000 character(s) maximum

-

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

-

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

-

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

-

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

-

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

3000 character(s) maximum

-

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

-

Other - please specify

3000 character(s) maximum

-

Contact

rule-of-law-network@ec.europa.eu