

# ***EU 2020: DEMANDING ON DEMOCRACY***

*Country & Trend Reports on Democratic  
Records by Civil Liberties Organisations  
Across the European Union*

## ***GERMANY***



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# Germany // Society for Civil Rights (GFF)



## Key concerns

- Following a ban of a leftist internet platform in 2017, the domestic intelligence service is laying eyes on a similar online medium, raising media freedom concerns.
- The expansion of police and intelligence powers pose a threat to journalists, in particular the use of spyware by security agencies.
- The civil society legislation is vague and incomplete, creating legal uncertainty and threatening the very existence of certain civil society organizations.
- Measures to contain the COVID-19 pandemic have severely restricted the right to freedom of assembly.

## Media environment and freedom of expression and of information

### Government interference

Self-regulation and supervision by the independent state regulatory authorities (Medienanstalten) are in danger of being undermined by recourse to security law. In January 2020, the Federal Administrative Court dismissed a lawsuit that was directed against the ban of the Internet platform “link-sunten.indymedia”.<sup>1</sup> The ban issued in 2017 by the Federal Ministry of the Interior was based on the Law on Associations, bypassing the strict provisions of the Interstate Treaty on Broadcasting and Telemedia.<sup>2</sup> The Federal Administrative Court did not examine the legality of the ban because the media activists did not admit to having operated the portal, probably for fear of prosecution. In July 2020, it became known that a similar online medium, the portal “de.indymedia” was listed by the domestic intelligence service (Federal Office for the Protection of the Constitution)

1 <https://www.bverwg.de/290120U6A1.19.0>

2 See the amicus curiae brief submitted by the Gesellschaft für Freiheitsrechte <https://freiheitsrechte.org/linksunten-indymedia-english/>

as a suspect case of extremist activities.<sup>3</sup> The medium is being discredited by the official report and the media activists concerned are at risk of surveillance.

## ***Freedom of expression and of information***

The expansion of police and intelligence powers poses a threat to journalists. Journalists are at risk of becoming the target of surveillance measures, for example when they for professional purposes maintain contacts with criminals or suspects. Particularly problematic is the use of spyware by security agencies, which has been successively expanded in recent years and threatens the confidentiality of journalistic investigation.<sup>4</sup> Most recently, the Free Hanseatic City of Hamburg even authorized the domestic intelligence service (State Office for the Protection of the Constitution) to use spyware.<sup>5</sup> On a positive note, the Federal Constitutional Court issued a ruling concerning the powers of the foreign intelligence

service (Federal Intelligence Service). Following a complaint by various foreign journalists, the court declared that the Federal Intelligence Service's practice of worldwide mass surveillance is unconstitutional.<sup>6</sup>

## ***Enabling framework for civil society***

In Germany, many civil society organizations (CSOs) are facing increasing restrictions on their work. The reason for this is that German legislation determining which CSOs are benefitting from tax benefits is vague and incomplete. To qualify for tax benefits, CSOs must engage in certain activities, which are listed in Section 52 of the Fiscal Code (Abgabenordnung). However, the list does not include activities related to, for example, the promotion of peace, social justice, or comprehensive equality. CSOs working on these issues therefore have difficulty classifying their work under a recognized activity,

3 See the amicus curiae brief submitted by the Gesellschaft für Freiheitsrechte <https://freiheitsrechte.org/linksunt-en-indymedia-english/>

4 See <https://freiheitsrechte.org/home/wp-content/uploads/2019/11/2019-11-11-Aktualisierte-Uebersicht-neue-Polizeigesetze.pdf>

5 Sec. 8 para 12 Hamburgisches Verfassungsschutzgesetz. See the constitutional complaint filed by the Gesellschaft für Freiheitsrechte, <https://freiheitsrechte.org/verfassungsbeschwerde-polizei-verfassungsschutzgesetz-hh/>

6 See [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519\\_1b-vr283517.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200519_1b-vr283517.html)

leading to practical challenges and serious consequences. For many CSOs, their financial existence depends on these tax benefits. The legal uncertainties increased since the decision of the Federal Fiscal Court that became known as the attac-ruling.<sup>7</sup> According to this ruling, a civil society organization must not engage in political matters more generally, but is only allowed to do so if strictly necessary to pursue one of the activities listed in the Fiscal Code. Political engagement is referred to as “influencing the formation of political opinion”. However, CSO are allowed to inform the public in a neutral way. Since it remains unclear as what is considered to be neutral in a democratic society, this ruling lead to enormous legal uncertainty for CSOs.

In addition, the BFH has confirmed its decision of 2019 in a new decision.<sup>8</sup> The new decision also added, albeit unnecessary for the decision at stake, that influencing public opinion must remain “in the background” even if such activity is necessary to pursue an aim recognized under Article 52 of the Fiscal Code. This massively restricts the scope of political activity for CSOs. If CSOs are found to have crossed the line by the fiscal authorities, they will lose their status as an organization that enjoys tax privileges also retrospectively.

As this constitutes a severe consequence for CSOs, many CSOs decided to refrain from public and political engagement. This denies citizens their right to collectively participate in their democracies through non-partisan associations. Moreover, the unclear legal situation increases the risk that political opponents will try to disrupt the work of CSOs by abusing this unclear legal situation. They have been many incidents in which a political party threatened to sue CSOs for their public engagement on illegitimate grounds.<sup>9</sup>

### ***Impact of COVID-19***

The COVID-19 pandemic poses particular challenges to the freedom of assembly, protected under Article 8 of the Basic Law. To contain the spread of the virus, since March 2020 the executive branch has been taking far-reaching measures that are virtually shutting down public life. In the so-called first lockdown in early March 2020, administrative court case law on freedom of assembly was still extremely restrictive. In this context, the courts mainly gave priority to health protection over freedom of assembly, in some cases without examining the concrete facts, i.e.

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7 <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BFH&Datum=10.01.2019&Aktenzeichen=V%20R%2060%2F17>

8 See <https://www.bundesfinanzhof.de/de/entscheidung/entscheidungen-online/detail/STRE202110007/>

9 See for instance [https://www.deutschlandfunk.de/parlamentarische-anfragen-afd-will-demokratie-vereinen.862.de.html?dram:article\\_id=408111](https://www.deutschlandfunk.de/parlamentarische-anfragen-afd-will-demokratie-vereinen.862.de.html?dram:article_id=408111)

whether the planned demonstration would in fact lead to an increase of infections and pose a real risk to the right to health. Thereby they granted the executive branch wide-ranging and unchecked discretionary powers.<sup>10</sup> In several other instances, the police cracked down on demonstrations although they were fully complying with the general regulations on the prevention of COVID-19 such as keeping the distance of several meters between people or wearing protective masks.<sup>11</sup>

This line of case law only significantly changed after two decisions by the Federal Constitutional Court<sup>12</sup> declared blanket bans on the freedom of assembly unconstitutional. Competent authorities and courts must always evaluate each case and examine whether restrictions on the right to protest or bans are proportionate in the specific case. While doing so, they must take into account the special significance of Article 8 of the Basic Law as an indispensable functional element of a democratic polity.<sup>13</sup> The Federal Constitutional Court explained that the authorities also cannot rely on general and blanket consideration

that can be held against any assembly.<sup>14</sup> For instance, authorities cannot prohibit an assembly based on a general risk that an assembly may attract more people resulting increased risk of infection. Instead, they must take into account the specific circumstances of the individual case and whether the organizers of the assembly put sufficient safety measures in place such as wearing protective masks or refraining from sending out public invitations. A ban can only be the last resort. At the same time the Court clarified the duty of the state to cooperate which means that the state must assist in developing safety concepts and to ensure that the protest can happen as planned.

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10 See Cf. VG Neustadt, decision of 02.04.2020, ref. 4 L 333/20.NW; VG Hannover, decision of 27 March 2020 - 15 B 1968/20; VG Dresden, decision of 30 March 2020 - 6 L 212/20

11 For more details and specific cases, see <https://freiheitsrechte.org/corona-und-zivilgesellschaft/#versammlungs-freiheit-kurzstudie>

12 See BVerfG, decision of April 15, 2020 - 1 BvR 828/20; decision of April 17, 2020 - 1 BvQ 37/20

13 See BVerfG, decision of May 15 1985 - 1 BvR 233/81, 1 BvR 341/81 69, 315 - Brokdorf

14 See BVerfG, decision of April 17, 2020 - 1 BvQ 37/20, fn. 23