BUNDESRECHTSANWALTSKAMMER

Stellungnahme Nr. 24
März 2021
Registernummer: 25412265365-88

Zur Konsultation zum jährlichen Bericht über die Rechtstaatlichkeit in der EU 2021

Verteiler: Europäische Kommission

Bundesrechtsanwaltskammer
The German Federal Bar
Barreau Fédéral Allemand
www.brak.de

Büro Berlin – Hans Litten Haus
Littenstraße 9
10179 Berlin
Deutschland
Tel. +49.30.28 49 39 - 0
Fax +49.30.28 49 39 -11
Mail zentrale@brak.de

Büro Brüssel
Avenue des Nerviens 85/9
1040 Brüssel
Belgien
Tel. +32.2.743 86 46
Fax +32.2.743 86 56
Mail brak.bxl@brak.eu

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 Rechtstaatlichkeit in der EU 2021 teilzunehmen. Auf den Fragebogen der Konsultation, der nur in englischer Sprache verfügbar ist, antwortet sie auf Grundlage der Erfahrungen ihrer Experten wie folgt:

2021 Rule of Law Report - targeted stakeholder consultation

Fields marked with * are mandatory.

Introduction

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

In the preparation of the first annual Rule of Law Report, the Commission relied on a diversity of relevant sources, including from Member States, country visits, and stakeholders' contributions collected through a targeted stakeholder consultation[1]. The information provided has informed the Member State-specific assessments of the Commission in preparing the Report. Building on the positive experience from the first Rule of Law Report, the Commission is inviting stakeholders to provide written contributions for the preparation of the 2021 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 2020 Rule of Law Report and (2) any other significant developments since January 2020[2] falling under the 'type of information' outlined in next section. 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.

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.

Please provide your contribution by 8 March. Should you have any requests for clarifications, 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

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

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 and nominations 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 2020 Rule of Law Report should not be repeated.

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

About you

* I am giving my contribution as

X Judicial association or network

If "Other", please specify

* Organisation name

250 character(s) maximum

Bundesrechtsanwaltskammer

* Main Areas of Work

X Justice System

* Please insert an URL towards your organisation's main online presence or describe your organisation briefly:

500 character(s) maximum

www.brak.de

Transparency register number

Check if your organisation is in the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making

25412265365-88

* Country of origin

Please add the country of origin of your organisation

Germany X

* First Name

*

Ulrich

*

* Surname

Wessels, Dr.

* Email Adress of the organisation (this information will not be published)

brak.bxl@brak.eu

*

* Publication of your contribution and privacy settings

You can choose whether you wish for your contribution to be published and whether you wish your details to be made public or to remain anonymous.

Anonymous - Only your type of respondent, country of origin and contribution will be published. Organisation name, URL, transparency register number, first name and surname given above will not be published. **To maintain anonymity, please refrain from mentioning the name of your organisation and any details from which your organisation an be identified in the rest of your contribution.**

X Public - Your personal details (name, organisation name, transparency register number, country of origin will be published with your contribution.

No publication - Your contribution will not be published. Elements of your contribution may be referred to anonymously in documents produced by the Commission based on this consultation.

X I agree with the personal data protection provisions.

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_contribution.pdf

Please provide any relevant information on horizontal developments here

5000 character(s) maximum

-

Questions on developments in Member States

The following four pillars are sub-divided into topics and sub-topics. You are invited to provide concrete information on significant developments, focusing primarily on developments since January 2020, for each of the sub-topics which are relevant for your work. Please feel free to provide a link to and reference relevant legislation/documents. Significant developments can include challenges, positive developments and best practices, covering both legislative developments or implementation and practices (as outlined under “type of information”).
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.

Please note that, due to the size of the questionnaire, certain elements may be slow to load, especially if selecting many Member States at once. In such cases, it is recommended to wait a few minutes to let the page load correctly.

Member States covered in contribution [several choices possible]

Please select all Member States for which you wish to contribute information. For each Member State, a separate template for providing information will open. This may take several minutes to fully load.

X Germany

Justice System - Germany

Independence

Appointment and selection of judges, prosecutors and court presidents

(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, dismissal and retirement regime of judges, court presidents and prosecutors

-

Promotion of judges and prosecutors

3000 character(s) maximum

-

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

-

Accountability of judges and prosecutors, including disciplinary regime and bodies and ethical rules, judicial immunity and criminal liability of judges

3000 character(s) maximum

-

Remuneration/bonuses for judges and prosecutors

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 und Verbraucherschutz,* BMJV). 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.

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

3000 character(s) maximum

The German judiciary enjoys the high respect of the public. It is considered independent, impartial and corruption-free. Regular surveys testify to this perception.
German judges are career judges who rarely have an individual public profile. In Germany, the Second State Examination provides the qualification for being a judge. It is also the entry requirement for the German legal profession. While a number of younger practicing lawyers change from the bar to the bench after having practiced for some years, there are hardly any such moves on the senior level.
In contrast to the selection of the judges at the Federal Constitutional Court, political influence on the selection of civil judges is limited. Judges are promoted on the basis of their qualifications and track record. Prior to being promoted to a Court of Appeal, a first instance judge usually spends some time on secondment with the Court of Appeal (*Erprobung*). Many presidents of courts have also accomplished secondments with a ministry of justice on the local or federal level, or with the German Federal Court of Justice.
The German public has no significant issues with the independence of German judges. The general trust in judicial independence is currently heightened by court decisions regarding measures combating the COVID-19 crisis, which strengthen the public's faith in the independence of the German judiciary. Nevertheless, there are recurring complaints about the length of proceedings and the number of civil matters is decreasing. The Federal Ministry of Justice has commissioned a review to better understand this development.

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, 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 Lawers, 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 charge 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

-

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

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)

(Factual information presented in Commission Staff Working Document of 2 December 2020, SWD(2020) 540 final, does not need to be repeated)

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.
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.
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. The BRAK welcomes the intended early introduction of e-files at the highest federal courts. The BRAK furthermore suggests 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

3000 character(s) maximum

-

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

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

-

Anti-Corruption Framework - Germany

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

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

3000 character(s) maximum

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.

Prevention

Integrity framework including incompatibility rules (e.g.: revolving doors)

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 und Verbraucherschutz*, BMJV), 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.
For example, § 3, which in this respect goes beyond § 43 (1) GwG, provides that any residence or equally 'close connection', be it on the part of the client, the counterparty, a beneficial owner, the object of a transaction, or an account used, to high-risk states or to states listed by the FATF as states with strategic deficiencies, triggers the obligation to report. As such, this goes beyond the cases of suspicion exhaustively provided for in § 43 (1) nos. 1 to 3.
Furthermore, undefined legal terms are used in this context. § 4 (5), for instance, stipulates that there is a reporting obligation if the acquisition process is grossly disproportionate to the legal income and financial circumstances of a seller, purchaser or beneficial owner. Despite the references made in the explanatory memorandum to the Ordinance, it remains unclear what constitutes a "gross disproportion". The use of this undefined legal term leads to considerable legal uncertainty for the legal practitioner.
The BRAK criticised these points in two position papers and is currently considering the possibility of supporting a constitutional complaint lodged by an affected lawyer.

General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)

3000 character(s) maximum

-

Rules on preventing conflict of interests in the public sector.

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 preventing corruption and conflict of interest in these sectors. (e.g. public procurement, healthcare, other).

3000 character(s) maximum

-

Measures taken to 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. This reporting obligation is contrary to the relationship of trust between the lawyer and the client.

Repressive measures

Criminalisation of corruption and related offences.

3000 character(s) maximum

A draft law on “strengthening integrity in business” is currently passing through the legislative process. The law aims at imposing more severe sanctions on corporations which profit from the wrongdoing of executives and staff in the context of corporate crimes. The only possible sanction in existence so far, the imposition of a regulatory fine in accordance with § 30 of the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*, OWiG), is no longer considered sufficient with regard to sanctioning ‘criminal corporate behaviour’. By turning away from the discretionary prosecution principle, a nationwide uniform application of the law is to be ensured. The draft law sets forth a functional separation of an association’s defence from its internal investigations, in order to afford the respective investigators more autonomy vis-à-vis the association’s defence counsel. Therefore, mitigation of a sanction is made dependent on the separation between investigators and defence counsel (§ 17 (1) no. 2 of the draft Association Sanctions Act, *Verbandssanktionengesetz*, VerSanG-E)

This is essentially based on the reasoning that the credibility of the results of an association’s internal investigation will thus be increased and that only an investigator who is independent from the association’s defence can get to the heart of the offence at hand and take a serious look at a possible involvement of the management. From this reasoning, the BRAK infers an inappropriate mistrust of the defence counsel, which does not do any justice to his position in the proceedings as an organ of the administration of justice.

The BRAK is also strongly opposed to the fact that, in future, practically all documents produced in the course of the internal investigation should be exempt from a prohibition of seizure. The amendments to the Code of Criminal Procedure (*Strafprozessordnung*, StPO) envisaged in the draft (§ 97(1)(3)(2)(2), § 160a(5) StPO-Reg-E) consolidate the hitherto prevailing view that even in the case of § 97(1)(3) of the Code of Criminal Procedure, under which a relationship of trust between the accused and the person entitled to refuse to testify is required, is not arbitrary and also constitutional. These changes in criminal procedure are extremely far-reaching and not only put companies at a considerable disadvantage, they also affect the individual case. The entire legal profession is affected by this disadvantage. It also remains unclear what this relationship of trust must look like in terms of quality. § 160a StPO will be effectively repealed with the intended amendment, as it will lead to the inapplicability of the provision to seizures and thus also to the prohibition of seizures regulated in § 97 StPO, since the new paragraph 5 leaves hardly any scope of application. This would leave it more than ever in the hands of the prosecuting authorities to decide whether documents are protected from seizure or not. The BRAK voiced its criticism in this regard in two position papers.

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 the implementation of EU funds

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

-

Other – please specify

3000 character(s) maximum

-

Media Pluralism - Germany

Media authorities and bodies

(Cf. Article 30 of Directive 2018/1808)

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

-

Transparency of media ownership and government interference

The transparent allocation of state advertising (including any rules regulating the matter); other safeguards against state / political interference

-

3000 character(s) maximum

Rules governing transparency of media ownership and public availability of media ownership information

3000 character(s) maximum

-

Framework for journalists' protection

Rules and practices guaranteeing journalist's independence and safety

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

-

Lawsuits and convictions against journalists (incl. defamation cases) and safeguards against abuse

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

Framework, policy and use of impact assessments, stakeholders'/public consultations (particularly consultation of judiciary 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.
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.
At the moment, however, deadlines and procedural rules governing the legislative process are flouted – even when it comes to draft laws that have nothing to do with the existing crisis. A very recent and worrying example is the draft law published by the Federal Ministry of the Interior (*Bundesinnenministerium*, BMI) to combat right-wing extremism and hate crime. The BRAK and all parties involved were given five working days for the detailed examination of a 52-page draft containing amendments to the Telecommunications Act (*Telekommunikationsgesetz*, TKG), the Act on the Federal Criminal Police Office and the Cooperation of the

Federation and the *Länder* in Criminal Matters (*Bundeskriminalamtgesetz*, BKAG) and the Federal Police Act (*Gesetz über die Bundespolizei*, BPolG), among others.
This disregard for procedural rules was criticised by the German National Regulatory Control Council (*Normenkontrollrat*, NKR) in its 2020 annual report. The report confirms that important draft laws are completed within a few days, often without involving those affected or the competent authorities. In the meantime - according to the NKR - the violation of rules has almost become a habit. This must not be allowed to continue. Better legislation requires the timely collection and consistent use of practical expertise for the purpose of an evidence-based preparation of lawmaking.
A pandemic must not be an excuse for hasty, incomplete or flawed 'fast-track' legislation.

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

-

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 by Parliament of emergency regimes and measures in the context of COVID-19 pandemic
- measures taken to ensure the continued activity of Parliament (including possible best practices)

3000 character(s) maximum

More transparency and participation of the legal profession in current legislative procedures
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
- Act to ensure proper planning and approval procedures during the COVID-19 pandemic (Planning Assurance Act) (*Planungssicherstellungsgesetz*, PlanSiG)
- Second Tax Relief Act in response to the coronavirus COVID-19 pandemic
- Law on social measures to combat the negative impact of the COVID-19 pandemic, "Social Protection Package II" (*Sozialschutz-Paket II*)

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 and Consumer Protection (BMJV). In several cases, the BRAK's expert committees issued own-initiative position papers in order to support 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 BMJV, 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.

Independent authorities

Independence, 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.

Accessibility and judicial review of administrative decisions

Transparency of administrative decisions and sanctions (incl. their publication and rules on collection of related data) and judicial review (incl. scope, suspensive effect)

3000 character(s) maximum

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

3000 character(s) maximum

-

The enabling framework for civil society

Measures regarding the framework for civil society organisations (e.g. access to funding, registration rules, measures capable of affecting the public perception of civil society organisations, etc.)

3000 character(s) maximum

-

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

-