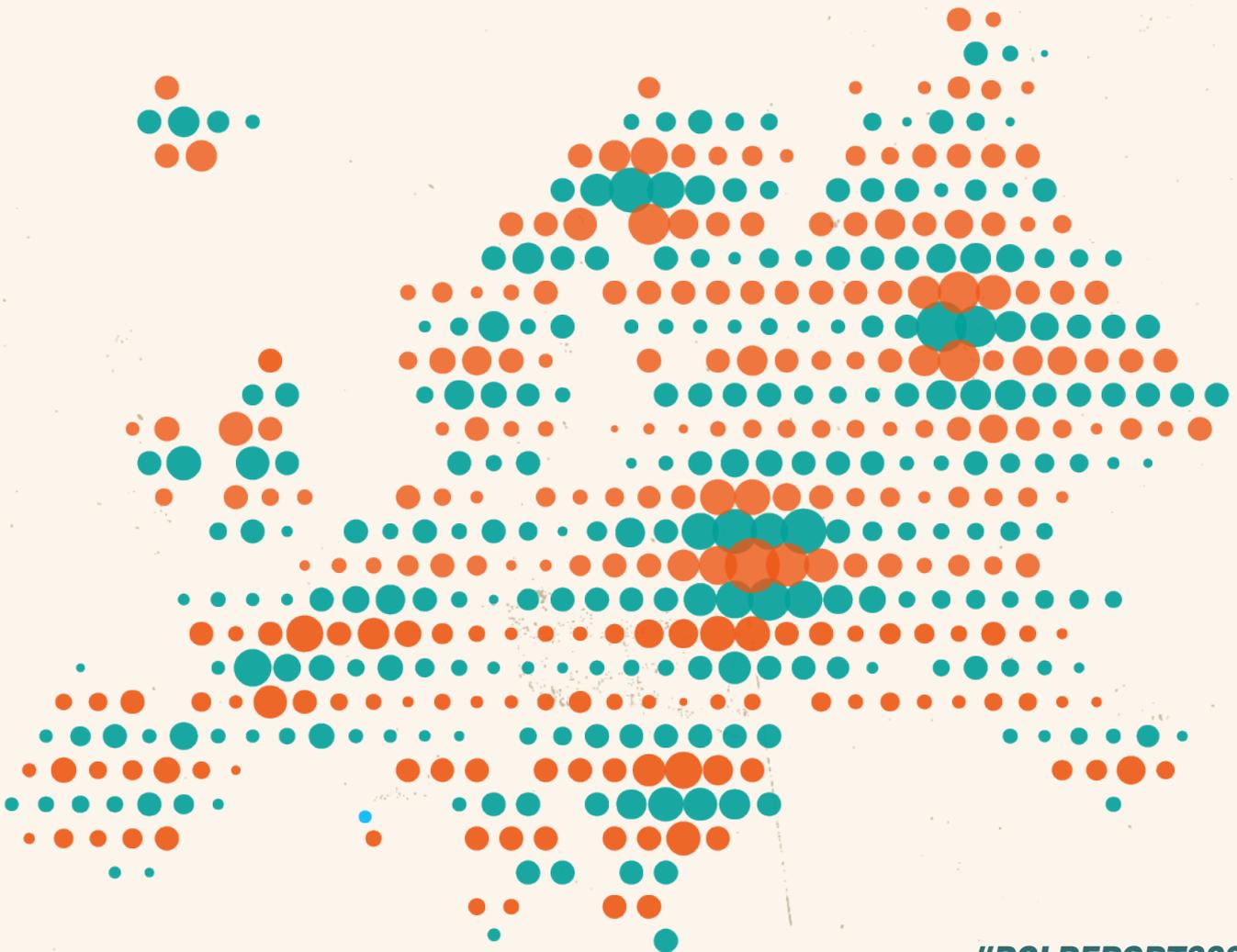


**LIBERTIES**

**RULE OF LAW REPORT**

**2023**

**GERMANY**



**#ROLREPORT2023**

## **FOREWORD**

This country report is part of the Liberties Rule of Law Report 2023, which is the fourth annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and gathers public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2023 Report was drafted by Liberties and its member and partner organisations, it and covers the situation during 2022. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports, and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2023 Report includes 18 country reports that follow a common structure, mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Forty-five member and partner organisations across the EU contributed to the compilation of these country reports.

**[Download the full Liberties Rule of Law Report 2023 here](#)**

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# GERMANY

## About the authors



**GFF** (Gesellschaft für Freiheitsrechte - “Society for Civil Rights”) is a Berlin-based not-for-profit NGO founded in 2015. Its goal is to establish a sustainable structure for successful strategic litigation for human and civil rights (HCR) in Germany, bringing together plaintiffs and excellent litigators to challenge infringements of HCR in court. GFF’s initial cases focused on protecting privacy, freedom of information and freedom of the press against state intrusion, and on defending equal freedom for all. In recent years, it has also expanded its activities to the areas of equality, non-discrimination and social justice.

GFF was supported by the following organisations:



**FragDenStaat** is a project established by the Open Knowledge Foundation e.V. and is the central contact point for freedom of information in Germany. FragDenStaat brings information to the public that was previously gathering dust in filing cabinets. Whether

it’s an email by a lobbyist, an environmental report, meeting minutes or a calendar entry – FragDenStaat helps liberate and publish it by using the Freedom of Information Law (*Informationsfreiheitsgesetz*, IFG).



**LobbyControl** is a non-profit association that educates about power structures and influence strategies in Germany and the EU. LobbyControl advocates for transparency, democratic control and clear limits to influencing politics and the public.

## Key concerns

The structural problems of the justice system in Germany remain essentially unchanged. The federal government’s reform plans, such as the reform of custodial sanctions, fall short of the mark. In other areas, such as transparency of the judiciary, there has been no progress. The federal government and the *Länder* have not been able to reach an agreement on the extension and consolidation of the ‘pact for the rule of law’, which provides, inter alia, for the funding of judicial positions and the digital transformation of the judiciary.

Regarding its anti-corruption framework, Germany still lacks comprehensive and consistent rules to prevent corruption and provide transparency in the finances of decision-makers and political parties. Germany has not made any significant progress in implementing the recommendations of the 2022 EU Commission's report in this area, neither in introducing the 'legislative footprint' nor in introducing stricter rules on revolving doors.

In the area of media environment and freedom of expression and information, systematic problems have not been addressed. The legislature has neither taken any steps to improve access to information for the press and the public, nor to improve protection of journalists against abusive lawsuits. Germany has still not moved forward with the plan to create a legal basis for a right to information of the press as regards federal authorities, even though it is included in the coalition agreement.

No progress has been made with regard to checks and balances. While the Commissioners for Data Protection and Freedom of Information enjoy a high level of independence, their level of engagement in freedom of information request procedures remains limited, which may be due to their limited powers in this regard.

The adoption of the act on the promotion of democracy (*Demokratieförderungsgesetz*) can be considered a significant improvement for creating an enabling framework for civil society. In other areas there has been no progress; the federal government neither delivered a proposal on the promised law against digital

violence nor related policies aiming at providing a safe online space. While the reform of the tax code is part of the coalition treaty of the new government, no reforms to protect public participation and advocacy work of civil society organisations were initiated.

The government has not taken up any measures against the known problems of documenting police violence and systematic and disproportionate restrictions on the rights of refugees when entering Germany.

### **State of play**

- Justice system
- Anti-corruption framework
- Media environment and freedom of expression and of information
- Checks and balances
- Enabling framework for civil society
- Systemic human rights issues

### **Legend (versus 2022)**

- ↓ Regression
- No progress
- ↑ Progress

## **Justice system —**

### **Key recommendations**

- Courts should no longer be obligated (or allowed) to inform migration authorities, in cases where people without residence titles file a lawsuit.

- The system of criminal sanctions must be reformed; custodial sanctions for petty offences should be abolished.
- Legislation that includes an obligation to publish all court decisions as a rule needs to be introduced.

## **Judicial independence**

### **Appointment and selection of judges, prosecutors and court presidents**

In Germany, lay judges, so-called *Schöff\*innen*, often participate in criminal proceedings and have the same voting rights as professional judges. The number of lay judges in Germany amounts to around 40,000. In recent years, right-wing parties such as the Alternative for Germany (*Alternative für Deutschland*, AfD) and the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschland*, NPD) have repeatedly called upon their members and supporters to become lay judges.<sup>1</sup> In order to prevent extremists from entering the bench, the Federal Ministry of Justice prepared an amendment of the Judiciary Act (*Richtergesetz*), namely § 44a. The proposed amendment holds that one may not be admitted as a lay judge if it cannot be

guaranteed that they will always defend and support the free democratic basic order.<sup>2</sup>

### **Irremovability of judges, including transfers, dismissal and retirement regime of judges, court presidents and prosecutors**

In Germany, judges are allowed to be members of political parties and to express their political opinions openly (out of court). In 2022, several cases of judges and prosecutors expressing far-right political opinions were reported. Germany's rules for disciplinary proceedings only allow the removal of these servants or judges in exceptional cases, so people openly opposing the constitution may in some cases stay in public service.

At the beginning of 2022, Federal Minister of the Interior (*Bundesinnenministerin*) Nancy Faeser presented an action plan against right-wing extremism which clearly states there is no place for enemies of the constitution in public service. It therefore demands that they need to be removed from office swiftly and effectively.<sup>3</sup> At its meeting on 10 November 2022, the Conference of Ministers of Justice (*Justizministerkonferenz*, Jumiko) called for a firm approach towards extremists in civil service and proposed amendments to the *Richtergesetz* as well as an amendment to

1 See <https://www.lto.de/recht/justiz/j/bmj-plan-schoeffen-ehrenamtliche-richter-extremisten-verfassungs-feinde-aufrufe-gerichte-richtergesetz-bverfg-hessen-justiz/>.

2 See <https://taz.de/Keine-Nazis-als-Schoeffen-bei-Gericht!/5840275/>.

3 Bundesministerium des Innern und der Heimat, Aktionsplan gegen Rechtsextremismus, 2022, S. 3.

the time-limit regulation in the Federal Disciplinary Act (*Bundesdisziplinalggesetz*).<sup>4</sup>

Reality, however, (still) looks different. Several right-wing judges continue to sit on the bench. Attempts were made to remove right-wing extremist judges – mainly former Members of Parliament for the right-wing party Alternative for Germany – from office. Some of these attempts were successful,<sup>5</sup> others failed.<sup>6</sup>

### **Promotion of judges and prosecutors**

Unchanged since the formation of the *Bundesrepublik*, decisions on the promotion of judges – especially the selection of court presidents and judges of the federal courts – are made by members of the state or federal governments in cooperation with parliamentary boards, and not by the judiciary itself. In many cases judges will only be elected for top positions if they are connected to the big political parties. Although some organisations demand more independence, or at least transparency, in 2022 there were no serious initiatives to minimise or end the influence of the government on judiciary, or to establish firm procedural safeguards for judicial independence.

## **Quality of justice**

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

In Germany a lawsuit is only admissible if the plaintiff fully identifies themselves by name and address; exceptions to this rule are very limited. At the same time, every German public authority, including courts, that comes in contact with migrants without the required residence title is legally obligated to immediately report the names and whereabouts of these migrants to the migration authorities, to enable deportation. This blocks *sans papiers* from seeking justice, due to the risk being deported if they file a lawsuit. In 2022, the German Constitutional Court dismissed the action of an undocumented migrant who requested an interim order to allow not only anonymous lawsuits but also anonymous healthcare.<sup>7</sup>

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

Although in 2020 about 22,000 judges were employed in Germany, there are not enough

4 For the whole decree see [https://www.justiz.bayern.de/media/pdf/top\\_i.19\\_-\\_extremisten.pdf](https://www.justiz.bayern.de/media/pdf/top_i.19_-_extremisten.pdf).

5 The extremist Jens Maier had to take early retirement in Saxony, cf. <https://www.sueddeutsche.de/politik/justiz-rechtsextremismus-afd-richter-1.5707814>.

6 Analogous proceedings against Birgit Malsack-Winkemann had failed at first, cf. <https://www.rbb24.de/politik/beitrag/2022/10/berlin-afd-richterin-abgeordnete-birgit-malsack-winkemann.html>. Later, it was discovered that she was part of a terrorist network planning an attack on state structures. For more information see <https://www.tagesspiegel.de/berlin/berliner-richterin-sportschutzzin-esoterik-fan-wer-ist-birgit-malsack-winkemann-die-militante-umsturzlerin-von-der-afd-8988766.html>. She was therefore detained and removed from office in December 2022.

7 <https://freiheitsrechte.org/themen/soziale-teilhabe/ohne-angst-zum-arzt>.

personnel in German courts to handle all cases, leading to severe delays in the judicial process. This concerns all branches of the judiciary. In criminal proceedings, this delay resulted in the release of several defendants in 2022, because the maximum time limits of pre-trial detention were exceeded.<sup>8</sup>

***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)***

The assessment of court decisions and of the process of decision-making is hampered for the public as well as for the judges themselves due to the lack of any comprehensive practice or regulation for publishing decisions.

In Germany, court decisions are not subject to copyright law and could therefore be published. Nevertheless, less than 1 percent of first-instance decisions are published.<sup>9</sup> This is a problem for both the legal practice and those seeking justice. The latter may refrain from bringing proceedings before the competent court as they cannot assess their chances of success. The lack of comprehensive publication also creates a problematic bias. The few publications create an imbalance and the impression that one or the other view is “predominant”,

although the publication rate of only 1 percent makes this assumption untenable.

Even for the highest courts, an obligation to publish only arises if the decisions are deemed “worthy of publication” by the courts. The requirement of publication worthiness is not subject to any review and is untransparent. Furthermore, the criterion of worthiness of publication is unsuitable, since unusual cases can also be of importance for the legal profession. Legislation is therefore needed that includes an obligation to publish all court decisions as a rule.

A further lack of transparency that is specific to the area of asylum and migration law affects the quality of justice. To assess the right to asylum and other questions relating to residence permission, the situation in the country of origin of the asylum seeker or claimant is crucial.<sup>10</sup> The migration authorities rely on reports written by the foreign ministry and base their decisions in large part on the reports. However, these reports are not publicly accessible. The content as well as the methodology of these reports is therefore unknown, not only to the public but also to asylum counselling services. Only lawyers receive access to the reports, but according to the Federal Agency of Migration and Refugees, passing on the reports is punishable by law. Above all, the lack of transparency makes the legal defence for asylum seekers and

8 <https://www.dw.com/de/untersuchungshaft-monatelang-ohne-urteil-ingesperrt/a-61983111>.

9 Hanjo Hamann, “Der blinde Fleck der deutschen Rechtswissenschaft - Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung“, JZ 2021, 656.

10 For more detailed information, see Kube, Vivian; Vos, Hannah: *Verschlussache Lagebericht: Die intransparente Rolle des Auswärtigen Amtes in Asylverfahren*, VerfBlog, 2022/11/11,

migrants very difficult. To improve the quality of such reports as well as the quality of justice, these reports should be made public as a rule with exceptions for sensitive information, as it is done in other states such as the USA, the UK and Switzerland.

## ***Fairness and efficiency of the justice system***

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### ***Length of proceedings***

The denial of interim relief measures for access to information claims, even those of journalists and public watchdogs, impairs the efficiency of the justice system and undermines the right to access to information.

In contrast to the right to information of the press, which is enshrined in Article 5 para 1 sentence 2 of the German Basic Law and implemented in legislation at *Länder* level, courts have so far denied the necessity for interim relief measures concerning the right of access to information.<sup>11</sup> This is a problem for journalists and the public alike, because the right of access to information goes beyond the right to information of the press, as it includes the right to access any documents or other sources of information.<sup>12</sup>

Claims for accessing documents and other sources of information must be based on the corresponding freedom of information act. However, state authorities, which are required to provide information under the freedom of information act, often deny access to information (in whole or in part) so that court proceedings become necessary. Even if the journalists or any other person entitled to access information win in court, the state authorities often appeal the decision. Therefore, journalists or other persons entitled to information are only granted access after a final verdict is reached and many years have passed, and the issue of concern is no longer in the focus of the public debate. Hence, these lengthy proceedings hamper well-researched journalism on current issues as well as public debates based on facts.

Interim relief measures, as they have been accepted for the right to information for the press, should therefore also be applied to the right to access information and documents. Journalists and the public would be able to access important information when this information is still relevant.

### ***Execution of judgments***

If a convict fails to pay a fine, they will be subject to custodial sanctions. In 2022, the

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11 See, for instance, Administrative Court of Berlin (Verwaltungsgericht Berlin), decision of 14 September 2014, VG 2 L 216/21; Higher Administrative Court of Berlin-Brandenburg (OVG Berlin-Brandenburg), decision of 19 July 2016, OVG 12 S 42.16

12 Federal Administrative Court, judgment of 27 November 2013, BVerwG 6 A 5.13, ECLI:DE:BVerwG:2013:271113U6A5.13.0; Federal Administrative Court, judgment of 30 January 2020, BVerwG 10 C 18.19, ECLI:DE:BVerwG:2020:300120U10C18.19.0

number of persons who were subject to custodial sanctions exceeded the number of persons in regular imprisonment. People with a lower socio-economic status and poor people are particularly affected by custodial sanctions and thus much more likely to be imprisoned for minor offences, such as violations of sec. 265a of the German Criminal Code - using public transportation without a valid ticket. After a long public and political debate, the federal government introduced a reform that would halve the duration of custodial sanctions.<sup>13</sup> However, the reform would amount to a cosmetic change because the costly and discriminatory system of default sanctions would remain in place.

## Anti-corruption framework 🟡

### Key recommendations

- Legislative reform needs to be introduced to increase transparency and accountability for public decision-making processes including law-making; the lobby register should be complemented by a comprehensive decision-making footprint.
- The conflict of interest regulation needs to be strengthened; regulation of post-employment activities

should be improved substantially, and the scope widened to include high-ranking public officials of top-level government bodies.

- Limits for obligations to make donations to political parties transparent should be reduced drastically and extended to income through sponsoring.

### Framework to prevent corruption

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

With the recent reform of the *Abgeordnetengesetz*, incompatibility rules and the conflict of interest regulation for members of the Deutsche Bundestag have been strengthened. But the new law leaves important issues unaddressed. For example, MPs now must declare more of their financial assets but liabilities and assets of close family members like spouses are still not required to be made transparent. Members of parliament must report financial assets if they hold shares of more than 5 percent in a company or business. Other assets like real estate are not addressed in the regulation.

This is even more problematic with regards to members of government. For top-level executive decision-makers the risk of corruption is

13 <https://www.lto.de/recht/hintergruende/h/ersatzfreiheitsstrafe-halbierung-gefaengnis-geldstrafe-reform-sanktionen-bmj/>.

even higher, but the integrity rules for ministers and parliamentary state secretaries do not even include a requirement to report financial interests. Thus, only the rules for members of parliament are applicable if a member of government is also a member of parliament, which is quite often the case in Germany, although it is not a prerequisite.

The regulation of post-employment activities should also be improved substantially, and the scope widened to include high-ranking public officials of top-level government bodies.

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

Progress was made in 2022 with the introduction of a mandatory lobby register for lobbying directed at the government and the parliament. The current government coalition has agreed to reform the lobby register law. Amendments should include a greater degree of transparency on who is lobbying for what, e.g. what law is addressed. Exemptions from the register, especially for employer associations, trade unions, and religious representations, should be removed, and the scope of the law should include lobbying directed at ministries of government as a whole. Further efforts should be made to increase the level of transparency with regards to the financing of registered lobbyists, without curbing the possibilities, especially for non-profit organisations, to raise funds.

To increase transparency about which lobbyists are participating in law- and decision-making processes, the lobby register should be complemented by a comprehensive decision-making footprint. This should include information about lobby meetings of the executive branch, documentation about ministerial hearings, the publication of formal and informal written statements, and other sources or services used. The government coalition has announced plans in this area, but at the end of 2022, the decision-making process seemed to be stuck.

Unlike in most EU member states, in Germany it is possible to donate unlimited amounts of money to political parties. This is possible both for natural as well as legal persons like companies or trade associations. Thus, to limit the possible political influence of very large donations or sponsorship deals, a maximum amount per donor, party, and year should be introduced. Additionally, the level of transparency is not sufficient to set a high standard of accountability. Only donations larger than 50,000 euros are published in a timely manner. Donations between 10,000 and 50,000 euros are reported with a very long delay of up to two years. This is unacceptable, especially for donations in the context of elections. Donations below 10,000 euros are not transparent at all, even though a four-digit sum can have substantial influence at the local level. Those limits should be reduced drastically and extended to income through sponsoring, which currently is not reported on at all. Additionally, third-party campaigns during election periods should be better regulated.

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

Germany implemented the EU Whistleblowing Directive (2019/1037) on 16 December 2022, almost a year after the transposition deadline had expired.

It is to be welcomed that the draft law also covers reports and disclosures of violations of certain national laws beyond the requirements of EU law. However, the draft law also has some weaknesses and gaps. The exceptions in the area of national security are too broad. Furthermore, reports and disclosures of misconduct that is not illegal are not covered and the processing of anonymous reports is not mandatory.

### **Investigation and prosecution of corruption**

#### **Criminalisation of corruption and related offences**

The criminal law on corruption and bribery of members of parliament is in dire need of being strengthened. This is illustrated by several cases in the context of public procurement of facial masks during the Covid-19 pandemic. Several parliamentarians used their position as members of parliament and their privileged access to the ministry of health and other relevant authorities to close deals in exchange for substantial provisions and personal gain. The criminal prosecution had to be dropped, however, because the law criminalises corrupt behaviour only when it is related to the sphere

of the parliament. Members of parliament using their influence in government for private gain can thus legally not be charged. This is in stark contradiction to the public's perception of what should be legal and illegal.

## **Media environment and freedom of expression and of information –**

### **Key recommendations**

- The federal government needs to introduce legislation to create a right to information of the press as regards federal authorities; Bavaria and Lower-Saxony need to introduce freedom of information at the *Länder* level.
- The Federal Freedom of Information Act should be independently and thoroughly evaluated with a particular focus on the scope of exceptions under this act and other more recent legislation, the application of these exceptions in practice, the system of fees and the enforcement of the act. Additional measures should be taken to improve public access to information at federal level, where necessary.
- The federal government needs to introduce effective safeguards against SLAPPs, by implementing the EU Commission's recommendation on strategic lawsuits against public par-

ticipation, which is in force since April 2022.

## **Online media**

### **Competence and powers of bodies or authorities supervising the online ecosystem**

Despite Germany having a legal framework in place to supervise and regulate the online ecosystem, the bodies or authorities tasked with implementing it lack competence and power.

According to the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*, NetzDG), the Federal Office of Justice (*Bundesamt der Justiz*, BfJ) supervises the compliance of the online platforms with NetzDG and can further issue sanctioning proceedings should the platforms fail to adhere to the rules set out in the NetzDG. However, the case of Telegram in the beginning of 2022 showed, once more, the shortcomings of the authorities aiming at enforcing the legal framework, as Telegram deliberately chose not to comply with the rules of the NetzDG. After months of public debate and attempts by German authorities to reach representatives of Telegram based in the United Arab Emirates, Telegram's lawyers in Germany finally responded to the BfJ's claims. BfJ has now issued a fine to Telegram due to its non-compliance with NetzDG; however, it is not certain that Telegram will comply.

In addition, media regulators have their own rapport with social media companies (e.g. media regulators 'encouraging' Twitter to delete material that they deem pornographic); generally, it seems that the involved bodies or authorities do not have a joint strategy when dealing with the platforms.

### **Safety and protection of journalists and other media activists**

#### **Frequency of verbal and physical attacks**

The European Centre for Press and Media Freedom published a study in the beginning of 2022, showing that verbal and physical attacks against journalists, especially when reporting from demonstrations, have increased in Germany; while the numbers for 2022 themselves have not yet been published, the ECPMF indicates that the situation in 2022 for journalists has been similarly bleak.<sup>14</sup> Correspondingly, the organisation Reporters Without Borders showed in their specific country monitoring that journalists are increasingly attacked and verbally assaulted; they further showed that on 12 occasions, law enforcement attacked journalists.<sup>15</sup>

14 See <https://www.zeit.de/gesellschaft/zeitgeschehen/2022-04/pressefreiheit-journalisten-angriffe-studie-corona>.

15 See <https://www.reporter-ohne-grenzen.de/nahaufnahme/2022>.

### **Lawsuits and prosecutions against journalists, including SLAPPs, and safeguards against abuse**

Independent journalists and small outlets have been most affected by SLAPPs. Among prominent cases are the proceedings by a real estate company against the student-run newspaper *lubze*, based in Leipzig. The real estate company United Capital had sued *lubze* for injunctive relief because the newspaper had printed quotes from tenants who criticised United Capital. Because of the very high value in dispute (50,000 euros) claimed by United Capital, the out-of-court dispute had already threatened *lubze's* existence.<sup>16</sup> After massive public protests, United Capital withdrew the claim in January 2022. Other examples for SLAPPs by private companies in 2022 include proceedings against tenant initiatives by real estate investor Ioannis Moraitis. Several initiatives have been sued for injunctive relief by Moraitis because they criticised his company's dealings with tenants.<sup>17</sup>

SLAPPs against journalists by state actors include criminal proceedings initiated by the State of Bavaria against journalist Michael Trammer. Michael Trammer had reported about protests by climate activists against the international automotive exhibition 'IAA' in Munich. Michael Trammer reported, among other things, from an abandoned building

that had been squatted by climate activists. Because the building is owned by the State of Bavaria, the State filed criminal charges against Michael Trammer for trespassing. The Munich District Court convicted Michael Trammer of trespassing without taking sufficient account of freedom of the press.<sup>18</sup>

Legal safeguards against SLAPPs are almost completely lacking; similarly, no government-funded information or support structures exist for affected journalists.

### **Confidentiality and protection of journalistic sources (including whistleblower protection)**

The Federal Constitutional Court has strengthened the rights of journalists (decision of 30 March 2022). The Court ruled that journalists are comprehensively exempt from the criminal liability of receiving stolen data (Section 202d of the Criminal Code). Whistleblowers, intermediaries, and auxiliary persons of journalists, however, continue to be at risk of criminal prosecution.

Under the draft Whistleblower Protection Act (see above), the disclosure of misconduct to the press will only be inadequately protected. Although the draft fulfils the requirements of the EU Directive in this respect, it does not go beyond them. This means that, in principle,

16 <https://www.zeit.de/campus/2022-01/leipzig-studentenzeitung-luhze-united-capital-rechtsstreit>.

17 <http://potsdam-stadtfueralle.de/2022/06/09/abmahnungen-unterlassungsverfuegungen-die-instrumente-von-immobilieninvestoren-gegen-eine-kritische-oeffentlichkeit/>.

18 <https://dju.verdi.de/presse/pressemitteilungen/++co++07774ffc-cc70-11ec-88a6-001a4a160111>.

misconduct must not be reported directly to the press even if there is a strong public interest in disclosure.

### **Access to information and public documents**

Germany has still not taken forward the plan to create a legal basis for a right to information of the press as regards federal authorities, even though it is included in the coalition agreement and recommended by the EU Commission in last year's Rule of Law Report. The Federal Administrative Court has ruled that journalists cannot rely on the press laws of the *Länder* regarding federal authorities, but only on their constitutional guarantee of the freedom of the press.<sup>19</sup>

Furthermore, based on current press laws journalists, do not have the right to also access documents, and such requests have to be based on the Freedom of Information Act at federal level or those of the *Länder*. As already noted in the 2022 Rule of Law Report of the EU Commission, there are considerable divergences in the legislation of the *Länder*.<sup>20</sup> Moreover, such freedom of information acts do not exist in Bavaria and Lower-Saxony. In

addition, journalists or public watchdogs are not privileged under these freedom of information acts, which means that fees can apply to such requests (and that interim measures for access to documents claims are hardly possible). The latter is highly problematic for journalists as they often have to wait several years to be granted access to information that is naturally only highly relevant for a short time. In particular, access to digital communications by officials becomes more difficult. Due to a lack of systematic strategies to archive digital communication,<sup>21</sup> there have been numerous cases in which such communication – even if deemed highly relevant for issues of public interests and falling in principle under the freedom of information acts – has been irreversibly deleted.<sup>22</sup>

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

As noted in 2022 Rule of Law Report, the Council of Europe's Group of States Against Corruption (GRECO), in its Evaluation Report on Germany in its Fifth Evaluation Round, has recommended that the federal Freedom of Information Act should be independently and thoroughly evaluated with a

19 Federal Administrative Court (Bundesverwaltungsgericht). Judgment of 20 February 2013, BVerwG 6 A 2.12, ECLI:DE:BVerwG:2013:200213U6A2.12.0

20 <https://transparenzranking.de/>

21 See, for instance, Hans-Martin Tillack, Mails von Ministern gelöscht – Bundesarchiv fürchtet Datenverlust, Veröffentlicht am 24.12.2022, Die Welt.

22 See, for instance, [the case](#) on the SMS of former chancellor Angela Merkel; Ongoing [case](#) against the Foreign Ministry on the digital communication of former Foreign Minister Heiko Maas during the withdrawal of German troops from Afghanistan.

particular focus on the scope of exceptions under this act and other more recent legislation, the application of these exceptions in practice, the system of fees and the enforcement of the act.<sup>23</sup> Additional measures should be taken to improve public access to information at the federal level, where necessary. In October of last year, an alliance of civil society organisations and journalists' associations presented a legislative proposal and demanded reforms.<sup>24</sup> The need for reforms has been stressed at the *Länder* level as well.<sup>25</sup> Further, the government has promised reforms in the coalition contract.

However, to date no reforms have been undertaken, which means that the federal Freedom of Information Act has not been amended since 2006. In the following, the main criticisms and need for reform are summarised:<sup>26</sup>

- The federal Freedom of Information Act aims to strengthen trust between the state and citizens by making administrative actions more transparent and comprehensible to citizens. Until now, however, freedom of information has required citizens to make a large number of individual requests in order to obtain information. In addition, many state officials still perceive secrecy as the rule and publication as the exception. This understanding must be fundamentally reversed. Therefore, as is already the case in

some *Länder*, such as Hamburg, an active obligation to publish should be enshrined in the law.

- The current obligation to pay a fee for information requests discourages citizens and does not contribute to increasing participation. Requests under the Freedom of Information Act should therefore be made free of charge.

- The processing of requests often takes excessively long. As a result, the events and processes that are being enquired about often lose their relevance. For this reason, a maximum time limit should be laid down in law, e.g. as a rule with room for exceptions limited to 15 working days.

- Frequently, public tasks are delegated to private or private-law legal entities. Therefore, private entities should fall under the Freedom of Information Act if they act on behalf of the public sector or if the shareholding structure is such that the public sector is the predominant and controlling owner or actor.

- The coexistence of the Environmental Information Act and the Freedom of Information Act leads to confusion and makes it difficult for information seekers

23 See GRECO – Evaluation Report, para 57.

24 For more information, see <https://transparenzgesetz.de/>.

25 See, for example, [the legislative proposals for a Transparency Law by the Commissioner for Data Protection and Freedom of Information Baden-Wuerttemberg](#).

26 For concrete proposals, see [legislative proposal](#) for a Federal Transparency Law by civil society organisations.

to obtain the data they are looking for. Therefore, the Environmental Information Act and the Freedom of Information Act should be merged.

- Too often, the exceptions are interpreted very broadly and used to deny unwelcome requests. The current exceptions for refusing information must therefore be interpreted more narrowly; the protection of personal data or to safeguard trade and business secrets must not be used in an abusive manner. For the same reason, the exceptions must not remain absolute, but should recede in the case of overriding public interest. Copyright legislation must not be used to prevent publication of such information.

- Increasingly, information that in principle falls under the Freedom of Information Act is being declared confidential and access in full or in large part is being denied. This practise requires a more thorough review by the Courts, which so far too quickly rely on the explanations provided by the authorities.

- Information rights are increasingly restricted via other laws, such as the Law on Political Parties (Parteiengesetz). Therefore, laws other than the Freedom of Information Act should only take precedence if they contain more extensive information rights.

## Checks and balances

### Key recommendations

- The Commissioners for Data Protection and Freedom of Information should be equipped with the competence to issue binding instructions on how the authorities should remedy their failures to comply with the freedom of information acts, and to enforce compliance by the relevant authority.
- In freedom of information request procedures, the initiation of a mediation procedure before the Commissioner for Data Protection and Freedom of Information should freeze the deadlines for legal claims.

### Process for preparing and enacting laws

Exemptions under the Freedom of Information Act are often interpreted too broadly by the competent authority in the context of law making. This practice makes it more difficult for the public to participate in the debate and to criticise the making and content of the law in question. Further, this practice disguises whose interests and which experts have been heard during the legislative process, as well as other influences.

These are just some cases to illustrate this practice: A request for access to information on the process leading the decision to establish

an unprecedented new budget for the German military after the Russian invasion into Ukraine was fully denied by the Chancellor's Office on grounds of state security and other similar grounds without any further explanation;<sup>27</sup> the Federal Ministry of Finance denied any access to information about which of the legislative projects in the coalition contract it planned to initiate during the last year.<sup>28</sup>

Other examples are information in the context of advisory bodies such as the body that advises the Federal Ministry of Finance in its annual estimation of tax revenues and budget planning,<sup>29</sup> or the general academic advisory board of the Federal Ministry of Finance.<sup>30</sup> The Ministry argued in both cases among others that the work of such advisory bodies should be confidential and that neither the members, the discussion of such bodies nor their conclusions reached should be made available to the public. A similar stance has been taken by the competent ministry with regard to several other committees – albeit consisting of external experts or state officials – that are tasked with advising the government. The authorities

continuously deny access to the minutes, the discussion, or the list of members of those committees.

### ***Independent authorities***

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Following the examples of other countries, Germany has established a Commissioner for Data Protection and Freedom of Information at federal level as well as in the 14 *Länder* that have adopted freedom of information legislation. The Commissioners enjoy a high level of independence.<sup>31</sup> They are elected by the competent parliament.<sup>32</sup> There is no official or legal supervision. The level of resources available for Commissioners at both federal and *Länder* level has been criticised; a survey concluded that many Commissioners are considerably understaffed compared to other countries.<sup>33</sup>

The Commissioners have the competence to counsel applicants of freedom of information requests and, if necessary, to initiate a mediation with authorities. Anyone who considers their right to access information to have been violated may bring an informal complaint

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27 Case is pending before the Administrative Court of Berlin, file no: VG 2 K 248/22.

28 Case is pending before the Administrative Court of Berlin, file no: VG 2 K 284/22.

29 Access to information was granted to a large extent by the Administrative Court of Berlin, judgment of 22 September, VG 2 K 35.19; for more information, see <https://fragenstaat.de/blog/2019/05/09/klage-rechnungsmodelle-steuerschatzungen/>.

30 Access to information was granted to a large extent by the Federal Administrative Court, judgment of 5 May 2022, BVerwG 10 C 1.21; for more information, see <https://fragenstaat.de/blog/2022/05/05/erfolgreiche-transparenzklage-bundesfinanzministerium-verliert-vor-bundesverwaltungsgericht-und-muss-seine-wissenschaftlichen-protokolle-offenlegen/>.

31 For the federal level, see § 10 (1) German Federal Data Protection Act (Bundesdatenschutzgesetz)

32 For the federal level, see § 11 (1) German Federal Data Protection Act (Bundesdatenschutzgesetz)

33 Tiziana Saab, [Staatlicher Auftrag geht ins Leere](#), 20 December 2022.

to the Commissioners, free of charge, and thereby initiate mediation proceedings.<sup>34</sup> The Commissioners may then request the federal authorities to submit a statement. However, they cannot issue binding instructions (*Weisungen/Verwaltungsakte*) to the authorities, but only formally state that the complaint was justified (*Beanstandung*).<sup>35</sup> The Commissioners may also offer training for administrations with the aim of increasing transparency and carry out political work, for example by providing expertise in legislation processes to strengthen transparency.

However, it is noteworthy that there are substantial differences amongst the Commissioners when it comes to using their powers. For instance, in 2021 there was not a single formal statement that a complaint was justified (*Beanstandung*) by the Federal Commissioner because of a breach of the federal Freedom of Information Act.<sup>36</sup> The Commissioner in Baden-Wuerttemberg has been an exception in this regard. Many others have focused mainly on the field of data protection.

Furthermore, there are several shortcomings when it comes to the scope of their powers. The

mediation process is often perceived as not very helpful. That is mainly because a complaint to the Commissioner does not suspend or interrupt time limits for administrative appeal and legal proceedings, which are only one month. Therefore, when waiting for the conclusion of a mediation procedure, one will inevitably lose the legal right to appeal. The initiation of a mediation procedure should therefore freeze the deadlines for legal claims.<sup>37</sup>

Furthermore, the powers of the Commissioners to investigate cases are extremely limited. They have no power to investigate the facts and they cannot oblige the authorities to submit a statement. This should be remedied by granting the Commissioners full and official access to the files of the proceedings as well as to information requested and adopt an obligation for state authorities to cooperate and respond.<sup>38</sup>

In addition, the Commissioners lack real decision-making power as explained above. They may only release a statement on their legal assessment. Therefore, the Commissioners should be equipped with the competence to issue binding instructions on how the authorities should remedy their failures to comply

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34 For federal level, see § 12 (1) German Federal Freedom of Information Act (Informationsfreiheitsgesetz)

35 For the federal level, see § 25 Federal Data Protection Act (old version) (Bundesdatenschutzgesetz a.F.)

36 See the Report for Data Protection and Freedom of Information of 2021 by the Federal Commissioner, at p. 121.

37 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (2), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

38 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (4), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

with the freedom of information acts, and to enforce compliance by the authority.<sup>39</sup>

### ***Accessibility and judicial review of administrative decisions***

The Berlin Constitutional Court ruled that the election for the Berlin House of Representatives in September 2021 was invalid due to serious flaws.<sup>40</sup> These flaws were, inter alia, missing or copied ballots, temporarily closed polling stations and long waiting times amounting to delay in voting. The election will therefore be repeated on 12 February 2023. Until the new parliament is elected and constituted, the current parliament will continue its work. The decision by the Berlin Constitutional Court has been heavily criticised for not applying the yardstick established by the Federal Constitutional Court for the repetition of elections. Forty-three claimants have therefore lodged a constitutional complaint.<sup>41</sup> It remains to be seen how the Federal Constitutional Court will decide on the matter.

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

### ***Key recommendations***

- The tax law that is de facto regulating most civil society organisations in Germany must be reformed to allow and protect public participation and advocacy work of civil society organisations.
- As laid out in the coalition agreement, a law against digital violence, including the possibility to file for quick and effective injunctions against social media accounts, has to be adopted in order to provide a safe online environment for marginalised communities and civil society.
- The federal government needs to introduce effective safeguards against SLAPPs, by implementing the EU Commission's recommendation on strategic lawsuits against public participation, which is in force since April 2022.

### ***Regulatory framework***

The legal uncertainties concerning public participation and political activity of civil

39 See, for instance, legislative proposal for a Federal Transparency Law by civil society organisations, § 20 (5)(6), available at <https://transparenzgesetz.de/gesetzentwurf.pdf>.

40 <https://www.berlin.de/gerichte/sonstige-gerichte/verfassungsgerichtshof/pressemitteilungen/2022/pressemitteilung.1265423.php>.

41 <https://www.zeit.de/politik/deutschland/2022-12/berlin-wahl-wiederholung-klage-bundesverfassungsgericht>.

society organisations with tax-exempt status (public benefit organisations) have not been resolved,<sup>42</sup> although the coalition treaty stipulates a reform that would improve the situation of civil society organisations. In practice, there is currently no political momentum for the intended improvements and no further legislative reforms have been initiated.

At the same time, the federal and Länder finance ministries implemented a new administrative decree (*Anwendungserlass der Abgabenordnung*)<sup>43</sup> that increases the legal uncertainty of civil society organisations' tax exemption status in cases of significant political activity.

This increases the pressure on civil society organisations. Some have increasingly faced legal action and threats by political opponents aiming to prevent them from publicly expressing criticism and generally from continuing their advocacy work. Anti-democratic actors and the Alternative für Deutschland use the legal situation to intimidate unfavourable organisations.<sup>44</sup> They continue to publicly discredit non-profit organisations that work against right-wing extremism and demand that their tax-exempt status be revoked. They argue

that tax-exempt civil society organisations are not allowed to publicly criticise a political party or to identify right-wing extremist positions or antisemitism within the party, basing their arguments on the *Attac* case law of the Federal Fiscal Court.<sup>45</sup> Many civil society organisations withdraw from public debates because of the legal uncertainties, and because of the case law around the Federal Fiscal Code that only allows tax-exempt civil society organisations to engage in political matters if strictly necessary to pursue the activities included in the Fiscal Code.

The legal uncertainties also seem to have influenced administrative proceedings, which take unreasonably long and thus become an additional burden for some organisations. For instance, in the case of Demokratisches Zentrum Ludwigsburg, the civil society organisation waited for almost three years for a decision by the financial authorities on whether their tax status remains withdrawn, inter alia, on grounds of breaching the principle of neutrality by taking a clear stance against right-wing extremism, after the first announcement of withdrawal in June 2019.<sup>46</sup> The resulting financial insecurity threatens the very existence of such donation-based local

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42 2020 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 12.; 2021 Rule of Law Report, country chapter on the rule of law situation in Germany, p. 17.

43 Administrative decree on tax code application, published by the Ministry of Finance, 12 January 2022, 2022/0001873, p. 5 f.

44 See for example the case of "Fulda stellt sich quer".

45 Judgment of the Federal Financial Court of 10 January 2019, V R 60/17; Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.

46 For further information, see: <https://freiheitsrechte.org/themen/demokratie/demoz.>

civil society organisations.<sup>47</sup> Furthermore, the loss of the tax-exempt status excludes civil society organisations from many sources of public funding – as one of the most common requirements of state-sponsored programmes or direct government grants is the status as a tax-exempt organisation, especially in the field of civil society subsidies programmes.<sup>48</sup>

Public participation and political activity for civil society organisations are further restricted because, according to the current legal situation, any organisation that is mentioned in the public reports of the internal intelligence services (*Landesämter or Bundesamt für Verfassungsschutz*) is automatically deprived of its tax-exempt status. This is due to a reversal of proof in the Fiscal Code (sec. 51 para 3 s. 2 AO), according to which, organisations – once mentioned in such a report – must prove that they are not extremist in order to uphold the tax-exempt status.<sup>49</sup> In addition, as the sources of the intelligence services are often confidential, the civil society organisations do not have access to the information on which the claims are being made and can hardly rebut it. The possibilities of legal protection are therefore extremely narrowed. This restrictive financing framework creates a chilling effect on civil society organisations that might prevent

financially less stable local organisations from engaging in public debates.

Such a chilling effect, as well as the generally sanction-like character of the tax law, may amount to an infringement on the right of civil society organisations to pursue political goals (provided that they do so using lawful and democratic means and provided that the aims advocated for are compatible with the fundamental principles of democracy), which is guaranteed to them as freedom of expression and freedom of association under Articles 10 and 11 of the European Convention on Human Rights (ECHR).<sup>50</sup>

### ***(Un)safe environment***

The freedom of assembly guaranteed by Article 8 of the Basic Law (*Grundgesetz*, GG) has been under immense pressure in Germany since the beginning of the pandemic. State authorities and the police have developed new standards for restrictions on the freedom of assembly – standards that could be applied in other crises. The executive relied on legal instruments (administrative decrees, general orders) to ban assemblies in general and not just in individual cases. Under these instruments, the right to freedom of assembly was suspended or restricted by authorities at an

47 For another case, in which the decision of the financial authorities took more than two years after the tax declarations was submitted, see <https://freiheitsrechte.org/pm-stellungnahme-changeorg/>.

48 The latest example of this is the draft of the democracy support act (*Demokratiefördergesetz*).

49 See for instance, the case of Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten VVN-BdA, an association founded by Holocaust survivors.

50 See legal [analysis](#) by Prof. Dr. Dr. Wiater.

(until then) inconceivable rate. In the beginning of 2022, right-wing groups disguised demonstrations against restrictions imposed to fight the Covid-19 pandemic as “walks” to avoid the legal obligations for holding a demonstration. In several cities, these “walks” have been banned by local authorities through the use of general orders. The lawfulness of such bans was assessed differently by the courts.<sup>51</sup>

Recent developments have shown that the instrument of general orders banning public assemblies is and will be used by the executive in other contexts. By general order, the city administration of Munich has banned assemblies in connection with climate protests, in which participants glue themselves to the streets.<sup>52</sup>

## ***Attacks and harassment***

### ***Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors***

SLAPPs against journalists and other watchdogs have become an increasing challenge for civil society in Germany. A lack of awareness

in the public discourse and the lack of legislative safeguards against SLAPPs can result in serious consequences for affected persons or organisations.

In 2022, several SLAPP-cases were reported, mostly targeting journalists, activists and smaller NGOs. SLAPPs have been initiated both by non-state actors and by state actors. Individuals and smaller NGOs are particularly vulnerable to these abusive lawsuits. For such groups, the financial consequences of SLAPPs are especially severe, and in Germany, even a single SLAPP can often lead to financial ruin.

A worrying trend in 2022 has been the increase in SLAPPs from the right-wing sphere. Markus Haintz, a well-known right-wing lawyer, has issued cease-and-desist letters to numerous people for critical comments on twitter. Among those affected are lawyers,<sup>53</sup> politicians<sup>54</sup> and ordinary twitter users. Other right-wing actors have targeted journalists.<sup>55</sup> The claims often lack any legal basis. Haintz often tries to overpower the victims by initiating several court proceedings, so that a defence in court not only becomes time consuming but also entails a risk of high costs.

51 dazu einerseits BayVGH, Beschluss vom 19 Januar 2022 - 10 CS 22.162 -; andererseits VG Stuttgart, Beschluss vom 12. Januar 2022 - 1 K 80/22 -, juris, Rn. 42; see also <https://www.lto.de/recht/hintergruende/h/corona-spaziergaenge-versammlungsrecht-grundgesetz-allgemeinverfuegung-vg-duesseldorf-vg-neustadt-querdenker/>.

52 See <https://www.br.de/nachrichten/bayern/kleben-geht-nicht-wie-muenchen-das-versammlungsverbot-begrundet,TPXobYo>.

53 <https://www.volksverpetzer.de/querdenker/abmahnung-bank-haintz/>.

54 [https://twitter.com/haintz\\_markus/status/1504616036754243592](https://twitter.com/haintz_markus/status/1504616036754243592).

55 <https://www.volksverpetzer.de/schwer-verpetzt/update-klage-wodarg-fuellmich/>.

The above-mentioned cases point towards a structural weakness in the protection against SLAPPs in the German legal system: cease-and-desist letters are usually connected with costs that can quickly reach several thousand euros. In many cases, even completely unfounded cease-and-desist letters therefore threaten the existence of the company and have a considerable intimidating effect. Those affected are dependent on legal advice to assess the chances of a legal defence, which in turn is associated with considerable costs, which cannot be reimbursed. Therefore, those affected by abusive cease-and-desist letters (which are often a necessary step before initiating court proceedings) must bear high costs, either if they comply or if they (successfully) defend themselves against the abusive claim in court.

In 2022, climate activists were subject to unprecedented attempts by state authorities and policies to suppress sit-in blockages, although these actions are in general protected by the right to freedom of assembly. In Bavaria, climate activists have been taken into “preventive custody” for up to 30 days in several cases because they participated in peaceful sit-ins. According to the Bavarian Police Tasks

Act (*Polizeiaufgabengesetz*, PAG), those who – according to the authorities’ findings – are planning a criminal or administrative offence can be detained for up to 30 days; the detention can even be prolonged for up to two months.<sup>56</sup> The application of this provision, which was intended to prevent terrorist attacks, to peaceful protest by climate activists has been heavily criticised.<sup>57</sup>

In December 2022, the public prosecution department of Neuruppin even opened investigations against activists of the Last Generation for forming a criminal organisation.<sup>58</sup> In the course of this investigation, the homes of eleven activists in Leipzig, Munich and other Bavarian cities were raided.<sup>59</sup>

## **Online civic space**

### **Doxing**

In 2021, Sec. 126a of the German Criminal Code was amended to ensure that doxing and the publication of so-called enemy lists (lists of names of potential targets) is punishable. While this has been a positive development, there are several shortcomings:

56 Cf. Art. 17, 20 PAG.

57 See <https://www.tagesschau.de/inland/gesellschaft/praeventivhaft-klima-protest-bayern-101.html>; <https://www.sueddeutsche.de/kultur/klimaaktivismus-letzte-generation-1.5691480?reduced=true>; <https://www.zdf.de/nachrichten/politik/praeventivgewahrsam-gefaengnis-bayern-klima-proteste-100.html>; for a general discussion about the lawfulness of pre-trial detention under the Bavarian PAG see <https://www.sueddeutsche.de/bayern/bayern-klimaaktivisten-markus-krajewski-praeventivhaft-1.5693099?reduced=true> and <https://verfassungsblog.de/gewahrsam-als-letztes-mittel-gegen-die-letzte-generation/>.

58 Cf. § 129 Criminal Code (Strafgesetzbuch, StGB).

59 <https://taz.de/Ermittlungen-gegen-die-Letzte-Generation/!5902589/>.

Those so-called enemy lists are often published in the context of law enforcement and supplied with data by law enforcement. Additionally, there have not been transparent investigations into the (often right-wing) networks within law enforcement. Secondly, even though there has been an increase in the publishing and sharing of private data and enemy lists, especially targeting politicians, prosecution is lacking. Lastly, social media accounts doxing other people often use anonymous handles. Due to the legal framework and the required necessities for legal proceedings, it is often impossible to prosecute the person that published private data.

### ***Online smear and disinformation campaigns***

In recent decisions, the District Court of Frankfurt has ruled that social media platforms such as Facebook and Twitter must actively get involved in preventing the spread of false narratives and disinformation.<sup>60</sup> However, the court decisions may open doors to so-called upload filters and the use of sometimes unreliable and often discriminatory AI in the digital space. This can further harm digital spaces and the participation of marginalised communities in the online sphere, as reports in the past have shown that AI has put marginalised communities at a disadvantage.

### ***Attacks, threats and hate speech online***

Despite the increased awareness of digital threats and the necessity to sensitise law enforcement, digital violence and hate speech are often neither recognised as such, especially in combination with forms of discrimination, nor taken seriously or investigated by state authorities. While there are, formally, legal measures in place to defend oneself against digital attacks, in practice they are barely used due to a lack of trust, awareness, knowledge and access.

As outlined by the federal government in its coalition agreement, the planned law against digital violence might address some of the existing shortcomings; however, the government has not yet announced a timetable for the drafting and implementation of the law.

### ***Law enforcement capacity to investigate online threats and attacks***

According to the law to fight right-wing extremism and hate crime, law enforcement shall be sensitised and trained to recognise and investigate online threats and attacks, as well as discrimination online. However, since the adoption of this law in 2021, resources to train law enforcement have been scarce; a media report in May 2022 showed that police officers in different states in Germany do not take digital violence and online attacks seriously.<sup>61</sup>

60 <https://www.tagesspiegel.de/gesellschaft/prozess-um-hasskommentare-auf-twitter-kann-sich-der-rechtsstaat-noch-gegen-die-tech-riesen-durchsetzen-8915926.html>.

61 See [https://www.youtube.com/watch?v=Xdm8SG8\\_v0I](https://www.youtube.com/watch?v=Xdm8SG8_v0I).

The adopted act on the promotion of democracy (Demokratiefördergesetz) also addresses support structures for those affected by discrimination and extremism; while digital violence is not mentioned specifically, this is a significant development and a step in the right direction. Nonetheless, the planned law against digital violence should also address the funding of support structures, especially if organisations can file lawsuits for those targeted as well as on their account.

## **Disregard of human rights obligations and other systemic issues affecting the rule of law framework** 🟡

### **Key recommendations**

- The federal government needs to reform Sec. 201 of the Criminal Code to decriminalise the recording of police operations in public.
- The federal government must phase out border controls at the German-Austrian border, which are contrary to European law.

## **Systemic human rights violations**

### **Widespread human rights violations and/or persistent protection failures**

#### *Police violence*

In 2022, a debate about German police violence and brutality was sparked by several police killings that took place in summer. Four people were killed in police operations within a six-day period in August 2022.<sup>62</sup> In most of the cases the police response was condemned as disproportionate.

Despite the on-going cases of police violence and the demands of civil society,<sup>63</sup> a coherent and effective network of independent supervisory bodies has not yet been established. While some federal states have made efforts to introduce respective complaint structures, in several ways these do not meet the requirements of ensuring independent, immediate, prompt and comprehensive investigations of police violence.

Cases of police violence almost never end up in court. One problem in this regard is the difficult state of evidence. Using video material as evidence involves significant legal risks. According to the case law of several district courts, it constitutes a criminal offence to record

62 Loick/Thompson, Die Polizei erschießt Menschen, die Mehrheit schweigt, 24. September 2022, DIE ZEIT.

63 See <https://www.amnesty.de/informieren/aktuell/deutschland-polizeigewalt-unabhaengige-untersuchungen-sind-unerlaesslich>.

police operations in picture and sound.<sup>64</sup> In many cases, the police confiscate the smartphone or camera or immediately file criminal charges because the recording of film with the accompanying audio is supposedly prohibited under Sec. 201 of the German Criminal Code. This is one of the reasons it is difficult to document unlawful police actions, which often amount to human rights violations, e.g. in cases of racial profiling.

Police violence is also a topic discussed within the context of dealing with climate activists/civil disobedience. To break up climate protests and get the protesters off the streets, police apply so-called pain-compliance holds or threaten their use even though it is heavily disputed whether this is lawful.<sup>65</sup>

### *Refugee rights*

Rising numbers of refugees have reignited the debate about their rights. In this regard, several practices affecting or violating human rights have been reported.

After crossing the border, German authorities often confiscate the mobile phones of refugees

to check their identity or to identify those who helped them flee.<sup>66</sup> It is known that Germany continues this practice (even though it was found to be unlawful by UK courts<sup>67</sup>); there are, however, no official nationwide or state-specific figures.

### ***Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights***

In April 2022, the Court of Justice of the European Union found that there should be – in principle – no border controls in the European Union. In a case concerning Austria, the CJEU ruled that border controls may only be reintroduced in the event of a serious threat to public order or internal security, and may only be limited to a period of six months and not extended at will.<sup>68</sup> Despite this clear ruling by the CJEU, Germany has continued its border controls at the German-Austrian border, which have been in place since 2015, thus clearly violating the requirements set out by the CJEU.<sup>69</sup>

64 OLG Zweibrücken, Beschluss vom 30. Juni 2022, Az. 1 OLG 2 Ss 62/21; for a summary of the decision see <https://www.lto.de/recht/hintergruende/vh/olg-zweibruecken-1olg2ss-smartphone-aufnahme-polizei-einsatz-film-ton-201-stgb-straftbar/>.

65 See <https://www.lto.de/recht/nachrichten/n/debatte-gewalt-polizei-letzte-generation-schmerzgriffe-verhaeltnismaessigkeit/>.

66 See <https://netzpolitik.org/2022/deutschland-und-grossbritannien-beschlagnahme-der-handys-von-asylsuchenden-kann-rechtswidrig-sein/>.

67 See <https://netzpolitik.org/2022/grossbritannien-handysbeschlagnahme-bei-asylsuchenden-war-unrechtmassig/>.

68 ECJ, Judgement Cases C-368/20 and C-369/20, 26. April 2022, available [online](#).

69 <https://www.investigate-europe.eu/de/2022/schengen-abkommen-eu-grenzkontrollen-illegal-eugh/>.

## **Contacts**

### ***Gesellschaft für Freiheitsrechte (GFF)*** *Society for Civil Rights*

The GFF is a Berlin-based not-for-profit-NGO founded in 2015. Its goal is to establish a sustainable structure for successful Strategic Litigation for Human and Civil Rights (HCR) in Germany, bringing together plaintiffs with excellent litigators in order to challenge infringements of HCR in court.

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### ***The Civil Liberties Union for Europe***

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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