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## Articles



## Case Review




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## Articles



## Case Review

# *Articles*

## Deployment of Armed Forces at Home and Abroad: Constitutional Framework and Need for Reform in Light of Democratic Resilience

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**Abstract**

*This paper provides an overview of the constitutional framework governing the deployment of the German armed forces, highlights shortcomings in their contribution to democratic resilience, and evaluates selected proposals for constitutional amendments against this background.*

*Regarding domestic deployments, it discusses a proposal for an amendment addressing competence-related challenges of drone defence. The proposal would explicitly permit the armed forces to support the police to maintain or restore public security or order where police capabilities are insufficient. Concerning foreign deployments, the paper examines a proposal to align constitutional and international law regarding foreign deployments, as certain deployments permissible under international law lack a clear constitutional basis. Subsequently, it turns to legislative initiatives to create a new procedure before the German Federal Constitutional Court for reviewing the substantive requirements for foreign deployments. Finally, it assesses the compatibility of these two demands.*

*The paper identifies a need for reform to ensure greater legal clarity and reviewability. Concerning domestic deployments, it regards the proposal as suitable, although further clarification by the Federal Constitutional Court would likely suffice. Regarding foreign deployments, it advocates a "near-complete alignment". Especially pending such alignment, it recommends a procedure enabling the Court to at least review the stricter constitutional requirements independent of international law. Furthermore, drawing on historical lessons, it demands that deployments of armed forces, domestically and abroad outside mutual collective security systems, remain a last resort.*

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## A. Introduction

On 24 February 2022, Russia invaded Ukraine.[1] On 27 February 2022, former German Chancellor Olaf Scholz stated that we were experiencing a "turning point" (*Zeitenwende*).[2] With the start of the largest war in Europe since the Second World War,[3] the German Armed Forces (*Bundeswehr*) have moved to the centre of the political debate. Scholz declared that an "efficient, state-of-the-art, advanced *Bundeswehr*" must be created to "protect our freedom and our democracy".[4]

Since then, various measures have been taken. The newly introduced Article 87a paragraph 1a of the German Constitution (*Grundgesetz*, GG) laid the foundation for the Act on the Financing of the *Bundeswehr* and the Establishment of a "*Bundeswehr* Special Fund"[5] passed later the same year, which provides for a credit authorisation for a single amount of up to 100 billion euros. In addition, the German Federal Parliament (*Bundestag*) passed a draft law on the modernisation of military service, which is initially voluntary, but allows for the reintroduction of compulsory military service in the future.[6]

These current far-reaching measures stand in contrast to constitutional provisions that have remained unchanged since 1968.[7] Against this background, the question arises as to whether, and if so, in what form, reforms of the constitutional framework for armed forces deployments are also necessary in order to allow the Bundeswehr to "protect our freedom and our democracy", as Scholz called for. In the following, this demand is treated under the

[1] Andrea Bachstein, 'Ukraine-Krieg: Chronik der Tage vor dem Einmarsch' (*Süddeutsche Zeitung*, 25 February 2022) <www.sueddeutsche.de/politik/russland-ukraine-krieg-chronik-1.5536075> accessed 20 December 2025.

[2] Bundesregierung, 'Regierungserklärung von Bundeskanzler Olaf Scholz' (*Bulletin der Bundesregierung*, 25-2, 2022) 1.

[3] Nicu Popescu, 'Europe's two wars: The danger of the comfort zone' (*European Council on Foreign Relations,* 24 November 2024) <https://ecfr.eu/article/europes-two-wars-the-danger-of-the-comfort-zone/> accessed 20 December 2025.

[4] Bundesregierung (n 2) 5.

[5] Gesetz zur Finanzierung der Bundeswehr und zur Errichtung eines „Sondervermögens Bundeswehr" und zur Änderung der Bundeshaushaltsordnung v. 1.7.2022, BGBl I 1030.

[6] BT-Drs 21/1853, 2 (government proposal).

[7] Dieter Weingärtner, 'Rechtliche Grundlagen Deutscher Verteidigungspolitik' (*Bundeszentrale für politische Bildung*, 1 May 2015) <www.bpb.de/themen/militaer/deutsche-verteidigungspolitik/199281/rechtliche-grundlagen-deutscher-verteidigungspolitik/> accessed 20 Dezember 2025.

concept of "democratic resilience". This concept refers to the ability of a democratic regime to overcome external and internal challenges and adapt to changing conditions without damaging its fundamental principles.[8]

Applied to the constitutional regulations governing the deployment of armed forces, this means, on the one hand, that they contribute to the resilience of our democracy when they enable the *Bundeswehr* to effectively fulfil its protective mandate, even in the face of new security policy challenges at home and abroad. On the other hand, they must protect against abuse of power, which requires legal clarity and comprehensive democratic oversight of military operations. Effective capacity to act, legal clarity and reviewability also promote public confidence in government action, which offers protection against anti-democratic influence.

In order to assess whether the current constitutional framework meets these requirements derived from the concept of democratic resilience, this contribution discusses possible constitutional amendments aimed at strengthening the resilience of our democracy in the context of the deployment of armed forces, starting with a section on domestic deployments (B.), followed by one on foreign deployments (C.) To give a general overview and to provide a substantive basis, both sections begin with an explanation of the respective current legal situation, which is then analysed in the light of selected proposed constitutional amendments with regard to democratic resilience.

## B. Domestic deployments

### I. Regulations governing domestic deployments

According to Article 87a paragraph 2 GG, the armed forces[9] may only be deployed for purposes other than defence if and to the extent that the German Constitution expressly permits this. The exceptions provided for in the German Constitution regarding domestic deployments, meaning deployments on the territory of the Federal Republic of Germany, can be found in Article 87a paragraphs 3 and 4 GG ("external" and "internal emergency")

[8] Wolfgang Merkel, 'Demokratische Resilienz als Konzept' in Julian Nida-Rümelin and Frank-Walter Steinmeier (eds), *Normative Konstituenzien der Demokratie* (De Gruyter 2024) 341, 343.

[9] The term "armed forces" within the meaning of the constitution encompasses all military units of the Federal Republic of Germany, which are characterised, on the one hand, by being subject to the command authority of the Minister of Defence or, in the state of defence (*Verteidigungsfall*), of the Federal Chancellor (Helmut Aust, 'Art 87a GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz-Kommentar* (8th edn, C.H. Beck 2025) para 29), and on the other hand, by their highly capable armament (Sebastian Müller-Franken, 'Art 87a GG' in Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz. Kommentar,* vol 3 (8th edn, C.H. Beck 2024) para 38). They are to be distinguished from police officers, the *Bundeswehr* administration, military criminal courts, military service courts, and military chaplaincies (Otto Depenheuer, 'Art 87a GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz. Kommentar*, vol 6 (107th supplement, C.H. Beck 2025) para 70).

and Article 35 paragraph 2 sentence 2 and paragraph 3 GG ("natural disasters and grave accidents").[10]

In its plenary decision on the Aviation Security Act (*Luftsicherheitsgesetz*, LuftSiG), the Federal Constitutional Court explained that only the use of armed forces "as a means of executive power in the context of intervention" exceeds the threshold for deployment (*Einsatzschwelle*).[11] Such use is said to exist both in the application of coercion and in the use of "the armed forces' personnel or material resources in their potential for threat or intimidation".[12] Measures that are "typically not associated with the exercise of sovereign power and thus also not with infringements of fundamental rights" do not constitute deployment within the sense of Article 87a paragraph 2 GG.[13] The use of the *Bundeswehr* by way of administrative assistance, as regulated in Article 35 paragraph 1 GG, must therefore be distinguished from the concept of "deployment".[14]

## 1. Deployments for defence (Article 87a paragraph 2 GG)

According to Article 87a paragraph 2 GG, the armed forces may be deployed for "defence". The scope of the term "defence" within the meaning of Article 87a paragraph 2 GG is controversial, particularly as to whether it permits not only domestic deployments but also deployments abroad.[15]

In the context of domestic deployments treated in this section, the term "defence" is understood as "the repulsion of an attack on the federal territory by armed force in order to maintain or restore the external security of the Federal Republic of Germany on the basis of international law".[16] The primary object of defence is the Federal Republic of Germany.[17] The legitimate goal is solely the protection of the state's existence and its liberal democratic basic order.[18]

Traditionally, attacks that may justify defence are understood as armed attacks within the meaning of Article 51 of the United Nations Charter and under customary international

[10] Carsten Kalla, 'Inlandseinsätze der Bundeswehr – Brauchen wir eine Verfassungsänderung?' (*Bundesakademie für Sicherheitspolitik*, 2015) <www.baks.bund.de/sites/baks010/files/arbeitspapier_sicherheitspolitik_11_2015.pdf> accessed 27 September 2025, 4.

[11] cf BVerfGE 132, 1, 20 (para 50).

[12] ibid.

[13] Kalla (n 10) 1.

[14] cf Kalla (n 10) 2.

[15] BVerfGE 90, 286, 355; Aust (n 9) para 40; David Hummel, 'Art 87a GG' in Michael Sachs, Christian von Coelln and Thomas Mann (eds), *Grundgesetz. Kommentar* (10th edn, C.H. Beck 2024) paras 11 ff. This debate is further elaborated in section C.

[16] Depenheuer (n 9) para 56.

[17] Kyrill-Alexander Schwarz, '§ 23 Äußere Sicherheit und militärische Verteidigung' in Markus Möstl, Helge Sodan, Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (2nd edn, C.H. Beck 2022) para 32.

[18] Depenheuer (n 9) para 85.

law.[19] Defence in the conventional sense is therefore usually directed against military attacks by the armed forces of another state.[20] In view of new types of threats, there is debate as to whether the concept of defence needs to be broadened. Controversy exists over, on the one hand, the possibility of carrying out a domestic defence deployment against attacks by international terrorist organisations and, on the other hand, repelling cyberattacks by military means.[21]

There is broad agreement that the concept of defence within the scope of Article 87 paragraph 2 GG is broader than that of a state of defence under Article 115a paragraph 1 sentence 1 GG.[22] According to the legal definition contained therein, a state of defence exists when "the federal territory is attacked by armed force or imminently threatened with such an attack". The possibility of defence situations that do not constitute a state of defence is explained in the chapter on foreign deployments.[23]

The decision to make use of the constitutionally permitted option of domestic deployment for defence purposes under Article 87a paragraph 2 GG is taken at federal government level, as there is no general requirement for the *Bundestag* to give its approval for domestic deployments.[24] In peacetime, the Federal Minister of Defence has the power of command over the armed forces in accordance with Article 65a GG. In the event of a state of defence, his power of command is transferred to the Federal Chancellor in accordance with Article 115b GG. According to Article 115a paragraph 1 sentence 1 GG, this requires the determination of a state of defence by declaration of the *Bundestag* with the consent of the Federal Council (*Bundesrat*). Nevertheless, the wording of Article 115a paragraph 1 sentence 1 GG does not indicate any parliamentary reservation regarding the deployment itself.

[19] Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (1st edn, C.H. Beck 2009) § 6 para 29. The debate over the scope of the concept of defence in international law is further examined in section C.

[20] Schwarz (n 17) para 33.

[21] Maik Bäumerich and Maximilian Schneider, 'Terrorismusbekämpfung durch Bundeswehreinsätze im Inneren: Eine neue alte Diskussion' (2017) 36 NVwZ 189; Christian Frick, *Der Einsatz von Streitkräften im Inneren* (1st edn, Nomos Verlagsgesellschaft 2024) 413-24, 431-37; Schorkopf (n 19) § 6 paras 29 ff.

[22] Sven Hölscheidt and Martin Limpert, 'Einsatz der Bundeswehr innen und außen' (2009) 41 JA 86, 88; Hans Jarass and Martin Kment, *Grundgesetz für die Bundesrepublik Deutschland. Kommentar* (18th edn, C.H. Beck 2024) Article 87a para 10; Aust (n 9) para 33.

[23] see section C.

[24] BVerfGE 126, 55, 71; Stefanie Schmahl, 'Art 87a GG' in Helge Sodan (ed), *Beck'sche Kompakt-Kommentare. Grundgesetz* (5th edn, C.H. Beck 2024) para 12.

## 2. Deployments with express authorisation

### a. Deployment in the case of an "external emergency" (Article 87a paragraph 3 GG)

One of the explicit authorisations for domestic deployment is provided in Article 87a paragraph 3 GG for cases of so-called "external emergencies".[25] Under sentence 1, the armed forces are authorised to protect civilian property and to perform traffic control functions within the scope of their defence mission. Sentence 2 permits the transfer of authority to protect civilian property in support of police operations.

An "external emergency" exists both in a situation of the aforementioned state of defence and in a state of tension.[26] The state of tension is regulated in Article 80a paragraph 1 GG and is predominantly regarded as a preliminary stage to the state of defence.[27] As in the case of a state of defence, an armed attack on the federal territory must be imminent, although a high probability is sufficient.[28]

According to Article 80a paragraph 1 sentence 2 GG, the state of tension must be determined by the *Bundestag* with a two-thirds majority of the votes cast. According to Article 80a paragraph 2 GG, the measures based on it must be terminated at the request of the *Bundestag* (by a simple majority).[29] To date, the *Bundestag* has never declared a state of defence or tension.[30]

### b. Deployment in the case of an "internal emergency" (Article 87a paragraph 4 GG)

Article 87a paragraph 4 sentence 1 GG contains a further explicit authorisation in the case of an "internal emergency".[31] It authorises the use of armed forces "to support the police and the Federal Border Guard [now the Federal Police] in protecting civilian property and in combating organised armed insurgents" under three conditions: The deployment must serve to avert an imminent danger to the existence or the free democratic basic order of the Federation or one of Germany's 16 Federal States (*Länder*), the conditions set out in Article 91 paragraph 2 GG must be met (i.e. the *Land* itself is neither willing nor able to combat the danger), and the police forces and the Federal Border Guard must be insufficient.

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[25] Kalla (n 10) 4.
[26] ibid.
[27] Jarass and Kment (n 22) Article 80a para 1; Thomas Mann, 'Art 80a GG' (n 15) para 2.
[28] ibid.
[29] Jarass and Kment (n 22) Article 80a para 2.
[30] cf Frick, *Der Einsatz von Streitkräften im Inneren* (n 21) 215.
[31] Kalla (n 10) 4.

According to Article 87a paragraph 4 sentence 2 GG, the deployment must be discontinued at the request of the *Bundestag* or the *Bundesrat*. To date, the armed forces have never been deployed under Article 87a paragraph 4 GG.[32]

### c. Deployment in case of a regional disaster emergency (Article 35 paragraph 2 sentence 2 GG)

Another explicit exception can be found in Article 35 paragraph 2 sentence 2 GG, namely regarding a so-called "regional disaster emergency".[33] It grants the *Länder* the authority to request assistance from the armed forces in the event of a natural disaster or a grave accident. The subsidiarity clause of Article 35 paragraph 2 sentence 1 GG, according to which a *Land* may only call for assistance if its police could not fulfil their responsibilities without it, or could do so only with great difficulty, applies *mutatis mutandis* to sentence 2.[34]

With regard to new security policy challenges, the term "grave accident" is particularly relevant. This is understood as a damaging event of great magnitude and significance for the public, caused by accidents, technical or human error, or deliberately caused by third parties.[35] The Federal Constitutional Court has emphasised that only "events of catastrophic dimensions" are covered,[36] in order to ensure that the narrow limits of Article 87a paragraph 4 GG regarding the use of specific military weapons within the domestic territory are not undermined by a broad scope of application of Article 35 paragraph 2 sentence 2 and paragraph 3 GG.[37] The Federal Constitutional Court recognises cases in which the occurrence of a disaster is almost certain to fulfil the requirements of Article 35 paragraph 2 sentence 2 and paragraph 3 GG.[38] This is consistent with the context and purpose of the norm, which underline its precautionary character.[39]

Whether the request requires a decision by the state parliament, depends on the respective state constitution.[40]

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[32] cf Frick, *Der Einsatz von Streitkräften im Inneren* (n 21) 225.

[33] Hölscheidt and Limpert (n 22) 89.

[34] Hartmut Bauer, 'Art 35 GG' in Horst Dreier (ed), *Grundgesetz-Kommentar*, vol 2 (3th edn, Mohr Siebeck 2015) para 29; cf Hans-Georg Dederer, 'Art 35 GG' (n 9) para 134.

[35] BVerfGE 132, 1, 18 para 46; Mathias Schubert, 'Art 35 GG' (n 15) para 38.

[36] BVerfGE 132, 1, 17 para 43.

[37] ibid para 24.

[38] BVerfGE 115, 118, 144.

[39] Volker Epping, 'Art 35 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar. Grundgesetz* (63th edn, C.H. Beck 2025) para 24.2.

[40] BVerwG 162, 269 (para 17).

### d. Deployment in case of a supra-regional disaster emergency (Article 35 paragraph 3 sentence 1 GG)

Article 35 paragraph 3 sentence 1 GG regulates the "supra-regional state of emergency".[41] This explicit exception basically corresponds to Article 35 paragraph 2 sentence 2 GG, with the essential difference that the territory of more than one federal state must be affected. However, the specifications of the Federal Constitutional Court correspond to those of paragraph 2 sentence 2.[42]

Here too, the deployment of the armed forces is subsidiary to operations of the *Länder*'s police forces, as it must be necessary to combat the danger (Article 35 paragraph 3 sentence 1 GG). It is disputed under which conditions this is the case. Some argue that necessity only exists if the federal states are unable or unwilling to respond effectively to the disaster.[43] This is persuasively countered by the argument that paragraph 3 sentence 1 provides its own substantive basis in the cross-border emergency situation and that the principle of effective hazard prevention argues against waiting for the measures under paragraph 2 sentence 2 to fail.[44]

The authority to decide on the deployment of the armed forces is granted to the Federal Government as a collegiate body; delegation to a single member, such as the Minister of Defence, would be inadmissible.[45] According to Article 35 paragraph 3 sentence 2 GG, measures based on sentence 1 must be repealed on demand by the *Bundesrat* or immediately once the danger has been eliminated.

## II. Impact of the regulations governing domestic deployments on democratic resilience

The armed forces play an ambivalent role with regard to the resilience of our democracy. While, on the one hand, they are responsible for defending against external attacks (Article 87a paragraph 1 sentence 1 GG) and are therefore indispensable for the state's self-assertion, on the other hand, they represent a source of danger for the state itself: they can become a "threat to liberal democracy within the country".[46] As a consequence of the excessive and abusive deployment of the armed forces in domestic affairs during the German Empire, and particularly during the Weimar Republic and the Nazi regime,[47] the German Constitution did not originally provide for any powers of deployment within the

[41] Hölscheidt and Limpert (n 22) 89.
[42] cf BVerfGE 115, 118, 145; cf BVerfGE 132, 1, 17 (para 24); cf Dederer (n 34) para 136.
[43] Bauer (n 34) para 33.
[44] Dederer (n 34) para 136; cf Michael Goldhammer, 'Art 35 GG' in von Münch and Kunig (n 9) para 72.
[45] BVerfGE 115, 118, 149; Bauer (n 34) para 33.
[46] Depenheuer (n 9) para 62.
[47] see Frick, *Der Einsatz von Streitkräften im Inneren* (n 21) 326-344.

territory of the Federal Republic.[48] Even though this changed with the creation of the German Emergency Acts of 1968, the powers of the *Bundeswehr* within the domestic territory remain very limited and are strictly separated from those of the police.[49]

This separation of powers, from a historical perspective, is fundamental to the resilience of democracy, since it is intended to guarantee the political neutrality of the armed forces.[50] Nevertheless, problems of competence resulting therefrom can have negative effects on resilience: An unclear allocation of competences can reduce the effectiveness of hazard prevention, for example if it leads to hesitancy in action. Soldiers depend on legal certainty in order to respond effectively.[51] Furthermore, the (partial) inability to act as perceived by the public carries the risk of weakening the population's trust in the state.[52]

With regard to the division of powers between the police and the *Bundeswehr*, the police may be responsible for cases for which they do not have the necessary means of response, while the *Bundeswehr* lacks the constitutional basis for deployment.[53] In view of new forms of threat, the discussion regularly returns to whether the powers of the *Bundeswehr* to deploy domestically should be expanded.[54] While it had already been reignited 10 years ago by the terrorist attacks in Paris, the increasing number of unmanned drone flights over the course of last year[55] provided further cause for discussion. Focusing on this example, the following section explains how legal resilience can be strengthened in relation to new types of threats.

## 1. The example of drone defence

The extent to which legal changes are necessary for effective drone defence is controversial. While some are calling for a constitutional amendment[56] to move away

[48] cf BVerfGE 132, 1 – dissenting opinion by Gaier (para 62).

[49] ibid.

[50] Wissenschaftliche Dienste, 'Dokumentation: Zum Einsatz der Bundeswehr im Inneren. Voraussetzungen, Rechtsgrundlagen, mögliche Verfassungsänderungen' (WD 2 – 3000 – 023/15, *Bundestag*, 03 February 2015) <www.bundestag.de/resource/blob/534516/116855dc8df769ba69d2f70a3a268a1e/wd-2-023-15-pdf-data.pdf> accessed 29 September 2025, 15.

[51] cf Christian Frick, 'Drohnenabwehr durch die Bundeswehr – Ergänzung der Rechtsgrundlagen erforderlich!' (2025) 8 GSZ 231, 233.

[52] cf comments on Victor Gojdka, 'Was sich wirklich gegen die Drohnenflüge machen lässt' (*Die Zeit*, 4 October 2025) <www.zeit.de/politik/deutschland/2025-10/drohnenabwehr-abschuss-jamming-bundeswehr-verteidigung> accessed 17 December 2025. This reference constitutes anecdotal evidence only and does not represent a social-scientific study.

[53] Christian Frick, 'Hybride Kriegsführung – Bedrohung durch Drohnenüberflüge' (2025) 58 ZPR 52, 53; Gojdka (n 52).

[54] Markus Decker and Malte Lehming, 'Drohnenabschuss im Inneren durch die Bundeswehr? Ein Pro und Contra' (*Das Parlament*, 7 October 2025) <www.das-parlament.de/inland/innenpolitik/drohnenabschuss-im-innern-durch-die-bundeswehr-ein-pro-und-contra> accessed 17 December 2025.

[55] Josina Johannsen and Flemming Maltzahn, 'Einsatz der Bundeswehr gegen Spionagedrohnen?' (*Junge Wissenschaft im Öffentlichen Recht*, 4 March 2025) <www.juwiss.de/24-2025/> accessed 17 December 2025.

[56] Frick, 'Hybride Kriegsführung' (n 53) 52; Johannsen and Maltzahn (n 55).

from the strict separation between external and internal security,[57] others consider the constitutional *status quo* to be sufficient and instead favour statutory reforms.[58] With regard to a constitutional amendment, a revision of Article 35 paragraph 2 sentence 1 GG has been proposed, adding that the state may "request the armed forces to support [the] police [of the federal state] if the forces of the federal police are insufficient".[59] The need for a constitutional amendment is justified by reference to changed security risks. The increasing number of hybrid attacks, such as those carried out by spy drones, is characterised by the fact that they are unarmed. As a result, the requirement for a "grave accident", which must be met under Article 35 paragraph 2 sentence 2 GG in conjunction with Article 87a paragraph 2 GG in order to permit the deployment of armed forces, is usually not reached. Additionally, a clear attribution to an adversary is often not possible, with the result that no attack justifying defence can be identified.[60]

The legislature has responded to the current threat situation not with a constitutional amendment but with a draft bill to amend the Aviation Security Act.[61] In addition to simplifying decision-making by amending section 13 LuftSiG, this draft bill provides for the creation of a new section 15a LuftSiG.[62] While paragraph 1 merely takes up the administrative assistance already enshrined in Article 35 paragraph 1 GG, paragraph 2 stipulates that the armed forces may also "use armed force or other means against unmanned aircraft" as a last resort to "prevent the occurrence of a grave accident".[63] Although this expands the substantive powers of the armed forces, Article 35 paragraph 2 sentence 2 GG remains the underlying constitutional basis. Thus, the fundamental problem persists, as the threshold of a "grave accident" is unlikely to be met in relation to hybrid attacks as envisaged by the proposed legislation.[64]

At the same time, however, the draft law expressly points out that the *Bundeswehr* is entitled to shoot down "military unmanned aerial vehicles of a foreign power entering German airspace" on the basis of its defence mandate under Article 87a GG.[65] Some voices who consider the constitutional *status quo* sufficient assume that both drones used as flying explosive devices and drones used for reconnaissance are to be classified as military

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[57] Frick, 'Drohnenabwehr durch die Bundeswehr' (n 51) 231.

[58] Patrick Heinemann, 'Verteidigung gegen Drohnen' (*Legal Tribute Online*, 2 October 2025) <www.lto.de/recht/hintergruende/h/bundeswehr-drohnen-verteidigung-aenderung-grundgesetz> accessed 17 December 2025; Laurids Hempel and Finn Preiss, 'Drohnenabwehr durch die Bundeswehr' (*Verfassungsblog*, 8 December 2025) <https://verfassungsblog.de/drohnenabwehr-bundeswehr-grundgesetz-luftsig/> accessed 18 December 2025.

[59] Frick, 'Hybride Kriegsführung' (n 53) 53.

[60] ibid 52.

[61] BT-Drs 21/3252 (government proposal).

[62] ibid 2.

[63] ibid 11 ff.

[64] Johannsen and Maltzahn (n 55); Hempel and Preiss (n 58).

[65] BT-Drs 21/3252, 12.

means that may justify defence by the *Bundeswehr*, provided they serve to prepare or carry out an attack. Accordingly, only civilian drones that serve solely to cause uncertainty should fall under the competence of the police.[66]

If, against the backdrop of a militant interpretation of the constitution (*wehrhafte Verfassungsinterpretation*),[67] this classification is convincingly assumed,[68] hybrid threats of this kind could also be countered under the existing constitutional system. One problem that nevertheless remains and would be avoided by the constitutional amendment is one that has already been discussed in the dispute over the division of powers with regard to terrorist attacks on domestic territory:[69] the difficulty of determining whether an attack is external or internal.[70] Under current constitutional law, only the police are responsible for internal attacks that do not constitute a grave accident in the sense of Article 35 paragraph 2 sentence 2 and paragraph 3 GG. The proposal to consider whether a presumption of responsibility on the part of the armed forces "*in dubio pro defensione*" could be constructed,[71] could compensate for this deficit associated with maintaining strict separation.

The example of drone defence demonstrates clearly how, in order to achieve maximum resilience, the effectiveness of hazard prevention must be weighed against the historically justified restrictive use of the armed forces within the territory of the Federal Republic. The debate shows that there are various ways to strengthen resilience at the legal level. One possibility is constitutional amendments. These are not only viewed critically in light of preconstitutional historical experiences regarding domestic deployment, but the two-thirds majority required for them also generally prevents a rapid response to new threats.[72] However, legal certainty can be strengthened through changes of statutory law, such as the draft law on the amendment of the Aviation Security Act. In this case, facilitating decision-making and expanding substantive powers contribute to an improved ability to react in drone defence operations.

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[66] Hempel and Preiss (n 58).

[67] Under the principle of *wehrhafte Verfassungsinterpretation*, the provisions of the constitutional security framework must not be interpreted in a manner that undermines the effectiveness of threat prevention (Depenheuer (n 9) para 52).

[68] Hempel and Preiss (n 58).

[69] cf Hummel (n 15) para 37.

[70] Hempel and Preiss (n 58).

[71] Wissenschaftliche Dienste, 'Abwehr von Drohnen durch die Bundeswehr im Inland: Handlungsspielräume zwischen Verteidigungsauftrag und Gefahrenabwehr' (WD 2 - 3000 - 061/25, *Bundestag*, 13 October 2025) <www.bundestag.de/resource/blob/1117014/WD-2-061-25.pdf> accessed 17 December 2025, 12.

[72] Hempel and Preiss (n 58).

### 2. The example of the concept of defence

However, a fundamental problem for resilience remains (even outside the debate on drone use)[73] – the interpretation of the concept of defence. The draft law does not clearly state that the Federal Government classifies reconnaissance drones as military means against which Article 87a paragraph 2 GG provides a secure legal basis for defensive actions. It is essential for purposes of legal security that such vague legal terms are unambiguously defined at least in legislative explanations or by the Federal Constitutional Court. If such ambiguities are not resolved, the need for a constitutional amendment to ensure effective drone defence remains.

## C. Foreign deployments

## I. Regulations governing foreign deployments

### 1. Definition and concept of foreign deployment

According to section 1 paragraph 2 and section 2 paragraph 1 of the Parliamentary Involvement Act (*Parlamentsbeteiligungsgesetz*, ParlBG), a foreign deployment of armed forces is deemed to exist if soldiers of the *Bundeswehr* are involved in armed operations outside the scope of the German Constitution or if such involvement is expected.

According to the jurisprudence of the Federal Constitutional Court, the "mere possibility" of such involvement is not sufficient; rather, a "qualified expectation" must exist.[74] In this regard, there must be "sufficient tangible factual evidence" and a "particular proximity to the use of armed force," understood in both factual and temporal terms.[75] This can generally be assumed if "the overall situation makes it likely that German soldiers will be automatically involved in the use of armed force and this depends practically only on coincidences in the actual course of events".[76] In practice, this distinction is reflected in the differentiation between "foreign deployments" and "recognised missions".[77] The latter merely serve to demonstrate NATO's defensive readiness.[78]

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[73] With regard to terrorism: cf Hummel (n 15) para 37; cf Depenheuer (n 9) para 30.
[74] BVerfGE 121, 135, 165.
[75] BVerfGE 140, 160, 191 (para 72).
[76] ibid para 75.
[77] Bundeswehr, 'Die Bundeswehr im Einsatz' (*Bundeswehr*) <www.bundeswehr.de/de/auftrag/einsaetze/missionen> accessed 13 December 2025.
[78] Deutsche Gesellschaft für Auswärtige Politik, 'Auslandseinsatz und anerkannte Missionen' (*Deutsche Gesellschaft für Auswärtige Politik*, January 2024) <https://dgap.org/de/forschung/glossar/sicherheitsglossar/auslandseinsatz-und-anerkannte-missionen> accessed 13 December 2025.

Article 26 paragraph 1 GG, which prohibits wars of aggression, reflects the peace-oriented approach in international law. The legal basis for foreign deployments under international law is provided by the Charter of the United Nations.[79] Article 51 of the UN Charter states that the fundamental prohibition of the use of force does not affect the "inherent right of individual or collective self-defence". Article 42 of the UN Charter provides that, subject to authorisation by the Security Council, military measures may be undertaken to maintain or restore international peace and security. Customary international law provisions are explained in the context of deployments outside a system of mutual collective security.

### 2. Parliamentary reservation

The parliamentary reservation regarding foreign deployments of the *Bundeswehr* follows directly from the case law of the Federal Constitutional Court.[80] The Federal Constitutional Court understands the *Bundeswehr* as a "parliamentary army", in the sense of a limitation of the executive's power.[81] According to the case law of the Federal Constitutional Court, the requirement of parliamentary approval applies not only to deployments within systems of mutual collective security, but to armed foreign deployments in general.[82] The approval by the *Bundestag* requires a majority of the votes cast within the meaning of Article 42 paragraph 2 GG.[83]

These constitutional requirements have been elaborated in the Parliamentary Involvement Act. According to section 1 paragraph 2 ParlBG, any such deployment requires approval by the *Bundestag*. In exceptional cases, it may be granted retrospectively, e.g. when imminent danger cannot be postponed (section 5 paragraph 1 ParlBG). A simplified approval procedure is also provided for deployments of lesser intensity and scope (section 4 paragraph 1 ParlBG).

### 3. Constitutional embedding

Foreign deployments can be divided into two categories in terms of their constitutional embedding: those carried out within a system of mutual collective security within the meaning of Article 24 paragraph 2 GG and those carried out outside such a system.

#### a. Deployment of armed forces within a system of mutual collective security

The Federal Constitutional Court defines a system of mutual collective security as an

[79] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[80] BVerfGE 121, 135, 152.
[81] BVerfGE 90, 286, 382.
[82] BVerfGE 140, 160.
[83] BVerfGE 90, 286, 388.

institutionally consolidated association of states which, through binding rules, mutually commit to the maintenance of peace and to reciprocal protection.[84] Alliances for collective self-defence are also included, provided they are "strictly committed to maintaining peace".[85] These include(d), for example, the UN,[86] NATO,[87] and the WEU,[88] which existed until 2011. The EU is also classified accordingly by parts of the literature.[89] In its ruling on the anti-ISIS mission, the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) deemed the aforementioned view to be "at least justifiable".[90] Due to their lack of institutional consolidation, so-called "ad hoc cooperations" are not included.[91]

Article 24 paragraph 2 GG constitutes the constitutional legal basis for deployments within these systems.[92] Although this article explicitly authorises only integration, it is interpreted as providing the basis for tasks typically associated with integration, such as the deployment of armed forces within the framework and according to the rules of the system.[93] Nonetheless, it is therefore not an "express" authorisation within the meaning of Article 87a paragraph 2 GG.[94] The Federal Constitutional Court has left open the question of whether Article 87a paragraph 2 GG is applicable to foreign deployments at all.[95] However, it assumes that it would not conflict with Article 24 paragraph 2 GG in any case,[96] since the purpose of introducing Article 87a paragraph 2 GG was not to restrict the possibility of deployment under Article 24 paragraph 2 GG, which was already laid down in the German Constitution.[97] Article 24 paragraph 2 GG remains in force as a more specific, independent legal basis alongside Article 87a GG.[98]

### b. Deployment of armed forces outside a system of mutual collective security

In its second Lisbon ruling, the Federal Constitutional Court stated in an *obiter dictum* that foreign deployment "is only permitted in systems of mutual collective security, except in a

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[84] ibid 286.
[85] ibid 286, 287.
[86] ibid 349.
[87] ibid 351.
[88] cf ibid 349.
[89] Schorkopf (n 19) § 6 para 39; Wolff Heintschel von Heinegg and Robert Frau, 'Art 24 GG' in Epping and Hillgruber (n 39) para 33.3.
[90] BVerfGE 152, 8, 33.
[91] Dieter Wiefelspütz, 'Der Einsatz bewaffneter deutscher Streitkräfte im Ausland' (2007) 132 AöR 44, 87.
[92] ibid 83.
[93] BVerfGE 90, 286.
[94] Felix Lange, 'Ein verfassungsrechtliches Fundament für Auslandseinsätze der Bundeswehr durch Bindung an das Völkerrecht' (*Verfassungsblog*, 1 April 2022) <https://verfassungsblog.de/ein-verfassungsrechtliches-fundament-fur-auslandseinsatze-der-bundeswehr-durch-bindung-an-das-volkerrecht/> accessed 18 December 2025.
[95] BVerfGE 90, 286, 355.
[96] ibid.
[97] ibid 357.
[98] Schorkopf (n 19) § 6 para 35.

state of defence".[99] However, it clarified in the Pegasus ruling that the parliamentary reservation does not apply only to deployments "within systems of mutual collective security, but [...] also generally applies to armed deployments of German soldiers abroad" and "regardless of their substantive legal basis".[100] This implies that foreign deployments outside a system of mutual collective security may also be constitutionally permissible.[101]

The circumstances under which this is the case are highly controversial. Various legal bases are being discussed: one possibility is a broad understanding of the concept of defence contained in Article 87a paragraph 2 GG, which encompasses all defensive measures within the framework of Article 51 of the UN Charter. The other two lines of argument ultimately lead to a convergence of international and constitutional law with regard to foreign deployments. This result is achieved either by classifying Article 25 GG as a norm containing an "express" authorisation within the meaning of Article 87a paragraph 2 GG or by rejecting the applicability of Article 87a GG to foreign deployments. The following section sets out, for each relevant legal basis, which deployment scenarios may be constitutionally permissible.

### aa) Broad understanding of the concept of defence

Proponents of a broad interpretation of defence, including the Federal Administrative Court, assume that Article 87a GG also applies to foreign deployments.[102] They interpret the concept of defence in line with the German Constitution's friendliness towards international law (*Völkerrechtsfreundlichkeit des Grundgesetzes*) in such a way that "defence" within the meaning of Article 87a GG "should encompass everything that, under applicable international law, can be considered self-defence under Article 51 of the UN Charter",[103] including defence outside systems of mutual collective security.[104]

Some scholars contend that additional substantive restrictions are required in order to fall under the constitutional concept of defence, such as the existence of a national security interest.[105]

This has been discussed particularly in relation to humanitarian interventions which in international law are generally regarded as a distinct concept alongside the concept of

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[99] BVerfGE 123, 267, 360.

[100] BVerfGE 140, 160, 187-188 (paras 66, 69).

[101] Wissenschaftliche Dienste, 'Ausarbeitung: Verfassungsrechtliche Grundlagen für Auslandseinsätze der Bundeswehr – Überlegungen zur Änderung der verfassungsrechtlichen Praxis' (WD 2 – 3000 – 025/16, *Bundestag*, 16 February 2016) <www.bundestag.de/resource/blob/416598/44c9aea5e7db605f1d9984afb68371f8/wd-2-025-16-pdf-data.pdf> accessed 19 December 2025, 7.

[102] BVerwGE 127, 302 (para 107); Aust (n 9) paras 40 ff.

[103] BVerwGE 127, 302 (para 107).

[104] cf Hummel (n 15) para 24.

[105] cf Depenheuer (n 9) para 137; ibid.

defence within the meaning of Article 51 of the UN Charter.[106] The International Commission on Intervention and State Sovereignty, however, argues that what is treated under the heading of humanitarian interventions can exceptionally be encompassed by Article 51 of the UN Charter in the case that regional organisations act with respect to one of their member states.[107] A similar view can be found in German constitutional scholarship, where it has been suggested that such interventions can be covered by the concept of defence if the massive human rights violations "endanger regional security in such a way that the deployment of German armed forces can be justified – at least also – as 'defence' of Germany".[108]

Another scenario in which the permissibility of defensive actions is debated is counter-terrorism operations on foreign territory. There is no discernible emergence of an *opinio iuris* suggesting that this constellation is generally regarded as lawful.[109] However, there is broad agreement that defensive actions against supporting states are permissible if the actions of the terrorists can be attributed to them, although the criteria for attribution are controversial.[110] There is growing support for the view that defensive action may be directed against terrorists directly, regardless of whether their conduct is attributable to a state,[111] as already applied in the Security Council resolutions 1368 (2001)[112] and 1373 (2001)[113] adopted in response to the attacks of 11 September 2001. The International Court of Justice, however, advocated in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that Article 51 of the UN Charter refers to the case of an armed attack by one State against another State only,[114] and state practice shows restraint as well.[115]

The United States in particular advocate the "unwilling or unable" doctrine, according to which defence against terrorists on foreign territory is permissible if their country of

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[106] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (*International Development Research Centre*, December 2001) <https://idrc-crdi.ca/en/books/responsibility-protect-report-international-commission-intervention-and-state-sovereignty> accessed 12 December 2025, 47 (para 6.4).

[107] ibid.

[108] Depenheuer (n 9) para 137.

[109] Andreas von Arnauld, *Völkerrecht* (5th edn, C.F. Müller 2023) § 13 para 1133.

[110] ibid paras 1127-28.

[111] Thomas Franck, 'Terrorism and the Right to Self-Defense' (2001) 95 AJIL 839, 840; Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 770, 775; Karin Oellers-Frahm, 'Article 51 – What Matters Is the Armed Attack, not the Attacker' (2017) 77 ZaöRV 49, 51.

[112] SC Res 1368, 56 UN SCOR, UN Doc S/RES/1368 (2001).

[113] SC Res 1373, 56 UN SCOR, UN Doc S/RES/1373 (2001).

[114] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, 194 para 139.

[115] cf von Arnauld (n 109) § 13 paras 1131-32.

residence is unwilling or unable to take effective action against them.[116] However, this doctrine has not attained the status of customary international law.[117] In its anti-ISIS mission, the German government has made it clear that its mission is directed against ISIS, but not against the Syrian Arab Republic.[118] Even though it did not explicitly rely on it, Germany seems to have taken up the argumentation of the "unwilling or unable" doctrine to justify its use of force in Syria.[119] In its ruling on the anti-ISIS mission, the Federal Constitutional Court classified it as "at least justifiable" to "consider attacks by non-state actors to be included in the meaning and purpose of the right of self-defence".[120]

In addition, the concept of so-called "defence of persons" (*Personalverteidigung*) is debated in the context of rescuing nationals abroad without the host state's consent. Some scholars argue that attacks on German citizens abroad could trigger the right to self-defence.[121] However, under international law, invoking Article 51 of the UN Charter is not recognised in such cases.[122] Others see such evacuations as falling within the concept of defence, as the state thereby fulfils its duty to protect under Article 2 paragraph 2 sentence 1 GG.[123] This is countered by the argument that, following this line of reasoning, all constitutionally protected goods would be stylised as objects of defence, which would contradict the exceptional nature of Article 87a paragraph 2 GG.[124] For this reason, evacuations with the character of a deployment fall outside the scope of defence, even in the broadest sense of the term. In any case, the exception under customary international law discussed in this regard would not find its way into German constitutional law via the concept of defence.

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[116] UN Security Council, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General* (UN Doc S/2014/695, 23 September 2014).

[117] International Law Association, 'Final Report on Aggression and the Use of Force' (*International Law Association*, 2018) <https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-7> accessed 13 December 2025, 16-17.

[118] UN Security Council, *Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council* (UN Doc S/2015/946, 10 December 2015).

[119] Benjamin Nussberger, 'The Federal Government continues to justify the fight against ISIL in Syria on grounds of collective self-defence' (2019) GPIL <https://gpil.jura.uni-bonn.de/2019/10/the-federal-government-continues-to-justify-the-fight-against-isil-in-syria-on-grounds-of-collective-self-defence/> accessed 13 December 2025.

[120] BVerfGE 152, 8, 31 para 50.

[121] cf Otto Depenheuer, 'Der verfassungsrechtliche Verteidigungsauftrag der Bundeswehr – Grundfragen des Außeneinsatzes deutscher Streitkräfte' (1997) 112 DVBl 685, 688; Müller-Franken (n 9) para 49.

[122] Aust (n 9) para 50.

[123] Jarass and Kment (n 23) Article 87a para 13.

[124] Volker Epping, 'Die Evakuierung deutscher Staatsbürger im Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage? – Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand' (1999) 124 AöR 423, 440.

**bb) Article 25 GG as an "express provision" / Restriction of Article 87a GG to domestic deployments**

Following the Federal Constitutional Court's finding that Article 87a GG does not preclude the classification of Article 24 paragraph 2 GG as an enabling provision, it is sometimes assumed that the requirement of "strict adherence to the text", emphasised by the Federal Constitutional Court in relation to domestic deployments,[125] does not apply to foreign deployments.[126] According to the line of argument which softens the requirement of explicitness, it cannot be ruled out that Article 25 GG also contains an "explicit" authorisation.[127] Proponents of this view argue that, just as the legislature did not intend to restrict deployments within a system of mutual collective security by introducing Article 87a GG, it likewise did not intend to prohibit foreign deployments that are generally permissible under international law.[128]

If Article 25 GG is regarded as an "express" authorisation, deployment scenarios that are permissible under international law, but would otherwise be unconstitutional, become constitutional. Those who contend that Article 87a GG is not applicable to foreign deployments at all arrive at the same conclusion,[129] which, they argue, is supported by the fact that debates on the emergency constitution have been limited to domestic deployments.[130]

If one follows one of these views, interventions by invitation of the host state, which are permissible under international law,[131] as well as counter-piracy operations[132] would be constitutional. The same applies to evacuations conducted with the host state's consent.[133] According to the prevailing view in legal scholarship, evacuations without the consent of the host state would also be permissible within narrow limits due to an exception under customary international law.[134] It should be noted, however, that the International Court of Justice seemed to regard evacuations without consent as a breach of international law in its judgment in the case between the USA and Iran in 1980.[135]

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[125] BVerfGE 115, 118, 142.
[126] Aust (n 9) para 47.
[127] ibid para 49.
[128] cf Schorkopf (n 19) § 6 paras 43, 63; ibid para 49.
[129] Matthias Herdegen, '§ 27 Außen- und Wehrverfassung' in Matthias Herdegen and others, *Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive* (1st edn, C.H. Beck 2021) para 83; Hummel (n 15) para 15.
[130] Hummel (n 15) para 14.
[131] von Arnauld (n 109) § 13 para 1054.
[132] Aust (n 9) para 49.
[133] cf Schorkopf (n 19) § 6 paras 60, 63.
[134] Schorkopf (n 19) § 6 paras 60, 63; Wolff Heintschel von Heinegg, '§ 56 Ausnahmen vom Gewaltverbot' in Volker Epping, Wolff Heintschel von Heinegg and Knut Ipsen, *Völkerrecht* (8th edn, C.H. Beck 2024) paras 46-47, 49.
[135] cf United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Judgement) [1980] ICJ Rep 3, 43 f.

Another deployment scenario that could be constitutional under this understanding is humanitarian intervention in the event of massive human rights violations. Such intervention is only permitted under international law if the UN Security Council classifies the situation as a "threat to the peace" within the meaning of Article 39 of the UN Charter and authorises the use of military force to end it on the basis of Article 42 of the UN Charter.[136] This is also significant outside the scope of Article 24 paragraph 2 GG, as Article 42 of the UN Charter provides for authorisation by "Members of the United Nations", which may also act individually or within a coalition of the willing (see Article 48 of the UN Charter). This applies not only to humanitarian interventions, but to all uses of force authorised by the Security Council that Germany is permitted to carry out under international law outside the framework of a system of mutual collective security.

Whether humanitarian intervention without a UN mandate can be permissible under international law, for example if the Security Council does not recognise a situation within the meaning of Article 39 of the UN Charter or if it is blocked,[137] is controversial. Even proponents of customary recognition of humanitarian intervention impose strict requirements.[138] Within the framework of the ICISS report, a set of guidelines was developed regarding the concept of the "responsibility to protect" established therein. In the absence of authorisation from the Security Council, this set of rules provides that the General Assembly may act on the basis of the "Uniting for Peace" resolution[139] and that any intervention would take place within the framework of a regional organisation within the meaning of Chapter VIII of the Charter.[140] Consequently, no unilateral deployments are envisaged, so that even if the "responsibility to protect", currently only a political concept,[141] were to become customary international law, deployments within this framework would find their constitutional basis in Article 24 paragraph 2 GG.[142] Thus, the parallelism between international and constitutional law with regard to foreign deployments only affects the constitutionality of humanitarian interventions authorised by the Security Council.

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136 cf Heintschel von Heinegg (n 134) para 50.

137 Schorkopf (n 19) § 6 para 53.

138 cf Heintschel von Heinegg (n 134) para 50.

139 UNGA Res 377 (V) (3 November 1950).

140 International Commission on Intervention and State Sovereignty (n 106) XIII para 3 letter E.

141 Schorkopf (n 19) § 6 para 56.

142 However, humanitarian intervention without authorisation by the Security Council is not recognised under international law by the majority (cf Oliver Dörr, 'Use of Force, Prohibition of' (*MPEPIL*, August 2019) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427> accessed 13 December 2025, para 52) and therefore cannot be considered relevant within the framework of Article 24 paragraph 2 GG either.

## II. Impact of the regulations governing foreign deployments on democratic resilience

As explained above, there is disagreement regarding the constitutionality of various deployment scenarios. This is due in particular to the fact that the norms date from a time when foreign deployments were not yet being considered.[143] However, since reunification, the role of the *Bundeswehr* has been transformed into an "army in action"[144] and has become even more important with the turning point, or *Zeitenwende*, in German security policy. Against the backdrop of this new understanding in particular, various proposals for strengthening resilience with regard to foreign deployments are being discussed.

In addition to the debate on reforming the parliamentary reservation,[145] there are two further demands: the demand for constitutional and international law to be brought into line with each other and the demand for the Federal Constitutional Court to exercise greater oversight, both regarding foreign deployments.

### 1. Call for constitutional law and international law to be brought into line regarding foreign deployments

The current situation, in which certain deployments permissible under international law and at times regarded as politically self-evident lack a clear constitutional basis, such as the evacuation mission in Afghanistan,[146] adversely affects resilience. Not only is the *Bundeswehr's* ability to act restricted beyond what is required under international law, but the population's confidence in the state's crisis management capacity is also undermined.

For these reasons, there are calls for the establishment of a constitutional basis under which foreign deployments are constitutionally permissible as long as they do not violate international law.[147] Professors *Helmut Aust* and *Claus Kreß* propose rewording Article 87a paragraph 2 GG to read: "The armed forces may only be deployed abroad to the extent that this is compatible with international law; domestically, only to the extent that this is expressly permitted by the German Constitution."[148]

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[143] Christian Marxsen, 'Verrechtlichte Kontrolle' (*Verfassungsblog*, 22 March 2022) <https://verfassungsblog.de/verrechtlichte-kontrolle/> accessed 19 December 2025.

[144] Bundeswehr, 'Die Geschichte der Bundeswehr als Einsatzarmee' (*Bundeswehr*) <www.bundeswehr.de/de/selbstverstaendnis/geschichte-bundeswehr/armee-einsatz-geschichte> accessed 19 December 2025.

[145] As elaborated in: Malte Seyffarth, 'Eine verfassungsgerechte Reform des Parlamentsbeteiligungsgesetzes' (2019) 2 GSZ 57.

[146] Helmut Aust and Claus Kreß 'Evakuierungen ohne Rechtsgrundlage?' (*Frankfurter Allgemeine Zeitung*, 7 September 2021) <www.faz.net/einspruch/exklusiv/afghanistan-evakuierungen-ohne-rechtsgrundlage-17526259.html> accessed 18 December 2025. The German Federal Government relied not only on the exception under customary international law recognised in legal scholarship, but also on a continuing consent to the evacuation granted by the Government of the Islamic Republic of Afghanistan (government motion in BT-Drs 19/32022, 1.

[147] Aust and Kreß (n 146); Marxsen (n 143); Lange (n 94); cf Aust (n 9) para 50.

[148] Aust and Kreß (n 146).

This might lead to a loss of significance of Article 24 paragraph 2 GG. Moving away from acting within the framework of mutual collective security systems would not be desirable, as the multinational integration of the *Bundeswehr* is fundamental to preventing unilateral actions[149] and thus constitutes, especially against the backdrop of German history, an essential supervisory instrument. Acting outside such a system should always be only the second choice. However, one could argue that "a departure from the requirement of collective involvement could [even] increase Germany's military 'capacity for cooperation and action' vis-à-vis its allies".[150]

In order to reconcile these two interests, this paper proposes a "near-complete alignment". It would be limited to a single constitutional requirement that goes beyond the demands of international law: namely, that recourse to action outside, rather than within, a system of mutual collective security should be permissible only as a measure of last resort. Such a "near-complete alignment" would largely preserve the advantages of complete alignment while simultaneously reducing the risk of unilateral action and of undermining the significance of systems of mutual collective security.

Of course, such alignment does not create complete legal clarity regarding the permissibility of foreign deployments, as points of discussion under international law remain. Nevertheless, legal certainty would be increased and the population's trust in the state would potentially be strengthened. Both the debate over the unconstitutionality of the Federal Government's actions as well as the failure to act on constitutional grounds despite the possibility under international law offer avoidable grounds for criticism.

### 2. Call for strengthening the Federal Constitutional Court's oversight of foreign deployments

Another democratic deficit is perceived in the fact that "there is practically no way for the Federal Constitutional Court to review the admissibility of the deployments".[151] Legal control of foreign deployments takes place in disputes between federal organs (*Organstreitverfahren*) and is limited to asserting the *Bundestag's* participatory rights regarding the requirement of parliamentary approval for deployments of armed forces (*wehrverfassungsrechtlicher Parlamentsvorbehalt*).[152] A review of the constitutionality of legislation (*Normenkontrolle*) is not possible, as the parliamentary decision concerning the deployment (as an individual measure) does not constitute federal law within the meaning of Article 94 paragraph 1 number 2 GG.[153] This shortcoming has become

[149] cf Wissenschaftliche Dienste, 'Ausarbeitung' (n 101) 11.
[150] ibid 13.
[151] Mehrdad Payandeh and Heiko Sauer, 'Die Beteiligung der Bundeswehr am Antiterroreinsatz in Syrien' (2016) 49 ZPR 34, 37; cf Marxsen (n 143).
[152] Marxsen (n 143).
[153] Payandeh and Sauer (n 151) 37.

significant in the context of the deployment in Syria, where it was controversial whether it was carried out within the framework of a system of mutual collective security, which the Federal Constitutional Court deemed "at least justifiable".[154]

On the grounds that "it must not matter whether one can 'justify' that [the deployments] are constitutional, but rather that the relevant questions [...] must be subject to a final and binding clarification by the Federal Constitutional Court",[155] two legislative initiatives were introduced.

These were intended to create a new type of procedure for reviewing the substantive requirements for foreign deployments.[156] However, they did not find a majority. Nonetheless, constitutional review would be important for effective supervision, as it is unlikely that the *Bundestag* would oppose the government it supports. To date, it has approved all mandates.[157]

### 3. Compatibility of these demands

The implementation of both demands would contribute to strengthening resilience in each case. However, their compatibility remains questionable. If constitutional and international law were aligned for foreign deployments and substantive supervision were established simultaneously, the task of the Federal Constitutional Court would theoretically still be to review constitutional law due to the dualistic understanding of the legal system. In practice, however, it would be limited to ensuring compliance with international law.

German constitutional law already recognises a review procedure relating to international law, the norm verification procedure under Article 100 paragraph 2 GG. This is a referral procedure in which the Federal Constitutional Court determines whether a rule of international law, namely the rules of universal customary international law and general principles of law,[158] is part of federal law and directly creates rights and obligations for individuals within the meaning of Article 25 GG. The procedure serves to "ascertain their validity and status"[159] and thus to prevent divergent classifications by German courts.[160] Its purpose is therefore to counteract domestic fragmentation. However, the review of the compatibility of individual acts with international law cannot

[154] BT-Drs 19/14025, 5 (opposition proposal); BVerfGE 152, 8, 29.
[155] BT-Drs 19/14025, 5.
[156] BT-Drs 18/8277 (opposition proposal); BT-Drs 19/14025.
[157] Marxsen (n 143).
[158] BVerfGE 109, 38, 53.
[159] Steffen Detterbeck, 'Article 87a GG' (n 15) para 26.
[160] cf von Arnauld (n 109) § 7 para 537.

be the subject of the referral procedure.[161]

The review of the legality of foreign deployments under international law may be carried out in proceedings before the International Court of Justice, provided that the states concerned recognise its jurisdiction under Article 36 of the ICJ Statute.[162] If constitutional law and international law were aligned with regard to foreign deployments and a review procedure of the Federal Constitutional Court were to be created, the International Court of Justice and the Federal Constitutional Court would ultimately rule on the same matter. This would entail the risk of further fragmentation of international law and could lead to the Federal Constitutional Court restricting the *Bundeswehr's* ability to act in individual cases beyond what the International Court of Justice might consider contrary to international law. Furthermore, there is a risk that the Federal Constitutional Court could develop into a kind of "court of international law" by determining Germany's positions under international law.[163]

At the same time, however, the creation of such a procedure would increase certainty that German foreign deployments are conducted within the framework of international law. This appears to be particularly important in light of the difficulties in enforcing international law and the current federal government's ambivalent relationship with international law.[164]

Even if the concerns mentioned above lead to the rejection of a procedure enabling the Federal Constitutional Court to review purely international law criteria, it would at least be desirable to establish a permanent, institutionally independent expert commission to review the legality of each deployment under international law and publish its findings. The federal government should be required to take a clear stance on the findings. This would at least strengthen parliamentary and public oversight. This, too, could help to promote legal clarity and ensure compliance with international law.

In any case, as long as international law and constitutional law have not been brought into line with each other, it seems desirable to at least create a procedure in which the Federal Constitutional Court reviews the existing stricter constitutional requirements which are independent of international law. This includes, for example, assessing whether the deployment actually took place within a system of mutual collective security, or whether

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[161] BVerfG NVwZ 2008, 878, 879.

[162] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 36.

[163] Marxsen (n 143).

[164] German Chancellor Friedrich Merz stated, for example: "Categorizing the events under international law will have relatively little effect. This is especially true when these classifications remain largely inconsequential." Bundesregierung, 'Press statement by Federal Chancellor Merz on the situation in the Middle East. Iranians deserve a better future' (*Bundesregierung*, 1 March 2026) <www.bundesregierung.de/breg-en/news/chancellor-statement-near-east-2409224> accessed 6 March 2026.

criteria specified by the Federal Constitutional Court were applied. This would initially ensure compliance with the constitutional requirements existing in addition to international law. Subsequently, this could increase the pressure for reform if these requirements prove impracticable for the *Bundeswehr's* ability to act. Even if a "near-complete alignment" as recommended above were established, the procedure could still be useful in determining whether acting outside, rather than within, a system of mutual collective security was genuinely a measure of last resort. In any case, legal clarity would be strengthened.

## D. Conclusion

Regarding the constitutional basis for domestic and foreign deployments, it can be noted that, despite numerous clarifications by the Federal Constitutional Court, legal uncertainties persist. This is particularly evident in debates on domestic challenges, such as drone defence and counter-terrorism operations, as well as in discussions on foreign deployments, such as defence on the territory of third countries or the evacuation of the state's own nationals.

A *Bundeswehr* that reliably protects our freedom and democracy, as called for by Olaf Scholz in his *Zeitenwende*-speech, should not operate based on ambiguous and possibly outdated legal foundations. The current constitution makes it difficult to act in a legally secure and swift manner. Moreover, this may negatively affect public trust in state crisis management, which provides additional leverage for anti-democratic forces.

For these reasons, it is important for the resilience of our democracy to establish clarity regarding the constitutional basis for armed forces deployments and to ensure that these deployments meet the new security policy challenges. Constitutional amendments can contribute to this, for example by explicitly expanding the possibilities for domestic deployments and by largely bringing constitutional law and international law into line regarding foreign deployments. On the other hand, the Federal Constitutional Court could enhance legal certainty by clarifying specific terms, which would be particularly beneficial with regard to the concept of "defence" in Article 87a GG.

The creation of a new type of procedure, which would at least allow for the review of compliance with constitutional requirements for military deployments that exceed international law, could also increase the pressure for reform, in addition to providing greater legal clarity. Furthermore, the establishment of a permanent, institutionally independent expert commission to review the legality of each deployment under international law on whose findings the federal government is required to take a clear

stance would also be beneficial.

At the same time, it is important for a resilient democracy to set clear limits on the deployment of armed forces. Apart from compliance with international law, it is essential that deployments of armed forces, both domestically and abroad outside of mutual collective security systems, remain a last resort.

A resilient democracy therefore requires a constitutional framework for military deployments that is adapted to new security policy challenges, thus contributing to effective capacity to act, legal clarity and democratic accountability, while at the same time preserving historical core principles that protect against abuse of power.

# *Articles*

## How (not) to elect a Federal Constitutional Court Justice

*Birte Krüger*[*]

**Abstract**

*This paper examines the process of the election of the Federal Constitutional Court Justices and the failed election of the candidate Prof. Dr. Frauke Brosius-Gersdorf in the summer of 2025. It highlights the vulnerabilities in the selection process and the dependency on informal consensus between the central parties. Additionally, it explores the role of the Federal Constitutional Court within in the German state to understand the intensity of the discussions around its Justices.*



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In the summer of 2025, 3 of 16 seats on the German Federal Constitutional Court, the *Bundesverfassungsgericht*, were up for election. Normally, this is a rather straightforward affair, with nominations being agreed upon between parties in an expert committee. The candidates are usually not controversial figures, so that they get the required votes easily. Last summer, however, things turned out differently. The debate around the nominations was held with unprecedented severity and media attention. The candidate Frauke Brosius-Gersdorf withdrew her application after a weeks-long controversy. With this in mind: What is the procedure for appointing Justices? How did the process derail last year? What exactly is the role of the *Bundesverfassungsgericht*?

## A. The procedure for appointing Justices to the Bundesverfassungsgericht

The election of a Federal Constitutional Court Justice is, very simply put, a two-step process: First, a committee selects a candidate and secondly, either the *Bundestag*, the German parliament, or the *Bundesrat*, the Federal Council with representatives from the states, vote to confirm the selection. However, it gets much trickier in the details: The selection is a tower of carefully balanced processes of informal consensus, which is – unfortunately – build on the quicksand of changing political influence and trust.[1] The post-1945 constitution (*Grundgesetz* or GG) has shaped the court and its central role in the German state.[2] However, the specific mode of operation of the court was not regulated in the constitution until 2024 and the details of the election of justices remain in the *Bundesverfassungsgerichtsgesetz* (BVerfGG). Additionally, informal agreements among the major parties continue to play a central role in the election of the justices.[3] For long, the party actors have avoided the politicization that has marked constitutional courts elsewhere and the constitutional court appointments have been handled as a serious but ultimately manageable questions of statecraft.

### I. The Justice Election Committee (Richterwahlausschuss)

The committee for selecting the candidates in the first part of the process is fittingly called the *Wahlausschuss für die Richter des Bundesverfassungsgerichts* or, in English, the Justice Election Committee. The committee consists of twelve members (section 6 paragraph 2 of the Federal Constitutional Court Act BVerfGG). After the election of the *Bundestag*, which occurs every four years, the 12 members of the committee are selected via vote in the

[1] Carmen Vidal Pérez, 'Von Konsens zum Konflikt: Die Wahl der Bundesverfassungsrichterinnen im Wandel' (2025) 61 Recht und Politik 356, 356.

[2] Regarding the role of the BVerfG as a characteristic of the post-world war order, see BVerfGE 114. 121 para 160.

[3] Vidal Pérez (n 1) 358.

*Bundestag.* Expertise in legal matters is required to be selected.[4] The number of members per party mirrors the composition of the *Bundestag.*[5]

The *Bundesverfassungsgericht* consist of two Senats (section 2 paragraph 1 BVerfGG) with eight Justices each (Article 93 paragraph 2 sentence 1 GG, section 2 paragraph 2 BVerfGG). The Justices are elected for a non-extendable 12-year term (Article 93 paragraph 3 sentence 1 GG, section 4 paragraph 1 BVerfGG).[6] The election committee gets to work when a Justice is reaching the end of his or her term. The different parties present candidates to the committee for debate among its members. It has become common practice that the Christian Democratic Union (CDU) of chancellor Friedrich Merz and the Social Democratic Party (SPD) each propose candidates for three of the eight Justices in each Chamber of the court. The Green Party and the Free Democratic Party (FDP) each get to nominate one candidate.[7] If a Justice that had been proposed by, for example, the CDU is retiring, the CDU then gets to present a candidate for this position.

The more fringe The Left Party (Die Linke), and the Alternative for Germany Party (AfD) have – up to today – not been able to successfully present candidates. However, since the last election they have enough votes between them to block the election of a candidate, causing the proposing parties to rely on support from The Left Party to elect Justices.[8]

How exactly the parties select the candidates they present to the committee is not made public. The *Bundesjustizministerium* keeps records of potential candidates in accordance with section 8 BVerfGG, but the parties are not limited to this record.[9] Instead, they rely on a few party politicians to identify potential candidates and informally find out whether they might be acceptable for the members of the other parties.[10]

The merits of the potential Justices are debated among the committee. The section 6 paragraph 4 BVerfGG obligates the members of the committee not to disclose the content of their discussions, the result of the votes and information on the candidates to the public

[4] Oliver Lepsius, 'Nicht der Modus ist das Problem, sondern die Abgeordneten.' (*beck-aktuell*, 2 September 2025) <https://www.beck-aktuell.de/node/21421> accessed 10 May 2026.

[5] Currently, it consists of five CDU/CSU-members, three AfD-members, two SPD-members and one each from *Die Linke* and *Bündnis 90/Die Grünen.* Vidal Pérez (n 2) 357.

[6] Alternatively, a Justices term ends when he or she reaches the age of 68 (section 4 paragraphs 1 and 3 BVerfGG). This practice reflects the understanding of democracy as time-limited power (Dieter Hömig, '§ 4 BVerfGG' in Bruno Schmidt-Bleibtreu and others, *Schmidt-Bleibtreu/Klein/Bethge Bundesverfassungsgerichtsgesetz* (65th supplement, C.H. Beck August 2025) para 5).

[7] As the FDP is currently not part of the *Bundestag* this agreement might need to be renegotiated once the FDP nominated justice of the Court is retiring.

[8] Christian Walter, 'Art. 93 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar* (109th supplement, C.H. Beck January 2026) para 231.

[9] Vidal Pérez (n 1) 358.

[10] ibid 359.

to avoid damage to the future Justices in the public opinion.[11] Sometimes the candidates also attend discussions with the *Bundestag*-members of a party. Finally, the candidates must pass the vote in the committee with a majority. This resolution recommends them for the final vote in either the *Bundesrat* or the *Bundestag*.[12]

## II. The vote of the Bundesrat or the Bundestag

Up until 2015, the vote in the committee would have been the end of the procedure.[13] However, growing concerns for the acceptance of the *Bundesverfassungsgericht* and the undemocratic nature of a closed-door committee decision inspired a change of policy.[14]

As per the recent changes, the *Bundestag* and the *Bundesrat* take turns confirming the proposal of the committee (Article 93 paragraph 2 sentence 2 GG, section 5 paragraph 1 sentence 1 and section 6 paragraph 1 BVerfGG).[15] However, the Justices are not voted for individually but rather in a package: If there are three seats to fill, one vote is cast to confirm all three candidates together. In the *Bundestag*, there is no debate prior to the vote, and the vote is cast with a secret ballot (section 6 paragraph sentence 1 BVerfGG). A vote without prior debate is not unusual; it is also used for election of other roles such as the Chancellor (Article 63 section 1 GG). For the Justices, a majority of two thirds is required to confirm their selection (section 6 paragraph 1 sentence 2 BVerfGG). In the *Bundesrat*, the vote is public and a two third majority is required as well (section 7 BVerfGG).[16]

While this part of the procedure exists to make the election more democratic, it is also not meant for the discussion of the candidates, not least because this would undermine the purpose of section 6 paragraph 2 BVerfGG.[17] Its purpose is merely the confirmation of the judgment of the committee, not an independent selection process by the members of the

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[11] BT-Drs 18/2737, 4-5; Gerd Morgenthaler and Laura Münkler, 'Art. 93 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (65th edn, C.H. Beck March 2026) para 19. Vidal Pérez (n 1) 357-58.

[12] In the case that the committee doesn't recommend a candidate to the voting body within two months after the end of the term of a Justice, the committee is obligated to call upon the court to present candidates it considers suitable (section 7a paragraph 1 BVerfGG). The Justices of both chambers vote in the *Plenum* on whom to present to the committee (section 7a paragraph 2 BVerfGG, sections 56 and 57 GO-BVerfG). The suggestions are not binding but the Bundestag must confirm election of new Justices no later than three months after a recommendation from the court. The measure was implemented in 2024 to strengthen the resilience of the BVerfG. This happened at the beginning of 2025 when the BVerfG suggested Günther Spinner as the successor of Josef Christ, see Maximilian Amos, 'Nun macht es das BVerfG eben selbst' (*beck-aktuell*, 22 May 2026) <https://www.beck-aktuell.de/node/26186> accessed 15 May 2026.

[13] The *BVerfG* deemed this process constitutional in a 2011 ruling: BVerfG, NVwZ 2012, 967 paras 9 ff.

[14] Lepsius (n 4).

[15] In the case that one of the two bodies is unable to collect the votes for a group of candidates within a certain timeframe, the other body may instead vote on the candidates and thereby ensure that the BVerfG remains functional (Article 93 section 2 sentence 3 GG). See BT-Drs 20/12977, 5, 7-8.; Morgenthaler and Münkler (n 11) para 20.

[16] See also Article 51 paragraph 2 GG; Hans Lechner and Rüdiger Zuck, *Bundesverfassungsgerichtsgesetz Kommentar* (8th edn, C.H. Beck 2019) section 7.

[17] Morgenthaler and Münkler (n 11) para 19.

*Bundestag*.[18] As membership in the committee is already based on the composition of the *Bundestag*, the second vote only serves to make the election more visible to the public. In keeping with this, the vote is usually cast among party lines as per the agreements found in the committee and less in keeping with the personal opinion of the individual members of the *Bundestag* or the representatives of the federal states in the *Bundesrat*.[19] It is not meant to be a matter of conscience and personal believes.[20] The *Bundesverfassungsgericht's* independence of political sway is rather meant to be reflected in a clean, straightforward process based on consensus across party lines.[21] Additionally, the alternating vote in the *Bundesrat* integrates a structural element of the federal government into the process in keeping with the basic division of power in the *Grundgesetz*.[22]

### III. Conclusion: Swearing in

After their confirmation through either the *Bundestag* or the *Bundesrat* the *Bundespräsident*, i.e. the formal head of the German state, discharges the incumbent Justices and appoints the incoming Justices (section 10 BVerfGG). According to section 11 BVerfGG the Justices swear the following oath: "I swear that I shall, as an impartial judge, at all times faithfully observe the Basic Law of the Federal Republic of Germany and that I shall faithfully perform my judicial duties towards everyone. So help me God." The reference to God may be replaced with a different religious declaration or left out entirely (section 11 paragraphs 2 and 3 BVerfGG).

This concludes the process of the election of the Federal Constitutional Court Judges. With the process in mind, it is possible to understand at which critical point the election derailed in 2025 and what caused calls to reform the process.[23]

## B. The case of Frauke Brosius-Gersdorf

At the center of the dispute was Frauke Brosius-Gersdorf, a professor of constitutional law from Potsdam University nominated by the SPD to succeed Justice Doris König. She was meant to be elected together with Günter Spinner and Ann-Katrin Kaufhold. Günter

[18] Walter (n 8) para 231; Steffen Detterbeck, 'Art. 94 GG' in Christian von Coelln and Thomas Mann (eds), *Sachs Grundgesetz* (10th edn, C.H. Beck 2024) para 2; Lepsius (n 5).

[19] Lepsius (n 4).

[20] ibid.

[21] Joachim Behnke, 'Der Krug geht so lange zum Brunnen, bis er bricht: Die gescheiterte Richterwahl von Brosius-Gersdorf und die politische Kultur' (2025) 61 Recht und Politik 345, 348.

[22] Detterbeck (n 18) para 2; Morgenthaler and Münkler (n 11) para 17.

[23] Redaktion beck-aktuell, 'Justizministerin für Konsequenzen aus Fall Brosius-Gersdorf' (*beck-aktuell*, 8 May 2025) (<https://www.beck-aktuell.de/node/22576> accessed 10 May 2026.

Spinner, who had been nominated by the *Bundesverfassungsgericht* pursuant to section 7a BVerfGG (also a novelty to ensure the functioning of the court), was to replace a CDU nominated Justice. Ann-Kathrin Kaufhold had been nominated by the SPD just like Brosius-Gersdorf. All three potential Justices passed the vote in the Justice Election Committee. As it was the turn of the *Bundestag* to confirm the selection, a vote on the matter was scheduled for early July 2025.

In the days leading up to the vote, opposition emerged within the CDU/CSU bloc in the *Bundestag*. Some members of the party had concerns regarding Brosius-Gersdorf's position on reproductive rights.[24] The strict framework within which abortions are compatible with the guarantee of human dignity in Article 1 paragraph 1 GG has been developed by the *Bundesverfassungsgericht* in multiple rulings.[25] In 2024, Brosius-Gersdorf was part of a Commission for Reproductive Self-Determination and Reproductive Medicine which discussed, amongst other things, a future regulation of abortion without criminalization.[26] Conservative and new right wing media outlets picked up on the issue.

What followed was a political and media campaign against the nominee. Brosius-Gersdorf's academic positions, particularly on reproductive rights and constitutional interpretation, were framed as evidence of ideological bias. More than 300 legal scholars came to her defense and opposed the way Brosius-Gersdorf and her academic opinions had been treated,[27] illustrating that she and her academic positions were not isolated or considered extremist in the field. However, positions that were and are part of the scholarly debate of the *Grundgesetz* were recast as disqualifying activism by some outlets and public figures.[28] Brosius-Gersdorf herself pointed out her positions also mostly aligned with the goals of the coalition agreement of the current CDU/CSU-SPD government.[29]

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[24] Redaktion beck-aktuell, 'Brosius-Gersdorf: In der Union umstrittene Juristin' (*beck aktuell*, 7 July 2025) <https://beck-online.beck.de/Bcid/Y-300-Z-becklink-N-2034816> accessed 2 June 2026.

[25] BVerfGE 39, 1 (judgement from 1975); BVerfGE 88, 203 (judgement from 1993); BVerfGE 98, 265 (judgement from 1998).

[26] Currently section 218 StGB. For the report of the commission see Kommission zur reproduktiven Selbstbestimmung und Fortpflanzungsmedizin (April 2024) <https://www.bmbfsfj.bund.de/resource/blob/238402/c47cae58b5cd2f68ffbd6e4e988f920d/bericht-kommission-zur-reproduktiven-selbstbestimmung-und-fortpflanzungsmedizin-data.pdf> accessed 2 June 2026.

[27] Verfassungsblog, 'Stellungnahme zur Causa „Frauke Brosius-Gersdorf"' (*Verfassungsblog*, 14 July 2025) <https://verfassungsblog.de/stellungnahme-zur-causa-frauke-brosius-gersdorf/> accessed 2 June 2026.

[28] Felix Perrefort, 'Richterkandidatin Frauke Brosius-Gersdorf: Warum ihre Abtreibungsposition noch radikaler ist als gedacht' (*NIUS*, 17 July 2025) <https://nius.de/politik/frauke-brosius-gersdorf-abtreibungsposition-noch> accessed 2 June 2026; Christian Rudolf and Lukas Steinwandter, 'Wird diese Abtreibungs-Befürworterin Vizepräsidentin des Bundesverfassungsgerichts?' (*Corrigenda*, 2 July 2025) <https://www.corrigenda.online/leben/frauke-brosius-gersdorf-wird-diese-abtreibungs-befuerworterin-vizepraesidentin-des> accessed 2 June 2026.

[29] See Vidal Pérez (n 1) 363 for further references.

It is worth to remember that, at this point in the debate, Brosius-Gersdorf had already been confirmed by the committee with CDU, SPD and The Left votes. The initial concerns by members of the CDU came from members of the *Bundestag* who had not been part of the committee. The widespread – and scrutinizing – public attention came only before the confirmation of the vote in the *Bundestag*. Because the doubt from the CDU emerged so late in the process, the CDU party leaders, especially the parliamentary leader Jens Spahn, also received criticism for failing to moderate the process among the members.[30] The debate further escalated when Brosius-Gersdorf was accused of plagiarizing her dissertation. The accusations regarding her dissertation did not hold up, but her reputation had been damaged substantially in the debate.[31]

Once it became clear that the agreement on the appointments had broken down, the parliamentary parties (except for the AfD) agreed to cancel the vote rather than risking an open failure in the *Bundestag*.[32] This itself was a novelty as the recommendations of the committee had up to this point always been executed.[33]

What followed where intense discussions whether Brosius-Gersdorf should withdraw her candidacy amidst the criticism or if the parties should continue to support her to show that their decisions couldn't be swayed by media campaigns.[34] Eventually, the other SPD-backed candidate, Ann-Katrin Kaufhold also came under fire for supposed extremists positions.[35] Finally, it can be noted, that – amongst other factors – the gender of the candidates seemed to have an influence on the controversy as the female candidates' positions were scrutinized while the third candidate, Günter Spinner, received almost no news coverage.[36]

In yet another novelty, Brosius Gersdorf attended a popular political talk show moderated by *Marcus Lanz* in July 2025 to talk about her understanding of the *Grundgesetz*.[37]

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[30] Tagesschau, 'Gescheiterte Richterwahl: Spahn räumt erstmals seine Mitverantwortung ein' (*Tagesschau*, 14 July 2025) <https://www.tagesschau.de/inland/innenpolitik/spahn-richterwahl-100.html> accessed 2 June 2026.

[31] Maximilian Amos, 'Brosius-Gersdorf veröffentlicht Gutachten: Anwälte sehen Plagiatsvorwurf widerlegt' (*beck-aktuell*, 16 July 2025) <https://beck-online.beck.de/Bcid/Y-300-Z-becklink-N-2034938> accessed 2 June 2026.

[32] Redaktion beck-aktuell, 'Bundestag verschiebt Wahlen von Verfassungsrichtern' (*beck-aktuell*, 11 July 2025) <https://www.beck-aktuell.de/node/23911> accessed 10 May 2026.

[33] Vidal Pérez (n 1) 365.

[34] Redaktion beck-aktuell, 'Umfrage: Mehrheit gegen Rückzug von Brosius-Gersdorf' (*beck-aktuell*, 21 July 2025) <https://beck-online.beck.de/Bcid/Y-300-Z-becklink-N-2034978> accessed 2 June 2026.

[35] Gerhard Strate, ‚Ökologische Transformation des Grundgesetzes' (*Cicero*, 29 July 2025) <https://www.cicero.de/innenpolitik/richterkandidatin-ann-katrin-kaufhold-okologische-transformation-des-grundgesetzes> accessed 2 June 2026; Christian Rath, 'Rechtsaußen nehmen Ann-Katrin Kaufhold ins Visier' (*TAZ*, 20 July 2025) <https://taz.de/Streit-um-Verfassungsgerichtsbesetzung/!6098652/> accessed 2 June 2026.

[36] Redaktion beck-aktuell, '"Ein ganzes Stück Frauenfeindlichkeit"' (*beck-aktuell*, 30 April 2026) <https://www.beck-aktuell.de/node/197341> accessed 10 May 2026.

[37] Broadcast from 15 July 2025, https://www.zdf.de/video/talk/markus-lanz-114/markus-lanz-vom-15-juli-2025-100.

However, the discussions did not subside and in August 2025, Brosius-Gersdorf withdrew her candidacy.[38] The SPD proposed Sigrid Emmeneger, previously a Judge at the Federal Administrative Court, as a new candidate. Finally, in September after eleven weeks of conflict, the *Bundestag* voted in favour of the future Justices Emmeneger, Kaufhold, and Spinner.[39] In October 2025, the three Justices were appointed by *Bundespräsident* Steinmeier.[40]

Throughout the affair, what used to be – as shown in the first section of this article – a carefully balanced but straightforward appointment process turned into a partisan confrontation. The discussion shifted first to intense criticism of the candidates then to questions of ideology, legitimacy, and the role of constitutional judges in democratic processes. It can be said – perhaps cynically – that the vote in the *Bundestag* did have the desired effect of more public attention. However, it also showed that the act of electing Justices for a body as central to the state as the *Bundesverfassungsgericht* is extremely liable for instrumentalization.[41] Furthermore, it became evident that some of the measures intended to protect the court from extremists turned out to cause damage to its public image.

## C. The Bundesverfassungsgericht's role

Given the intensity and emotionality of the debates around the election of Federal Constitutional Court Justices it is worth to look at what exactly the court does and what its role is within the German state.

The *Grundgesetz* has recently been amended to spell out the role of the *Bundesverfassungsgericht* more explicitly.[42] Changes to the *Grundgesetz* require a two-thirds majority in the *Bundestag* (Article 79 paragraph 2 GG), thus making it harder to make changes to the nature of the court. Article 93 paragraph 1 GG now specifies that the *Bundesverfassungsgericht* is independent of all other constitutional bodies such as the *Bundestag,* mirroring section 1 BVerfGG.[43] In its core, the role of the court with its

[38] zdf heute, 'Brosius-Gersdorf verzichtet auf Kandidatur' (*zdf heute*, 7 August 2025) <https://www.zdfheute.de/politik/deutschland/brosius-gersdorf-rueckzug-richterwahl-100.html> accessed 2 June 2026; Redaktion beck-aktuell, 'Richterkandidatin Brosius-Gersdorf zieht sich zurück' (*beck-aktuell*, 7 August 2025) <https://www.beck-aktuell.de/node/22641> accessed 2 June 2026.

[39] Anne-Beatrice Clasmann and Michael Fischer, 'Bundestag bestätigt alle drei Kandidaten fürs BVerfG' (*beck-aktuell*, 25 September 2025<https://www.beck-aktuell.de/node/20131> accessed 10 May 2026.

[40] Redaktion beck-aktuell, 'Steinmeier ernennt neue Verfassungsrichter' (*beck-aktuell*, 7 October 2025) <https://www.beck-aktuell.de/node/19566> accessed 2 June 2026.

[41] Walter (n 8) para 232; Angelika Nußberger, 'Justiz – die „sensible Gewalt"' (2020) 73 NJW 3294 (para 9).

[42] Proclamation in BGBl. 2024 I Nr. 439 v. 27.12.2024.

[43] Article 93 paragraphs 2 and 3 GG further regulate the division of the court into two Senates, as well as the mode of election and provisions in case the election is delayed for extended periods. Dieter Hömig, '§ 3 BVerfGG' in Schmidt-Bleibtreu and others (n 6) para 28; Steffen Detterbeck, 'Art. 93 GG' in von Coelln and Mann (n 18) para 6.

independence is to determine whether actions of the Government and all its institutions are compatible with the provisions of the *Grundgesetz*. It is not simply the court of final appeal but is limited in its responsibility to constitutional matters. In that sense it is a central element of the rule of law. It is the last resort to fend off governmental overreach as its decisions are binding for all other bodies of the state (section 31 paragraph 1 BVerfGG).[44] In accordance with these responsibilities it exercises the supreme authority of the state and has the 'final say' over the governance of the German Federal Republic.[45]

More specifically Article 94 GG and section 13 BVerfGG list the specific case types the court can be petitioned to decide.[46] The most prominent is the individual constitutional complaint with which anyone can accuse a government body of violating one's constitutional rights (Article 94 paragraph 1 Nr. 4a GG, section 13 number 8a, sections 90 and following BVerfGG). Perhaps even more importantly it can be petitioned by the federal government, a state government or a quarter of the members of the *Bundestag* to decide whether a law is constitutional (Article 94 paragraph 1 Nr. 2 GG, section 13 Nr. 6, sections 76 and following BVerfGG). Should the court find a law to be unconstitutional it has the power to either pronounce the law void or order the government to remake the content of the law in keeping with the constitution (section 78 BVerfGG). It can also grant preliminary legal protection in urgent cases (§ 32 BVerfGG).[47] Additionally judges from other courts can petition the *Bundesverfassungsgericht* if they believe a law relevant to deciding on of their cases to be unconstitutional (Article 100 paragraph 1 GG, section 13 number 11, sections 80 and following BVerfGG). The court also decides in conflicts between the federal government and a state (Article 93 paragraph 1 number 3 GG, section 13 number 7, sections 68 and following BVerfGG). In perhaps one of the most delicate types of case the court can rule on the banning of parties if it deems them a threat to the constitutional order (Article 21 paragraph 2 GG, section 13 number 2, sections 43 and following BVerfGG).

As evident from this small excerpt from the defined list, the court holds tremendous power within the German state.[48] It operates on the fine line between constitutional interpretation and political influence. However, one of the differences between political actors and the court is, that political actors can be held responsible – by the *Bundesverfassungsgericht* – but the *Bundesverfassungsgericht* itself does not have a

[44] Nußberger (n 41) para 23.
[45] Detterbeck (n 43) para 7.
[46] Gerd Morgenthaler and Laura Münkler, 'Art. 94 GG' in Epping and Hillgruber (n 11) para 1.
[47] ibid para 4.
[48] For a more detailed list see Morgenthaler and Münkler (n 46) paras 4, 79, 82.

corrective mechanism.[49] It is in many ways the last resort of the rule of law. Its Justices carry the responsibility of having no one above them but the text of the *Grundgesetz*, according to which the must decide.

## D. Conclusion

What the Bundesverfassungsgericht decides can have lasting impact – on individuals petitioning the court, on the fate of the political parties, the direction in which both Germany and the European Union are headed. The analysis has shown the carefully crafted balance of the election process of the Justices with its adaptions in recent years as well as the speed at with the process can derail and damage the reputation of candidates, parties, and the court itself despite these adjustments. It became evident that the process can no longer rely on the informal consensus between the central parties.[50] However, fostering a non-partisan public discussion of the candidates could still unlock the potential of the vote in the *Bundestag* and the *Bundesrat* and strengthen the courts legitimacy in the public eye.

To connect the election process with the actual role and influence of the *Bundesverfassungsgericht* enables a clearer understanding of the deep emotions which have shaped the debate around the election process of the Justices in 2025. It serves as a reminder that while the election process might not be perfect now, it is worth to continue improving it and to continue the conversation on what the role of the *Bundesverfassungsgericht* and its Justices entails.

What becomes evident is, that the independence of courts is not guaranteed by constitutional text alone. It depends on the willingness of political actors to achieve non-partisan consensus and to preserve institutions whose authority ultimately constrains their own power. In that sense, the – usually – quiet procedures governing judicial appointments are among the most important safeguards of democratic constitutionalism.

[49] Nußberger (n 41) para 30
[50] Vidal Pérez (n 1) 365-66.

# *Articles*

## Maternity Leave after miscarriages – a review of the latest update to the German Maternity Protection Act

*Lea Leidig*[*]

**Abstract**

*On 30 January 2025, the German Bundestag amended the Maternity Protection Act (Mutterschutzgesetz) to extend maternity leave to miscarriages after the 12th week of pregnancy. This article analyses the reform against the historical and constitutional background of German maternity protection, including the Federal Constitutional Court's recent obiter dictum on the term "delivery". At its centre lies the newly introduced staggered maternity leave of two, six or eight weeks, depending on the stage of pregnancy, together with the redefinition of "delivery" in section 2 paragraph 6, which treats miscarriages after the 12th week as deliveries while declining to define "live birth" and "stillbirth". The article argues that, although the reform offers genuine relief in most cases, the legislator left several questions unresolved: the still-undefined statutory terms; the precise moment a miscarriage is deemed to occur, which sits uneasily with the case of a "missed miscarriage"; the effect on adjacent provisions once maternity leave ends; the uncertain treatment of medically indicated abortions; and the deliberate exclusion of women who miscarry before the 12th week. It concludes that it will fall to the courts to fill these remaining gaps.*

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## A. Introduction

On the 30th of January 2025, the German Bundestag unanimously passed an amendment to the Maternity Protection Act. The goal was simple: To extend the existing Maternity Leave to miscarriages after the 12th week of pregnancy.

After the result was proclaimed by the vice president of the parliament, Aydan Özoğuz, the Bundestag broke out in standing ovations. Aydan Özoğuz used the moment to address a visitor at the gallery of the Bundestag: *"Dear Ms Sagorski, on behalf of the whole House, I would like to thank you for your initiative. Many women will benefit from the fact that you had the courage to launch this initiative. Thank you very much!"*[1]

This rather unusual shoutout to a non-member of parliament is explained by the also rather unusual development process of the amendment just passed. Natascha Sigorski, an author, experienced a miscarriage herself and was sent back to work the next day by her gynaecologist. She wrote about this in her book "Every 3rd woman". The title refers to the probability of experiencing a miscarriage. After having to work through the lack of maternity leave herself, she saw the need for a change of the Maternity Protection Act. She initiated a petition and campaigned for signatures in German media.[2] The Campaign reached over 50.000 signatures and was heard by the Committee on Family Affairs of the Bundestag.[3] Only a small number of petitions is heard by a committee let alone the Bundestag itself.[4] The Bundestag does not keep a record of the number of petitions which are enacted into law.

Considering this very special legislative process the amendment might be seen as a sweeping success. An affected person found a gap in the law, proposed an easy solution and this solution was then passed into law. But how does the new maternity leave after

[1] Plenary Protocol 20/210, 27390.

[2] Luisa Faust, '"Jede dritte Frau erlebt eine Fehlgeburt"' (*taz*, 31 March 2025) <https://taz.de/Aktivistin-zum-gestaffelten-Mutterschutz/!6063361/> accessed 13 May 2026.

[3] Verena Töpper, 'Sie wurde zu der Lobbyistin, die sie gesucht hatte' (*Der Spiegel*, 13 December 2025), <https://www.spiegel.de/familie/natascha-sagorski-und-ihr-kampf-fuer-mutterschutz-sie-wurde-zu-der-lobbyistin-die-sie-gesucht-hatte-a-fe7de63c-99b3-422c-ba08-2a6233a77a22> accessed 13 May 2026.

[4] Press release '9.260 Petitionen erreichten den Ausschuss im Jahr 2024' (*Bundestag*, 15 October 2025). <https://www.bundestag.de/presse/hib/kurzmeldungen-1116464> accessed 13 May 2026.

miscarriages actually work? And are the regulations proposed in the amendment really an easy fix or are there still gaps left?

## B. The Maternity Protection Act

### I. Short History

Protection rights for working mothers exist almost as long as there is a unified legislature for all of Germany. The Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*) prohibited the employment of mothers for three weeks after giving birth as early as 1878.[5] After Chancellor Bismarck established the first social security program in Germany in 1883, women could be compensated for their maternity leave through their health insurance.[6]

Throughout the next centuries, mother's rights were broadened. The ban on employment after birth extended and a right to refuse to work before the expected birth was added in 1927 in the Act on the Employment of Women Before and After Childbirth (*Gesetz über die Beschäftigung vor und nach der Niederkunft*). This was the first time Germany codified Maternity Protection in a single law.[7] The next big step in legislation happened in the young Federal Republic of Germany in 1952. with the Maternity Protection Act (*Mutterschutzgesetz*). This act is the basis for the Maternity Protection Act that applies today. [8]

One important historical change that should be emphasised here is the source of compensation for women who are banned from work. In the beginning of Maternity Protection legislature this compensation was an insurance benefit, paid for by the health insurance. Now the compensation for maternity leave is an obligation for the employer (Maternity Protection Act ss 18 - 20). The employer can be reimbursed by the health insurance, Act on the Reimbursement of Employers' Expenditure on Continued Payment of Remuneration (*Gesetz über den Ausgleich der Arbeitgeberaufwendungen für Entgeltfortzahlung*) s 2 para 2. Thus, the social insurance community bears the financial burden of a pregnancy. But the important fact remains: A mother is paid by her employer during maternity leave, not by a health insurance.

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[5] Yasmina Gutensohn, 'Einleitung' in Wiebke Brose, Stephan Weth and Annette Volk (eds), *Mutterschutzgesetz und Bundeselterngeld- und Elternzeitgesetz Kommentar* (10th edn, C.H. Beck 2025) para 1; Georg Pepping, 'Vorbemerkung zu §§ 1 und 2' in Friedbert Rancke and Georg Pepping (eds*), Mutterschutz Elterngeld Elternzeit Handkommentar* (6th edn, Nomos 2022) para 1.

[6] Gutensohn (n 5) para 1.

[7] ibid para 2.

[8] Pepping, 'Vorbemerkung zu §§ 1 und 2' (n 5) para 1.

## II. Constitutional perspective

Maternity Protection is one of the fundamental rights granted by the Basic Law (*Grundgesetz*) as well as the Weimar Constitution (*Weimarer Reichsverfassung*).

Art 119 para 3 Weimar Constitution: *"Mothers are entitled to the protection and care of the state."*

Art 6 para 4 Basic Law: *"Every mother is entitled to the protection and care of the community."*

The term "mother" is not interpreted in the usual way here. According to the Merriam Webster Dictionary, a mother is a female parent.[9] However, only mothers currently pregnant, in the postpartum period or breastfeeding are protected by these constitutional norms.[10] Beyond these time periods, mothers have no more parental rights than fathers.[11]

Whether women who had a miscarriage are mothers in the constitutional sense is not the topic of a broad scholarly discourse or Constitutional Court rulings. Some argued that Art 6 para 4 GG protects the mother. Therefore, it does not matter whether the delivered child is alive or not; the woman is a mother and entitled to protection.[12]

One distinction between the Basic Law and the Weimar Constitution is the protector. The Basic Law guarantees the protection of the community, unlike the Weimar Constitution, which guaranteed the protection of the state.[13] The communal approach of the German Constitution is why the Federal Constitutional Court ruled that the compensation of mothers in the employment prohibition periods could be imposed upon employers.[14]

Ms. Sagorski and several other mothers who had miscarried tried to bring the issue before the Federal Constitutional Court. But their complaint was rejected as inadmissible. This is because they refrained from bringing their cases before lower courts and therefore did not the need the judicial protection of the Federal Constitutional Court. Nevertheless, the Federal Constitutional Court commented in a rare obiter dictum. Most cases are simply rejected as inadmissible without an explanation.[15]

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[9] Merriam-Webster, 'Mother' <https://www.merriam-webster.com/dictionary/mother> accessed 18 May 2026.

[10] Frauke Brosius-Gersdorf, 'Art. 6 [Ehe und Familie, Elternrecht, Wächteramt, Trennungsamt, Mutterschutz, uneheliche Kinder]' in Frauke Brosius-Gersdorf (ed), *Dreier Grundgesetz Kommentar Band 1* (4th edn, Mohr Siebeck 2023) paras 445–48.

[11] ibid para 447.

[12] ibid para 446; Peter Badura, 'GG Art 6' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar* (109th edn, C. H. Beck 2026) para 154.

[13] Badura, 'GG Art 6' (n 12) para 152.

[14] BVerfGE 109, 64, 87.

[15] Sarah Leclercq and Felix W Zimmermann, 'Geringste Erfolgsquote seit 24 Jahren' <https://www.lto.de/recht/justiz/j/bverfg-2021-begruendungen-nichtannahmen-jahrestatistik-2021> accessed 13 May 2026.

The court argued that the term "delivery" used by the Maternity Protection Act is an undefined legal term and therefore up to interpretation. It explained that the interpretation by lower courts so far did not fit the protection purpose of the Maternity Protection Act.[16] They had based their interpretation on the Civil Status Ordinance (P*ersonenstandsverordnung*). This ordinance defines who is entered in the Civil Status registry. Stillborn children are registered, but children who were miscarried are not (Civil Status Ordinance s 31 para 2 sent 29. The character of the Civil Status Ordinance is truly administrative.[17] It is not built to guarantee health protection, so it is understandable why the Federal Constitutional Court sees it as unfit to determine maternity protection. As the interpretation used this far was deemed unfit, the Federal Constitutional Court suggested that lower courts should find a new one. It suggested that a newly found interpretation of the term delivery could be open to include miscarriages.[18]

## III. Structure and important regulations of the Maternity Protection Act

The Maternity Protection Act sets out its objectives in its first part, in s 1 para 1: The first objective is to protect the health of woman and child during a pregnancy, in the postpartum period and while breastfeeding. The second objective is to enable women in those phases to partake in a normal working life and the third objective is to prevent discrimination in those phases.

The second part (ss 3 – 16) regulates individual and workplace health protection. Women are banned from working six weeks before the expected date of delivery and eight weeks after giving birth (s 3). Before maternity leave, occupational and medical employment bans are the most important tool for health protection. Employers cannot employ pregnant women if the workplace endangers the mother's or the child's health (ss 9 – 13). Examples for a typically dangerous workplace leading to an occupational employment ban are an airplane, due to increased radiation, or a kindergarten, due to the heightened risk of infection. A medical employment ban can be issued by a doctor if the woman has a pregnancy related illness that makes it impossible for her to work (s 16).

While health protection clearly is the main objective, the Act aims to let women participate in working life as long as possible. Before an employer can issue an occupational employment ban, he has to review whether the workplace can be adjusted to be safer or if the woman can be transferred to a less dangerous occupation. Banning a woman from employment is the ultima ratio (s 13).

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[16] BVerfG NZA 2024, 1564, 1565.
[17] ibid.
[18] ibid 1564.

The third part only consists of one section. S 17 grants pregnant women protection against dismissal for up to four months after the delivery. Employers are, however, not prohibited from dismissing pregnant women and mothers at all. They must obtain a permission by the Maternity Protection Authority. The authority will give the permission if it is certain that the dismissal is not caused by the pregnancy. A typical case for a permit would be a whole company closing down.[19]

The fourth part (ss 18 – 25) regulates the compensation during times of work prohibition. The goal of those regulations is to grant a woman the same financial resources she would have had without being pregnant.[20] There is one noteworthy distinction between an employment ban due to a dangerous workplace or individual complications in the pregnancy and the 14 weeks around the delivery ("maternal leave"). During employment bans before the maternal leave, the employer must pay the pregnant woman her gross salary (s 18). In that way, the wage is taxed and social insurance contributions are paid. During the maternal leave an employer is only required to pay the net salary, minus a contribution by the health insurance amounting to EUR 13,00 per day. While on maternal leave a woman does not pay taxes and is insured without contributions, Income Tax Act (*Einkommensteuergesetz*) s 3 lit 1d and Code of Social Law IV (*Viertes Sozialgesetzbuch*) s 15.

This needs to be read in conjunction with s 2 of the Act on the Reimbursement of Employers' Expenditure on Continued Payment of Remuneration. While the employer is the one who continuously pays a woman her salary, he has the right to be reimbursed by the health insurance.

The last parts (ss 26 – 34) regulate the public and criminal law aspects of maternity protection. They specify which authorities are responsible for maternity protection and set out fines and penalties for breaches of the law.

## IV. Protection after miscarriages before the amendment

At first one needs to understand what a miscarriage is in the sense of the Maternity Protection Act. The word "miscarriage" was first introduced to the Maternity Protection Act with an amendment in 2017. With this amendment the dismissal ban was expanded to apply to miscarriages after the 12th week of the pregnancy. A definition of the word miscarriage was not provided in this amendment. Therefore, it needed to be interpreted.

The labour courts, which decided most maternity protection related cases, used the Civil

[19] Monika Schlachter-Voll and Daniel Ulber, 'MuSchG § 17 Kündigungsverbot' in Rudi Müller-Glöge, Christian Rolfs, Inken Gallner and Ingrid Schmidt (eds) *Erfurter Kommentar zum Arbeitsrecht* (26th edn, C. H. Beck 2026) para 21.

[20] Annette Volk, 'MuSchG § 18 Mutterschutzlohn' in Brose, Weth and Volk (n 5) para 2.

Status Ordinance for guidance.[21] The Civil Status Ordinance set out how the civil status register is to be maintained. In s 31, it defines the terms "live birth", "stillbirth" and "miscarriage". A live birth has taken place when after the separation from the womb the child had a heartbeat, the umbilical cord pulsed or the child breathed (Civil Status Ordinance s 31 para 1). A stillbirth has taken place when none of the before mentioned life signs showed, but the foetus separated from the womb after the 24th week or weighed over 500 grams at the time of the separation (Civil Status Ordinance s 31 para 2 sent 1). Every other separation of foetus or embryo[22] and womb is a miscarriage (Civil Status Ordinance s 31 para 2 sent 1). Miscarried children are not registered in the civil status register (Civil Status Ordinance s 31 para 2 sent 2). Labour courts interpreted the term "delivery" in the following as a live birth or stillbirth in the sense of the Civil Status Ordinance.[23]

Maternity Leave before that point was not deemed necessary as there was the possibility to take sick leave. In addition, the need for recovery leave was seen as needless, as the physical changes during the pregnancy are not progressed as far.[24] German employees get up to six weeks of sick leave paid by their employer per year, s 3 Continued Renumeration Act (*Entgeltfortzahlungsgesetz*). After that health insurance pays them for up to 78 weeks, but only 70% of the gross salary, Code of Social Law V (*Fünftes Sozialgesetzbuch*) ss 47, 48.

## C. The amendment

### I. Changes to the Maternity Protection Act

The first change was made in the first segment. S 2 para 6 now defines the term "delivery" as a live birth or stillbirth. But it also states that 'regulations about deliveries should be applied to miscarriages after the 12th weeks as far as there is not a deviating law.' With this solution the lawmaker reached a compromise between the previous labour court rulings and the need to integrate miscarriages into this maternity protection system.

One could criticize that miscarriages seem to be second class births after this definition.[25] The Constitutional Court's approach to interpret miscarriages as deliveries is not possible

[21] BAG NZA 2006, 994.

[22] In German the term "*Leibesfrucht*" is used to describe the unborn organism in a neutral way. In the English language, two terms are used as a neutral description: "embryo" until the 9th week and "fetus" or "foetus" after that.

[23] ibid.

[24] Katharina Dahm, 'MuSchG § 3 Schutzfristen vor und nach der Entbindung' in Christian Rolfs, Richard Giesen, Miriam Meßling and Peter Udsching (eds), *BeckOK Arbeitsrecht* (79th edn, C.H. Beck 2026) para 38.

[25] Patrick Aligbe, 'MuSchG' in Michael Winkelmüller, Sebastian Felz and Marcus Hussing (eds) *BeckOK Arbeitsschutzrecht* (26th edn, C.H. Beck 2026) para 55.

under this amendment. Miscarriages are now explicitly not deliveries. But one could also say that this is merely a semantic issue. The important thing is that miscarriages are treated equally and receive the same kind of protection. At least after the 12th week.

Two things that s 2 para 6 does not define are the terms "live birth" and "stillbirth". This suggests that the terms should still be interpreted in accordance with the Civil Status Ordinance.[26] While this may be controversial considering the very different subject matters and the Constitutional Court's criticism of this interpretation, it ensures legal consistency.

The big change the amendment makes is the maternity leave in s 3 para 5. It introduces a form of staggered maternity leave for miscarriages after the 12th week:

Week 13 – 16: Two weeks

Week 17 – 19: Six weeks

From week 20: Eight weeks

The distinction between stillbirth and miscarriage does not matter anymore. In the sense of the Civil Status Ordinance a separation of foetus and womb after the 20th week could both be a miscarriage or a stillbirth. Both cases are now protected by eight weeks of maternity leave. The question if miscarriages that occur before the 20th week could be defined as a stillbirth under the "above 500g rule", is not likely of practical relevancy. A foetus in the womb typically weighs up to 250g in the 19th week.

In the same effort, the Bundestag reformed the Maternity Protection and Parental Leave Ordinance (*Verordnung über den Mutterschutz für Beamtinnen des Bundes und die Elternzeit für Beamtinnen und Beamte des Bundes*), which regulates maternity protections for federal civil servants and the Maternity Protection Ordinance for Soldiers (*Verordnung über den Mutterschutz für Soldatinnen*). In that way federal civil servants and soldiers also receive maternity leave after miscarriages.

## II. Considerations in the explanatory memoranda

Before the act was passed, there were two draft bills with two different explanatory memoranda: One from the governing parties (SPD, Die Grünen, FDP)[27] and one from an opposition parties (CDU, CSU).[28] The only distinction in the text of the act is the start time of the parental leave. The governing parties proposed maternal leaves after miscarriages after the 14th week, the opposition party after the 12th week. In the end the oppositions

[26] ibid para 58.
[27] BT Drs 20/14241.
[28] BT Drs 20/14321.

draft was passed unanimously into law, after it was favoured by the committee on family affairs. But as the difference between the two drafts lies only in two weeks, both explanatory memoranda can be used to explain the considerations behind the amendment.

Both state that the employees' rights in case of sickness are not fit for the situation of a woman after a miscarriage.[29] The governing parties memorandum specifically says: 'J*ust as pregnancy should not be regarded as an illness, the premature termination of an (advanced) pregnancy should not, as a matter of principle, be treated as an illness*.'[30] They also stress that a change from sick leave to maternity leave would mean a change in process. Women would not be required to actively seek out a doctor who would give them a medical sickness certificate, but would automatically be in maternity leave, as long as they inform their employer.[31]

Both memoranda emphasise that, after the first trimester, a stillbirth or miscarriage have a heavier impact than in the first trimester. After the first trimester a pregnancy is considered "safe", as the chance for a miscarriage shrinks drastically. The connection between mother and child strengthens and the psychological effect of a miscarriage would weigh harder. [32] From the 17th week onward, a miscarriage is typically accompanied by contractions. The woman experiences the miscarriage like active labour.[33]

It is interesting to note that the governing parties mention the estimated number of miscarriages that would be affected by the amendment. They estimated about 5.000 miscarriages per year after the 14th week.[34] As the oppositions draft with the start of maternity leave in the 13th week was passed into law, the numbers should be significantly higher. The oppositions draft stated that there is no reliable data on the number of miscarriages.[35]

## III. Open questions

The legislator missed an opportunity to answer several open questions:

[29] ibid 9; BT Drs 20/14241, 2.
[30] BT Drs 20/14241, 2.
[31] BT Drs 20/14321, 9.
[32] ibid.
[33] BT Drs 20/14241, 2.
[34] ibid 11.
[35] BT Drs 20/14321, 10.

### 1. Undefined terms

First, the terms "live birth" and "stillbirth" are still not defined. The explanatory memoranda stress the abandonment of the Civil Status Ordinance definitions but do not introduce own definitions for those terms. This is a negligible issue, as only in the improbable case that a child would be born dead before the 20th pregnancy week and weigh about 500g, the distinction would become relevant.

Second, the time of the miscarriage has not been defined. The time of the miscarriage is significant for employees, employers and also for the health insurance to determine start and end of the maternal leave. The Federal Labour Court ruled that a miscarriage takes place when the embryo or foetus separates from the womb.[36] The case centred around the question how long the ban on dismissal lasted. An application of this rule to the question when maternity leave after miscarriages begins could lead to unwanted results.

Both explanatory memoranda emphasise the psychological damage a woman experiences after losing a foetus in an advanced stage of pregnancy. It was one of the main objectives to establish maternity leave after miscarriages in the first place. The problem here is that psychological shock might set in earlier than the miscarriage, as defined by the Federal Labour Court. There are cases in which a doctor tells a woman that the pregnancy has ended, but the miscarriage process has not yet set in, a missed miscarriage. The woman has to decide whether she wants to await the natural miscarriage or induce it medically.[37] In both cases, there may be a few days between the message that the foetus is not viable anymore and the actual separation of womb and foetus.

If we agree with the Federal Labour Court's ruling, the pregnant woman would be required to work in those days – or obtain a sickness certificate from their doctor. One objective of the amendment was, however, to abandon the need of obtaining such a certificate and protect women automatically. In such a case that objective would be missed.

A situation in which a woman tells her employer that she "just had a miscarriage" and the employer would need to answer, "But is the foetus already separated from your womb?", is not in the interest of any party. A practical solution would be to interpret the time of the miscarriage as the time of receiving the message instead of the separation. In practice, it will be a matter between employer and employee to determine the start and end of maternal leave. As long as the duration of the maternal leave is not shortened, a small shift in beginning and end seems to be bearable.

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[36] BAG NZA 2014, 722, 724.

[37] Miscarriage Association <https://www.miscarriageassociation.org.uk/information/miscarriage/the-physical-process/> accessed 18 May 2026.

## 2. Impact on other Maternity Protection Act Regulations

Another open question is: What will happen after the maternity leave is over? Is the duration of the maternity leave long enough or will a sick leave follow in most cases? S 16 para 2 states that a doctor can impose an employment ban after the delivery if she is not capable of working. As a miscarriage after the 12th week should now be treated like a delivery, this regulation could apply to situations after miscarriages.

## 3. Maternity leave after abortions?

Another issue the Bundestag left untouched is the question whether abortions can be miscarriages or deliveries in the sense of the Maternity Protection Act. This would only concern medically indicated abortions, as other forms of abortion, namely criminally indicated abortions and abortions after a consultation, are only legal until the end of the 12th week, see German Criminal Code s 218a.

The question was subject of a Federal Labour Court ruling before. The court ruled that abortions are only deliveries if the abortion was not executed with the intention of killing the embryo or foetus.[38] In the underlying case, it found that labour was induced without the intention to kill the foetus. The foetus died due to its medical condition. Its death was declared natural.[39]

However, the question is now more urgent than before. Due to the courts' application of the Civil Register Ordinances definition of the term delivery, only abortions that fell under the category stillbirth were even eligible to receive maternity leave under this ruling. But there are way more abortions happening in the miscarriage stage, so the group of affected women broadens.[40]

Some argue that the term delivery should be interpreted to include abortions after the 12th week. The equivalent burden after the loss of a child would require this.[41]

Others see the situation entirely differently in accordance with the Federal Labour Court's 2006 ruling. Abortions that are executed with the intention of killing the foetus should still not be seen as a delivery.[42]

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[38] BAG NZA 2006, 994.

[39] ibid.

[40] Jaqueline Stein, 'Das neue Mutterschaftsrecht – Rechtslage vor und nach der Reform' (2025) 15 NZA 1066, 1068.

[41] ibid 1070; Katharina Dahm, 'MuSchG § 17 Kündigungsverbot' in Rolfs, Giesen, Meßling and Udsching (n 24), para 20; Friederike Malorny, 'MuSchG § 17 Gesetzliches Kündigungsverbot' in Clemens Höpfner, Christian Picker and Felipe Temming (eds) *beck-online.GROSSKOMMENTAR* (C.H. Beck, 1 March 2026) para 61.

[42] Georg Pepping, 'MuSchG § 3 Schutzfristen vor und nach der Entbindung' in Rancke and Pepping (n 5) para 34.

As the legislator missed to regulate the topic of abortions, it will be the courts' task to decide whether abortions in the miscarriage stage are to be treated like deliveries or not. The argument of the equal burden is rather convincing. It should also be taken into consideration that the amendment to the Maternity Protection Act puts the mother even more into the centre of the regulation. Therefore, it should not matter with which intention the foetus separates from her body. The intention does not affect the medical effects of an interrupted pregnancy.[43]

## D. Conclusion

The amendment to the Maternity Protection Act is without a doubt a relief for many women. It will be fitting and helpful in the vast majority of cases.

But there are still open issues and questions. One last group that is still not protected are women who have a miscarriage up until the 12th week. The legislators' explanatory memoranda show clearly that this was deliberate decision. Maternal leave was not deemed necessary in those cases. It is at least ironic that Ms. Sagorski would not have profited personally from the amendment she was the public face of.

[43] Stein (n 40) 1070.

# *Articles*

## The European Energy Union: Between Climate Ambition and Member State Sovereignty

*Hanna Voßen*[*]

**Abstract**

*This paper examines the legal architecture of the European Energy Union, situating it within the enduring tension between the Union's climate ambition and the energy-policy sovereignty retained by its Member States. The author traces the development of a Europe-wide energy policy from its sectoral origins in the ECSC and EURATOM to the explicit energy competence introduced by Article 194 TFEU with the Treaty of Lisbon. The author analyses the triangle of objectives underlying the Energy Union (security of supply, sustainability, and competitiveness) as well as the fragmented competence regime in which it operates, shaped by the principles of conferral, subsidiarity, and proportionality. Particular attention is given to the sovereignty reservation in Article 194 paragraph 2 subparagraph 2 TFEU and to the Union's response to climate change through the Renewable Energy Directive (RED III) and the Governance Regulation. It is shown that, following the abandonment of binding national targets, these instruments rely on 'soft governance' mechanisms whose effectiveness depends on the goodwill of individual Member States. In conclusion, a series of reforms is proposed, including binding procedural participation rights and a closer linkage between the European Structural and Investment Funds and the Governance Regulation.*

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## A. Introduction

Over the past decades, a Europe-wide energy policy has emerged, shaped by economic ambition as well as environmental and social responsibility. What began with the European Coal and Steel Community (ECSC) in 1951 and the European Atomic Energy Community (EURATOM) in 1957 was for decades limited to specific sectors of energy production.

However, the past two decades have redefined the Union's role in addressing energy-related challenges. Central to this transformation is the European Energy Union. The Energy Union is grounded in three overarching objectives: security of energy supply, sustainability, and competitiveness. Together, these objectives reflect the need for economic stability, ecological integrity, and consumer protection across the Union.[1]

Yet, the path to achieving these goals has been far from straightforward. The EU operates within a fragmented competence regime. While Article 194 TFEU provides the Union with a legal basis for energy policy, it simultaneously preserves Member State sovereignty. As per Article 194 paragraph 2 subparagraph 2 TFEU, key aspects such as energy resource exploitation and energy mix choices are still in the hands of the Member States. This sovereignty reservation, combined with the principles of subsidiarity and proportionality, has often hindered the EU's ability to enforce uniform and binding energy measures. The resulting framework reflects both ambition and limitation: a difficult balance between collective European goals and national interests.

At the heart of current European energy policy lies the pressing challenge of climate change. The Paris Agreement is committing the EU to reduce greenhouse gas emissions by at least 40 % until 2030. This is an immense task. While the EU Emissions Trading System remains the principal market-based instrument of Union climate policy, it does not itself prescribe the expansion of renewable energy sources. The Renewable Energy Directive (RED III) and the EU Governance Regulation are the cornerstone mechanisms in the expansion of renewable energy sources. However, these instruments heavily rely on 'soft

[1] European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM (2015) 80 final 2.

governance' mechanisms, such as National Energy and Climate Plans (NECPs) and non-binding recommendations from the Commission.

This raises critical questions towards the Energy Union's future: Can a system that relies on voluntary ambition and national goodwill effectively address the urgency of climate change? How can the EU navigate the tension between Member State sovereignty and its role as a global leader in climate action?

## B. Background of European energy policy

### I. Development of objectives and dimensions in European energy policy

The story of European energy policy begins at the same point in time as EU history itself, namely with the formation of the European Coal and Steel Community (ECSC) in 1951, followed by the European Atomic Energy Community (EURATOM) in 1957. For a long time, European integration was limited to these areas of energy production. The Union only gradually extended its reach across the energy sector, a development that broadened the scope of Union action step by step and culminated in the introduction of an explicit energy competence (Article 194 TFEU) with the Treaty of Lisbon in 2009.

Throughout the last 20 years, a new energy policy has evolved in the Union. However, this evolution has not been without challenges. Member States often have different energy policy approaches due to differing energy dependencies and priorities. For instance, coal-dependent countries such as Poland and others have resisted rapid transitions to renewable energy, chiefly out of concern for the economic and social costs of phasing out a domestic industry on which employment and supply security depend. Conversely, nations like Germany and Denmark have pushed for more ambitious renewable energy targets, prioritizing climate goals with limited domestic fossil resources and strong wind and solar potential. They treat decarbonization not only as an environmental obligation but also as an opportunity to reduce dependence on energy imports.[2]

The first energy market package from 1996/1998 marks the starting point of a Union-wide energy policy.[3] Since then, the EU has pursued the vision of a common European

[2] Forum Energii, *Energy Transition in Poland: Edition 2025* (2025) (coal 56.2% and renewables 29.4% of electricity generation in 2024); Eurostat, 'Electricity from Renewable Sources Reached 47% in 2024' (*Statistics Explained*, 19 March 2025) <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20250319-1> accessed 11 June 2026.

[3] Jörg Gundel and Julius Buckler, 'Das Europäische Energierecht nach dem Erlaß des Clean Energy Package: Eine gelungene Synthese von EU-Klimaschutz- und EU-Binnenmarktrecht?' [2020] GewArch 41, 42; Sabine Schlacke and Michèle Knodt, 'Das Governance-System für die Europäische Energieunion und für den Klimaschutz' [2019] ZUR 404, 405; Mariam Dekanozishvili, *Dynamics of EU Renewable Energy Policy Integration* (Springer 2023) 5; Daniela Winkler, Max Baumgart and Thomas Ackermann, *Europäisches Energierecht* (Nomos 2021) para 1.

energy market, encapsulated in the concept of an Energy Union. The Energy Union defines a triangle of objectives for European Energy policy. It consists of security of energy supply, sustainability and competitiveness.[4] **Security of energy supply** means the secure supply of electricity and gas across the entire Union. This objective is strongly linked to the principle of solidarity among the EU's Member States.[5] When it comes to **sustainability**, the focus is climate protection. A sustainable economy ensures the natural regenerative capacity of its systems. Therefore, sustainable energy policy and European environmental protection go hand in hand.[6] **Competitiveness** completes the triangle of objectives. The economic assumption is that competition leads to the optimal use of scarce resources and stimulates innovation.[7] Together, these key objectives combine economic, ecological and consumer interests.[8] Nevertheless, tensions frequently arise among Member States when attempting to balance these priorities. One example would be the closure of the Strait of Hormuz during the 2026 Iran war. The Strait of Hormuz is a chokepoint for a large share of the world's seaborne oil and LNG. The closure triggered what the International Energy Agency called the largest supply disruption in the history of the global oil market. However, the resulting scramble to secure affordable short-term supply again, favored fossil alternatives and competition for scarce LNG cargoes, which fosters the tension with the climate goal of accelerating the transition to renewable energy.[9]

The objectives of the European Energy Union are further itemized into five dimensions: (1) security of supply, (2) completion of an EU internal energy market, (3) promotion of energy efficiency, (4) reduction of CO2 emissions and (5) research, innovation and competitiveness.[10] Together, the three objectives and the five dimensions constitute the framework for today's European energy policy. Any Union acts will be measured against the backdrop of this framework.

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[4] European Commission (n 1).

[5] Kim Talus and James McCulloch, 'The Interpretation of the Principle of Energy Solidarity: A Critical Comment on the Opinion of the Advocate General in OPAL' (Energy Insight 89, Oxford Institute for Energy Studies 2021) 2-5; Jörg Gundel, 'Europäisches Energierecht' in Christian Theobald and Jürgen Kühling (eds), *Energierecht* (125th supplement, CH Beck 2024) para 21; Winkler, Baumgart and Ackermann (n 3) para 7.

[6] Winkler, Baumgart and Ackermann (n 3) para 8.

[7] ibid para 9.

[8] Gundel, 'Europäisches Energierecht' (n 5) para 21; Winkler, Baumgart and Ackermann (n 3) paras 6-7.

[9] International Energy Agency, *Oil Market Report* (IEA 2026); see also 'From Chokepoint to Crisis: The Strait of Hormuz and Global Oil Markets' (*Brookings*, 2026) <https://www.brookings.edu/articles/from-chokepoint-to-crisis-the-strait-of-hormuz-and-global-oil-markets/> accessed 11 June 2026.

[10] Sophie Bings, 'AEUV Art. 194' in Rudolf Streinz (ed), *EUV/AEUV* (3rd edn, CH Beck 2018) paras 17-18; Christian Calliess, 'AEUV Art. 194' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (6th edn, CH Beck 2022) para 3; Jens Hamer, 'Art. 194 AEUV' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015) para 7; Markus Kotzur and Manuela Niehaus, 'AEUV Art 194' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *EUV/AEUV* (7th edn, CH Beck 2023) para 5.

Additionally, European energy policy is governed by international rules such as the Energy Charter Treaty,[11] the Energy Community Treaty,[12] the United Nations Framework Convention on Climate Change (UNFCCC)[13] and the Paris Agreement.[14]

## II. How to achieve the Community objectives?

European energy policy is not based on a uniform regulatory mechanism. In fact, European energy policy is highly fragmented. This is due to the strong individual interests of EU Member States in the field of energy. Besides that, the EU's actions in energy law affect a number of other policy areas. This challenges the European legislator to form effective directives or regulations.

### 1. Competence Regime

The fundamental Treaties of the EU establish whether and to what extent the EU can act in certain areas of policy. Those rules are based on Member State's conferral of competences to the EU, according to the principle of conferral as enshrined in Article 5 paragraphs 1 and 2 TEU. This principle ensures that the Union can only act if and to the extent that Member States have granted it competences in the Treaties.[15] The legislative actions of the Union must remain within the limits set by the European Treaties (TEU, TFEU)[16] and the Charter of Fundamental Rights of the EU (CFR),[17] the primary Union law. The treaties differentiate among three types of competences: (**1**) policy areas in which the EU alone has the sole power to legislate (**exclusive competence)**; (**2**) such where only the Member States can legislate; and (**3**) areas, in which the EU and the Member States share the power to legislate (**shared competence)**. Whenever the EU enacts legislation, it has to name an appropriate title to competence.[18]

In the energy sector, the EU shares competences with the Member States, Article 2 paragraph 2 TFEU in conjunction with Article 4 paragraph 2 letter i TFEU. In areas of shared competence, Member States may only act as long as, and to the extent that the

[11] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects [1998] OJ L69/1.

[12] Treaty establishing the Energy Community (signed 25 October 2005, entered into force 1 July 2006) [2006] OJ L198/18.

[13] Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change [1994] OJ L33/11.

[14] Paris Agreement [2016] OJ L282/4.

[15] Calliess (n 10) para 27; Winkler, Baumgart and Ackermann (n 3) para 47.

[16] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[17] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[18] Winkler, Baumgart and Ackermann (n 3) paras 43-45.

Union does not exercise its competence. National law that deviates from EU legislation is inapplicable (so-called **primacy of Union law**).[19]

### 2. Triad of restrictions under Union law

Article 5 TEU contains the so-called triad of limits for European legislation: (**1**) the **principle of conferral**, (**2**) the **principle of subsidiarity** and (**3**) the **principle of proportionality**. The **principle of conferral** has already been set out above (see the section on the competence regime, Article 5(1) and (2) TEU). The **principle of subsidiarity** ensures that, in the case of shared competences, the Union acts if necessary. The Union should only take actions if it is easier to achieve the objectives at a Union level than by the Member States.[20] The standard of **proportionality** requires EU actions to be appropriate and necessary towards their objectives.[21]

### 3. Legal basis

European energy policy affects different fields of politics. Therefore, different TFEU competences may be considered as a basis for actions: The **internal competence** (Article 114 TFEU), the **European emergency competence** (Article 122 TFEU), the **environmental competence** (Article 191 ff. TFEU) and the explicit **energy competence** (Article 194 TFEU).[22] The choice of legal basis is often controversial and subject to proceedings before the European Court of Justice (ECJ).[23] This is due to the fact that the legislative procedures differ, depending on the choice of legal competence. The different majority requirements and participation of certain EU institutions throughout the legislative process may be decisive for the adoption of new legislation. Some TFEU provisions even give the Member States a de facto right to veto.[24] It follows that the choice of legal basis is crucial for the implementation of energy policy proposals and measures.

#### a. Internal competence, Article 114 TFEU

Article 114 TFEU aims to establish an internal energy market. The internal energy market is a sub-category of the EU internal market. The objective of Article 114 TFEU is to harmonize Member State's rules. Legislation in the fields of energy policy, however, is

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[19] Hamer (n 10) para 20; Martin Nettesheim, 'AEUV Art 194' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (82nd edn, CH Beck 2024) para 24; Calliess (n 10); Winkler, Baumgart and Ackermann (n 3) paras 43-46.

[20] Calliess (n 10) para 27; Eike Albrecht and Annegret Mordhorst, 'Die Energiekompetenz des Art 194 AEUV und die 32 %-Zielvorgabe für den Anteil erneuerbarer Energien am Bruttoendenergieverbrauch in 2030 in der EU' [2019] EnWZ 343, 344.

[21] Calliess (n 10) para 27-28; Winkler, Baumgart and Ackermann (n 3) para 48.

[22] Bings (n 10) para 36-39; Calliess (n 10) para 19.

[23] Gundel and Buckler (n 3) 42; Christoph Sobotta, 'EuGH: Neue Verfahren im Umweltrecht' [2024] ZUR 181; Winkler, Baumgart and Ackermann (n 3) paras 55-56.

[24] Sobotta (n 23) 181.

often criticized on the grounds of subsidiarity and proportionality issues.[25] That is why Article 114 TFEU is considered to be more of a 'catch-all provision'.

### b. Emergency competence, Article 122 TFEU

The emergency competence is part of the chapter on European economic policy (Articles 120 to 126). Nevertheless, it serves as a legal basis in the event of emergencies in the energy sector. Due to its emergency character, measures based on Article 122 TFEU are often limited in time.[26]

### c. Environmental competence, Article 192 TFEU

Article 192 TFEU regulates the legislative procedure for measures with an environmental objective. Energy policy and environmental policy often overlap. Therefore, Article 192 TFEU can be an appropriate basis for energy policy measures.[27] Article 192 paragraph 2 letter c TFEU even directly corresponds to the energy competence in Article 194 paragraph 2 subparagraph 2 TFEU.

### d. Energy competence, Article 194 TFEU

The most important legal basis for energy law is Article 194 TFEU. The provision was introduced in 2009 with the Treaty of Lisbon.[28] Since the introduction of Article 194 TFEU, the European legislator has used the energy competence as a basis for its Energy Efficiency Directive 2012/27/EU[29] and Regulation (EU) 2017/1938 on the security of natural gas supply.[30]

The introduction of Article 194 TFEU raised two questions: How far does the Union's competence in the energy sector extend under Article 194? And is there still room to rely on other provisions as a legal basis?[31] The structure and contents of Article 194 TFEU itself give answers to these questions.

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[25] Bings (n 10) 36-37.

[26] Bings (n 10) 38; Markus Ludwigs, 'Unionsrechtliche Rahmensetzungen zur Bewältigung der Energiekrise' [2023] EuZW 506, 507.

[27] Markus Ludwigs, 'Grundstrukturen des Energieumweltrechts' in Franz Jürgen Säcker and Markus Ludwigs (eds), *Berliner Kommentar zum Energierecht* (5th edn, Deutscher Wirtschaftsdienst 2022) paras 1-5.

[28] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[29] Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L315/1.

[30] Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply [2017] OJ L280/1.

[31] Hamer (n 10) 24-26; Gundel, 'Europäisches Energierecht' (n 5) para 22; Bings (n 10) para 36; Ludwigs, 'Grundstrukturen' (n 27) paras 6-7; Winkler, Baumgart and Ackermann (n 3) paras 55-57; Pirstner-Ebner (n 28) 20-22.

## III. The Core competence of Article 194 TFEU

Article 194 TFEU is divided into two paragraphs. Paragraph 1 defines the objectives and guiding principles of energy policy. Paragraph 2 contains the legislative competence itself. According to paragraph 2 subparagraph 1, the European legislator is authorized to take measures to achieve the objectives set out in paragraph 1. Paragraph 2 subparagraph 2 limits the legislative competence of the EU in certain areas of energy law.

### 1. Objectives and guiding principles (paragraph 1)

The term 'energy policy' covers all aspects of the energy industry (production, transmission, distribution, consumption) and energy sources (e.g. electricity, gas, district heating, hydropower). The broad regulatory spectrum of the energy sector is reflected in the objectives and guiding principles set out in Article 194 paragraph 1 TFEU.

### a. The objectives in detail

According to the energy policy objectives in Article 194, the EU takes measures to ensure the **functioning of the energy market** (letter a), to ensure the **security of energy supply** in the Union (letter b), to promote **energy efficiency** and **energy saving** as well as the **development of new and renewable forms of energy** (letter c) and to promote the **interconnection of energy networks** (letter d).

#### aa. Functioning of the energy market

This objective intends to strengthen the free movement of goods, services and capital in the energy sector, as well as the movement of energy itself between Member States. This includes the possibility of taking competitive measures to prevent market disruption.[32]

#### bb. Security of energy supply in the Union

Security of supply aims to ensure the permanent availability of energy for public and private sectors at an affordable price. The objective especially addresses the independence from foreign energy imports, such as energy imports from Russia.[33]

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[32] Hamer (n 10) para 14; Nettesheim (n 19) para 15.

[33] Bings (n 10) paras 22-24; Hamer (n 10) para 15; Nettesheim (n 19) para 16; Ludwigs, 'Grundstrukturen' (n 27) para 4; Calliess (n 10) para 13; Kotzur and Niehaus (n 10) para 5; Jörg Gundel, 'AEUV Art. 194' in Matthias Pechstein, Carsten Nowak and Ulrich Häde (eds), *Frankfurter Kommentar EUV/GRC/AEUV* (2nd edn, Mohr Siebeck 2023) paras 10-13; Winkler, Baumgart and Ackermann (n 3) para 7.

#### cc. Energy efficiency, energy savings and development of new and renewable forms of energy

This EU objective is twofold. Firstly, the overall energy consumption needs to be reduced. Secondly, energy production has to be switched to renewable sources.[34] This objective does also refer to the environmental competence in Article 192 TFEU. The concept of energy efficiency and the promotion of renewable energy production have an ecological, climate-protection dimension.

#### dd. Interconnection

The interconnection of energy networks is particularly concerned with the infrastructure of the energy sector. The interconnection of national networks is necessary to create an EU energy market.[35]

### b. The guiding principles

In addition to the energy policy objectives, Article 194 paragraph TFEU lays down three guiding principles: **solidarity**, **completion of the internal market** and **environmental protection**. The Union pursues its energy policy objectives against the background of these three guiding principles.[36]

According to the European Court of Justice, the **principle of solidarity** underpins the entire Community system. By enshrining the idea of solidarity in Article 194 paragraph TFEU, it acquires importance specifically with regard to energy policy.[37] The increasing interconnection of national markets creates interdependencies. As a result, national energy policy measures tend to have impacts on neighboring markets. Issues that arise from this interdependence are addressed by this principle.

The **idea of environmental protection** goes hand in hand with Article 11 TFEU. Again, this shows that energy and environmental policy are closely linked to each other and must be treated in an integrative way.[38]

Moreover, the EU is pursuing a fully integrated **internal energy market** alongside of the solidarity and environmental dimensions of the Energy Union.[39]

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[34] Calliess (n 10) paras 14-15; Kotzur and Niehaus (n 10) para 5.
[35] Nettesheim (n 19) para 20; Ludwigs, 'Grundstrukturen' (n 27) para 5; Calliess (n 10) paras 16-17.
[36] Bings (n 10) paras 32-35; Hamer (n 10) paras 9-12; Nettesheim (n 19) paras 21-24; Ludwigs, 'Grundstrukturen' (n 27) para 3; Calliess (n 10) paras 4-8; Gundel, 'AEUV Art. 194' (n 33) paras 4-6; Albrecht and Mordhorst (n 20) 344.
[37] Ludwigs, 'Unionsrechtliche Rahmensetzungen' (n 26) 507.
[38] Hamer (n 10) para 11; Nettesheim (n 19) para 21.
[39] Bings (n 10) para 33; Albrecht and Mordhorst (n 20) 344.

### 2. Legislative competence and Member State reservation (paragraph 2)

Article 194 paragraph 2 subparagraph 1 TFEU constitutes a uniform legislative competence for the field of energy policy. The more important question, however, is how this competence is restricted by the reservation for Member States in Article 194 paragraph 2 subparagraph 2.

#### a. Legislative competence (subparagraph 1)

Pursuant to Article 194 paragraph 2 subparagraph 1 TFEU, the European Parliament and the Council shall adopt measures in accordance with the ordinary legislative procedure. The ordinary legislative procedure is laid down in Article 289 paragraph 1 in conjunction with Article 294 TFEU. It requires a qualified majority vote in the Council of the EU (Article 16 paragraph 3 TEU).

#### b. Member State's reservation of competence (subparagraph 2)

Article 194 paragraph 2 subparagraph 2 TFEU is a sovereignty reservation that applies to various elements in the field of energy policy. It grants Member States the right to **determine the conditions for exploiting its energy resources**, its **choice between different energy sources** and the general **structure of its energy supply**. It also mentions Article 192 paragraph 2 letter c TFEU which sets out the unanimity requirement for decisions by the European Council. This raises questions towards the nature of the sovereignty reservation in Article 194 (paragraph 2 subparagraph 2 TFEU and its relation to Article 192 paragraph 2 letter c TFEU.[40]

Most literalists consider Article 194 paragraph 2 subparagraph 2 TFEU a material limitation of competences. A material limitation of competences would exclude the Union from taking any measures in the fields of energy policy that are listed in Article 194 paragraph 2 subparagraph 2 TFEU.[41]

A smaller group of legal scholars calls the reservation in Article 194 paragraph 2 subparagraph 2 TFEU a procedural provision. The reference to Article 192 paragraph 2 TFEU allows the Union to take actions under the condition that it adheres to the legislative procedure of Article 192 paragraph 2 TFEU. In contrast to Article 194 paragraph 2 TFEU, Article 192 paragraph 2 TFEU requires a unanimous voting by the Council. Accordingly, the adoption of new legislation in the areas covered by Article 194 paragraph 2

[40] Hamer (n 10) para 27; Bings (n 10) para 40; Albrecht and Mordhorst (n 20) 345-346; Jens Brauneck, 'Neues EU-Öko-Label für Finanzprodukte nach Vorgaben der EU-Kommission?' [2019] WM 1530, 1531; Talus and McCulloch (n 5) 5-6.

[41] Hamer (n 10) para 27; Bings (n 10) para 40; Kotzur and Niehaus (n 10) para 6; Gundel, 'AEUV Art. 194' (n 33) para 28; Charlotte Kreuter-Kirchhof, 'Der Künftige Ausbau der Erneuerbaren Energien in der EU' [2017] EuZW 829, 830; Albrecht and Mordhorst (n 20) 345-346.

subparagraph 2 TFEU would not be excluded but rather grant every Member State a right to veto in the Council.[42]

The first interpretation of Article 194 paragraph 2 subparagraph 2 TFEU is supported by the fact that the very nature of the provision expresses a substantive reservation. It is therefore not a merely procedural provision. Additionally, even if Article 192 paragraph 2 TFEU was considered as a legal basis for legislation in the excluded areas, a unanimous vote in the Council is utopian. Measures to phase out coal across Europe or reintroduce nationally binding renewable energy targets are not supported by all Member States. Therefore, the Union's competence for measures affecting the energy mix and energy supply of its Member States, has in fact been limited by the introduction of Article 194 TFEU in the Treaty of Lisbon.[43] Due to the principle of *lex specialis derogat legi generali*, Article 194 TFEU as a rule excludes the use of Articles 114 and 192 TFEU as legal bases for energy policy measures.[44] The precise relationship between Article 194 TFEU and these competing legal bases is, however, far from settled. Where a measure pursues a predominantly environmental or internal-market aim, recourse to Article 192 or Article 194 TFEU may still be appropriate, the decisive criterion being the measure's "centre of gravity". In this respect, the reservation in Article 194 paragraph 2 subparagraph 2 TFEU is a clear expression of the Member States' sovereignty in the energy sector.

Considering Russia's war of aggression against Ukraine and climate change, the Union faces various areas of tension in the field of energy policy. Article 194 TFEU is the Union's basis to respond to these crises. The EU's focus point is to achieve a balance of interests among the Member States. This is crucial as an effective energy policy has never been more important than today.

## C. European energy policy in terms of climate change

After the examination of the European legislative framework for energy policy, an analysis of today's world challenges regarding energy will be the second focus point. Despite the global energy supply crisis triggered by the closure of the Strait of Hormuz during the

[42] Gundel, 'AEUV Art. 194' (n 33) paras 29-32; Marjan Peeters and Thomas Schomerus, 'An EU Law Perspective on the Role of Regional Authorities in the Field of Renewable Energy' in Marjan Peeters and Thomas Schomerus (eds), *Renewable Energy Law in the EU* (Edward Elgar 2014) 11-14; Winkler, Baumgart and Ackermann (n 3) paras 80-82.

[43] Calliess (n 10) paras 28-29; Peeters and Schomerus (n 42) 12-13; Schlacke and Knodt (n 3) 405; Dekanozishvili (n 3) 46-48.

[44] Gundel, 'AEUV Art. 194' (n 33) para 22; Nettesheim (n 19) paras 27-29; Jörg Hacker, Dieter Spath and Hanns Hatt, *Governance für die Europäische Energieunion: Gestaltungsoptionen für die Steuerung der EU-Klima- und Energiepolitik bis 2030* (acatech/Leopoldina/Akademienunion 2018) 9-11.

2026 Iran war, through which a substantial share of the world's seaborne oil trade passes, global climate change remains as the overarching precarious task.

This chapter critically assesses the EU's response to climate change challenges by looking at different regulatory mechanisms. Finally, the paper will focus on the development of guidelines for an effective European energy policy in the future.

## I. The Challenge of Climate Crisis

Climate change is a global environmental issue. No country in the world can protect the Earth's atmosphere on its own. As part of the Paris Agreement, the EU and its Member States have jointly agreed to reduce the EU's greenhouse gas emissions by at least 40% until 2030 compared to 1990 levels.[45] Whether the EU achieves this target is measured by Europe-wide, cross-sectoral greenhouse gas emissions, not by the emissions in the individual Member States. Therefore, the EU Member States depend on each other to fulfill the requirements of the Paris Agreement. The effective contribution to this joint target among all EU Member States has proven to be challenging, particularly for Member States with higher reliance on fossil fuels. Poland, for example, has resisted decarbonization due to economic concerns and its dependence on coal. This creates internal tensions within the EU, as countries with advanced renewable energy infrastructure, like Sweden, push for more ambitious climate goals while others favor a slower transition. The EU – in this context – is responsible to effectively steer this development process among the Member States.[46]

A central instrument for the expansion of renewable energy in the Union is the **Renewable Energy Directive (RED III).**[47] It serves the expansion of renewable energies throughout the EU. The expansion of renewable energy is one of the objectives in Article 194 paragraph 1 letter c TFEU. The promotion of renewable energies is also part of the EU's climate protection strategy. Fossil fuels are to be replaced by renewable energies to avoid greenhouse gas emissions. Within that strategy, however, the principal lever for reducing emissions is not RED III but the EU Emissions Trading System. The Emissions Trading System caps and prices greenhouse gas emissions across the power and industrial sectors. Following the 2023 reform, the system is being extended to buildings

[45] Charlotte Kreuter-Kirchhof, 'Emissionshandel und Erneuerbare Energien Richtlinie: Instrumente zur Umsetzung der Klimaschutzstrategie der EU' [2019] ZUR 396, 397; Winkler, Baumgart and Ackermann (n 3) paras 12-13.

[46] Peeters and Schomerus (n 42) 3-5; Dekanozishvili (n 3) 48-50; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 397-98; Marc Ringel and Michèle Knodt, 'Governance der Energieunion: Weiche Steuerung mit harten Zügen?' (2017) 40 integration 125, 126-127; Fabian Pause, '„Saubere Energie für alle Europäer" – Was bringt das Legislativpaket der EU?' [2019] ZUR 387, 388.

[47] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources (RED III) [2023] OJ L2413/1.

and road transport. RED III does not replace this carbon pricing mechanism. Rather, it completes it by addressing the non-price barriers to renewables that a carbon price alone does not remove.[48]

## II. Objectives and content of the Renewable Energy Directive

The current Renewable Energy Directive (RED III 2023/24) is the third European directive to promote renewable energy since its introduction in 2001. At its forefront is the binding target to increase the share of renewable energy sources in Europe's energy consumption to at least 42.5% by 2030. It is also closely linked to the energy sector. For instance, the RED III contains specific rules for the transport and heating/cooling sectors and promotes cooperation and trade between countries in the internal energy market. It also includes provisions to speed up authorization procedures for renewable energy projects, strengthens the development of new technologies and innovations and sets sustainability criteria for bioenergy.[49]

### 1. European instead of national objectives

On the one hand, the Directive establishes a Europe-wide expansion target of 42.5% by 2030. On the other hand, it does not bind its Member States to any specific expansion rates. The Member States are solely obliged to hold on to their 2020-level of renewables.

This raises the problem that RED III only secures the status quo.[50] This, however, is an overstatement. The 2020 share operates as a non-regression floor rather than a ceiling, and the binding 42.5% Union target is operationalized through the Governance Regulation. What RED III gives up relative to RED I are binding national targets and not the binding Union-wide target or the duty of each Member State to contribute towards it. However, the EU will not reach the 42.5% target by 2030 if the expansion of renewable energy in Member States stagnates.[51]

Unlike the two latter directives (RED II and III), the original Renewable Energy Directive (RED I) set binding expansion targets for each Member State. This ensured the EU that it would be able to meet its overall target for renewable energy development. In this respect,

[48] Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC and Decision (EU) 2015/1814 [2023] OJ L130/134.

[49] Kreuter-Kirchhof, 'Emissionshandel' (n 45) 398-399; Ludwigs, 'Unionsrechtliche Rahmensetzungen' (n 27) 508; Pause (n 46) 389-390; Ringel and Knodt (n 46) 128-129; Antonia vom Dahl, 'Zeitenwende für ein neues Energierecht? Zur Umsetzung des EU-Winterpakets in deutsches Recht' [2020] N&R 66, 67.

[50] Uta Stäsche, 'Reform des EU-Emissionshandelssystems, der Effort-Sharing-Verordnung, der Erneuerbare-Energien-Richtlinie und der Energieeffizienzrichtlinie – „Fit for 55"?' [2023] KlimR 171, 177-178.

[51] European Commission, *State of the Energy Union Report 2024* (Communication) COM(2024) 404 final.

the current directive (RED III) falls short of the old regulations.[52] The reformed directive thus follows the guidelines of the European Council, emphasizing the sovereignty of Member States. The European Council emphasizes the Member State's competence regarding their energy mix, which excludes binding national targets.[53]

The end of national targets for each Member States coincided with the introduction of Article 194 TFEU by the Treaty of Lisbon in 2009. This link should not be read too literally, however. RED I (Directive 2009/28/EC) retained binding national targets until 2020. The actual move away from binding national targets only came with RED II in 2018. Rather, the Lisbon competence shift (Article 194 TFEU) made such targets legally harder to adopt thereafter than ending them in 2009. Prior to the Treaty of Lisbon and Article 194 TFEU, the Renewable Energy Directive (RED I) was based on the environmental competence of Article 192 TFEU (formerly Article 174 TEC). With energy policy falling under 'environmental policy', the establishment of new EU energy legislation only required a qualified majority vote in the European Council. Single Member States were not able to prevent their adoption. Since 2009, environmental energy measures have been mentioned by the wording of Article 194 TFEU.[54] This means that the Renewable Energy Directive can no longer be based solely on the EU's environmental competence. Consequently, the establishment of binding Member State targets can no longer be decided by a qualified majority vote in the Council. This conclusion is, however, contested. It presupposes the material reading of Article 194 paragraph 2 subparagraph 2 TFEU set out above, whereas proponents of the procedural reading argue that binding targets could still be adopted under the unanimity procedure of Article 192 paragraph 2 TFEU. According to Article 194 paragraph 2 subparagraph 2 TFEU, this would constitute an encroachment on the sovereignty of the Member States.

## 2. Regulatory mechanisms of the Renewable Energy Directive (RED III)

The corner stone of the function of the Renewable Energy Directive (RED III) is the target to increase the EU's share of renewable energies to 42.5% by 2030. In 2022 the overall share of renewable energies amounted only to 22.2%. Until today, it is unclear how the EU will manage to achieve its target.[55]

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[52] Gundel and Buckler (n 3); Jens Vollprecht, Wieland Lehnert and Nurelia Kather, 'Die Neue Erneuerbare-Energien-Richtlinie (RED II): Steife Brise oder laues Lüftchen aus Europa?' [2020] ZUR 204, 207-208; vom Dahl (n 46) 67-68.

[53] Peeters and Schomerus (n 42) 11-12; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 398; Pirstner-Ebner (n 28) 22-23.

[54] Calliess (n 10) para 19; Gundel and Buckler (n 3) 42-43; Kreuter-Kirchhof, 'Der Künftige Ausbau' (n 41) 830; Albrecht and Mordhorst (n 20) 344-345; Hacker, Spath and Hatt (n 44) 10-11.

[55] Peeters and Schomerus (n 42) 8-10; Simon Römling and Dominik Lammers, 'Das Neue Governance-System der Europäischen Energieunion: Anforderungen an Beteiligungs- und Überprüfungsrechte' [2019] ZUR 332, 333; Hacker, Spath and Hatt (n 44) 12-13.

The RED III directive follows a new approach to achieve the 2030 target without the binding sub-targets for EU Member States. The **National Energy and Climate Plans** – so called **NECPs** – are at the heart of the RED III strategy. All Member States are obliged to determine national targets for the expansion of renewables in NECPs. However, the RED III leaves it up to the Member States how ambitiously they set their targets.[56] In this respect, the governance regime is 'soft', even though the National Energy and Climate Plans are framed by the Governance Regulation, which is directly applicable. RED III itself is a directive that must be transposed into national law, so the 'softness' of the regime lies in the substance of the obligations rather than in the legal form of the instruments.[57]

The details concerning procedure, definition and monitoring of these plans are set out by the **EU Governance Regulation**. The EU Governance Regulation works as an 'umbrella act' to ensure an EU overarching governance for energy and climate policy until 2030.[58] Thus, it serves to realize the EU's climate protection goals from the Paris Agreement. At the same time, the Governance Regulation is supposed to compensate the EU's lack of competence in the field of energy policy.

The key objective of the Governance Regulation is the realization of the five dimensions of European energy policy, thereby achieving the target of a 42.5% share in renewables by 2030. Therefore, the Governance Regulation integrates common climate and energy policies in a single legal act. Functionally, it establishes a complex set of reporting, monitoring and control instruments. However, the Governance Regulation is still a classic "limping regulation", which means that – despite its applicability on a surface level – it leaves important elements of an effective energy policy in the hands of the Member States.[59]

According to the Governance Regulation, NECPs are submitted by the Member States, reviewed by the Commission and – if necessary – sent back with recommendations for improvement. The NECPs always cover a period of ten years. The content of the plans should cover objectives, strategies and measures for the realization of the 5 dimensions that frame the Energy Union. Member States are obliged to provide reports about their

[56] Pirstner-Ebner (n 28) 12; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 399; Peeters and Schomerus (n 42) 11; Ringel and Knodt (n 46) 130-131; Schlacke and Knodt (n 3) 405-406; Römling and Lammers (n 55) 333-334.

[57] Calliess (n 10) 22-23; Gundel and Buckler (n 3) 43; Schlacke and Knodt, 'Das Governance-System' (n 1); Römling and Lammers (n 55) 334; Kreuter-Kirchhof, 'Der Künftige Ausbau' (n 41) 831; Winkler, Baumgart and Ackermann (n 3) 25-27; Sabine Schlacke, 'Klimaschutzrecht im Mehrebenensystem' [2020] EnWZ 355, 357; Pause (n 46) 389.

[58] Schlacke and Knodt (n 3) 405-406; Römling and Lammers (n 55) 333-334; Hacker, Spath and Hatt (n 44) 14-16; Stäsche (n 50) 178.

[59] Albrecht and Mordhorst (n 20) 345; Schlacke, 'Klimaschutzrecht' (n 57) 357-358; vom Dahl (n 49) 68.

progress to the Commission every two years. The Commission assesses the progress and provides the Member States with non-binding recommendations.[60]

The mechanism of the Governance Regulation raises the question whether RED III enables the European Commission to ensure progress in the expansion of renewable energy share. How does the EU guarantee that national targets are sufficiently ambitious to meet the EU-wide target? How can the EU be sure that its Member States will meet their own targets from the NECPs? And what is the consequence if Member States do not adequately contribute to the Union's goal?

The simple answer to these questions is: There is none. The Commission may issue recommendations to Member States if it considers their targets in the NECPs to be inadequate. These recommendations, however, are not binding on the Member States. If Member States don't implement adequate strategies and measures to reach their NECP targets, there is a so-called 'delivery gap'. Here too, the Union makes recommendations. The Commission also works on a 'target path' for the expansion of renewable energies: By 2022 they planned to achieve 18% of their 2030 target, 43% by 2025, 65% by 2027 and finally 100% by 2030.[61]

However, the success of RED III will be measured by the overall expansion in the share of renewables among the EU. Some Member States may fall short of their national targets and others may exceed them. If these developments balance out one another, the Union still meets its target path for the expansion of renewable energies. In this case, the Commission will not take any action to close national delivery gaps. Member States that do not meet their targets will only have to report on how they intend to close the national delivery-gap.

## 3. Assessment of today's renewable energy strategy

On the positive side, the Governance Regulation succeeds in linking the EU's energy and climate policies. This link is crucial with regard to the EU's obligation to achieve the climate protection goals of the Paris Agreement.[62]

However, the Governance Regulation relies on very 'soft' mechanisms to coordinate the extension of renewable energy sources among the Union.[63] This is due to the EU's limited

[60] Gundel and Buckler (n 3) 43; Schlacke and Knodt (n 3) 406; Römling and Lammers (n 55) 334-335; Kreuter-Kirchhof, 'Der Künftige Ausbau' (n 41) 831-832; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 399-400; Hacker, Spath and Hatt (n 44) 16-18; Josef Falke, 'Neue Entwicklungen im Europäischen Umweltrecht (Berichtszeitraum: 7.12.2023–15.2.2024)' [2024] ZUR 245, 247.

[61] Schlacke and Knodt (n 3) 406-407; Kreuter-Kirchhof, 'Der Künftige Ausbau' (n 41) 832-833; Dekanozishvili (n 3) 50-52; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 400; Hacker, Spath and Hatt (n 44) 18-20; Ringel and Knodt (n 46) 131-132.

[62] Schlacke and Knodt (n 3) 407.

[63] Peeters and Schomerus (n 42) 14-15; Schlacke and Knodt (n 3) 405.

legislative powers in the field of energy policy, in particular the Member States reservation in Article 194 paragraph 2 subparagraph 2 TFEU.

Until today, there is no political agreement among the Member States on what a European energy mix should look like.[64] This precludes the EU from establishing strong and effective mechanisms towards the expansion of renewable energies. The legal nature of the Governance Regulation does not change its character as a 'soft law'. On a surface level, the regulation has a binding effect towards the EU Member States. However, in terms of its contents and measures, it has the character of a directive. The recourse to the national NECPs and the 10-year-strategies highlight this impression. The 'soft control approach' of the Governance Regulation is further reinforced by the gap-filling mechanisms. As a result, the Governance Regulation's effectiveness is highly dependent on the will of each Member State.

Sovereignty arguments have tended to delay EU-wide initiatives in the past. For example, the debates between France and Germany regarding nuclear energy have been hindering collective progress. France strongly advocates for nuclear power as a low-carbon energy source to meet the climate targets, while Germany resists due to safety concerns and prioritizes renewable energy sources.

Besides, the mechanisms to hold Member States accountable in case they don't act properly to achieve the 2030 target are weak. The Commission's recommendations are *de facto* non-binding on the Member States.[65] Their lack of ambition towards the extension of the renewable energies share cannot be prosecuted by the Commission. Furthermore, they cannot be held accountable for their failures to comply with the national NECP target.

An analysis of the current NECPs reveals a lack of ambition on the part of the Member States. The result is sobering. According to the Commission's Energy Union Report 2024, the 2022 share is only slightly above the binding intermediate trajectory share of 22.2% for the year 2022.[66] Yet, renewable energy shares continue to vary widely between Member States. Sweden had the highest share in 2022 (66%), followed by Finland (47.9%), Latvia (43.3%) and Denmark (41.6%). In contrast, other countries are struggling to meet their own expansion plans. France, for example, is still behind its 2020 renewable energy target for 2024.[67] Other countries, such as Poland, established extension rates that

[64] Gundel and Buckler (n 3) 43-44; Schlacke and Knodt (n 3) 405-406; Römling and Lammers (n 55) 335; Hacker, Spath and Hatt (n 44) 20-22; Patrick Sikora, 'Grundstrukturen der Energieversorgungssicherheit' [2023] NJW 2989; Pause (n 46) 390.

[65] Hacker, Spath and Hatt (n 44) 22-24; Römling and Lammers (n 55) 335-336; Kreuter-Kirchhof, 'Der Künftige Ausbau' (n 41) 833; Kreuter-Kirchhof, 'Emissionshandel' (n 45) 400-401; Ludwigs, 'Unionsrechtliche Rahmensetzungen' (n 26) 508-509; Stäsche (n 50) 178-179.

[66] European Commission (n 51).

[67] Eurostat, 'Share of Energy from Renewable Sources' (Eurostat Data Browser, nrg_ind_ren) <https://ec.europa.eu/eurostat/databrowser/view/nrg_ind_ren/default/table> accessed 23 May 2026.

undercut the EU's 2030 goal. Their lack of ambition could cause the EU to struggle to meet the share-rates in the future.[68]

Against this backdrop, the sovereignty of Member States appears problematic regarding the push of renewable energies. The EU will have a hard time to achieve its renewables expansion targets in the future. The reason for this is the Union's 'soft-law approach', fostered by the Renewable Energy Directive (RED III) and the Governance Regulation. On the one hand, EU Member States set their own national targets for the extension of renewable energies. On the other hand, the EU itself is obliged to adhere to the Paris Agreement. Since the extension of renewable energies is a crucial element to reduce greenhouse gases, the Member State's sovereignty conflicts with the EU's obligation to live up to an international Treaty, the Paris Agreement. Despite this, the European Union should act as role model for other countries to establish effective climate protection.

However, still some Member States insist that they retain sovereignty over energy policy. Accordingly, if the Union still takes actions in the field of energy policy, this is often subject to proceedings before the European Court of Justice.[69]

## 4. Solutions

The following actions show how the EU Commission can effectively use RED III and the Governance Regulation to realize its 2030 target and the requirements of the Paris Agreement. While some of these measures can be pursued within the existing legal framework (*de lege lata*), most of them would require amendments to the Governance Regulation and are therefore proposed *de lege ferenda*.

### a. Effective participation of local entities and the public

The procedure on which parties shall participate in the development of a Member State's NECP is governed by Article 10 Governance Regulation. However, the regulation only gives rudimentary guidelines towards the participation of cities, municipalities, other local entities or the public.[70] In order to take sufficient account of the importance of local and regional authorities as well as public interest bodies and non-governmental organizations, the procedural framework of the NECPs should be regulated in a legally binding manner. Today, there is no obligation to explain to those bodies and organizations how their recommendations will be considered in the preparation of the plan. Nor is it necessary to justify why they will not be taken into account. However, after the establishment of the plan, it is up to those entities to realize the plan in the manner it has

[68] European Commission (n 51); Schlacke and Knodt (n 3) 407.
[69] Brauneck (n 40) 1531.
[70] Schlacke and Knodt (n 3) 407; Hacker, Spath and Hatt (n 44) 24-26; Römling and Lammers (n 55) 336-337; Falke (n 57) 247-248.

been established. Active participation of local and public entities in the development process of NECPs would help to establish effective measures for the extension of renewable energies.[71]

### b. Financial incentives and financial sanctions

The review of the first NECPs already indicated a lack of ambition by the Member States. Financial incentives could help to make them more ambitious.[72] So far, the Regulation itself does not contribute to incentivize this. According to Article 33 of the Regulation, Member States can pay a contribution if they end up with a delivery-gap. However, such contribution is voluntary. Further instruments for financing climate and energy policy measures are needed here.

A closer link between the European Structural and Investment Funds (ESI Funds) and the Governance Regulation could provide an attractive funding incentive[73]. The promotion of renewable energies is already recognized in various funds. A direct link between the ESI Funds and the Governance Regulation would enable more regional projects to support the extension of renewable energy shares. At the same time, this could close the gap caused by lack of ambition or failure to implement climate targets, given the EU's insufficient legislative competence in energy policy. Finally, the initiation of linking the ESI Funds to the Governance Regulation would only require a qualified majority vote in the Council under the ordinary legislative procedure (Article 177 TFEU); the necessary funding, however, depends on the multiannual financial framework, which the Council must adopt unanimously under Article 312 paragraph 2 TFEU.

From another point of view, this interconnection would also open the possibility of sanctions. A Member State's failure to comply with the Commission's recommendations on proper NECPs could – in the worst case – result in the cancellation of ESI Funds. This could be a powerful control mechanism in cases where national targets are not ambitious enough or not sufficiently implemented. Therefore, the possibility of sanctions would make the soft governance of the Energy Union more effective. Such a mechanism would, however, raise two objections. First, it is doubtful whether the Union has the competence to attach energy-policy conditions to the cohesion funds in this way. Second, insofar as the withheld funding pursued objectives unrelated to climate protection, this conditionality could run up against the prohibition of improperly coupling unrelated policy aims. Any

[71] Hacker, Spath and Hatt (n 44) 26-28; Peeters and Schomerus (n 42) 16-18; Schlacke and Knodt, 'Das Governance-System' (n 1) 407; Römling and Lammers (n 55) 337.

[72] Schlacke and Knodt (n 3) 407-08; Ringel and Knodt (n 46) 133-134; Hacker, Spath and Hatt (n 44) 28-30.

[73] Peeters and Schomerus (n 42) 18-20; Ringel and Knodt (n 46) 134-135; Römling and Lammers (n 55) 337-338; Schlacke and Knodt (n 3) 408.

such linkage would therefore have to be confined to climate- and energy-related conditions and anchored in a sufficiently clear legal basis.

### c. Access to legal remedies

Another way to promote the Regulation's effectiveness is the establishment of judicial enforceability. Therefore, environmental organizations should be able to invoke measures regarding Member State's NECPs before the ECJ. A right of action would give these organizations the opportunity to monitor the national progress in the extension of renewable energies.[74]

For instance, environmental organizations could be enabled to sue if Member States do not draw up NECPs or if they do not live up to their targets. Additionally, they could enact legal remedies if the NECPs are not ambitious enough or monitor procedural errors in the development of NECPs (for example, failure to properly involve the public). In this manner, access to legal remedies could at least partially outweigh the deficits of the 'soft governance' elements, such as the Commission's non-binding recommendations.

## D. Concluding Remarks and Future Directions

Looking at these proposals, there still seems to be a way to prevent the Union from falling short of its objective to reach a total share of 42.5% renewable energies by 2030. However, the clock is ticking and without any changes, the Union risks failing the requirements of the Paris Agreement.

Climate change is an urgent problem that requires the contribution of every country around the globe. There is only a narrow window left for us to avert an irreversible global climate crisis. Therefore, we can no longer ignore any power plays between the EU and its Member States but have to find effective solutions for those problems.

As shown above, three reforms could strengthen the Governance Regulation without abandoning the Member States' reservation under Article 194 paragraph 2 subparagraph 2 TFEU: First, a legally binding framework for the effective participation of local and public entities in the drafting of the NECPs, second, financial incentives coupled with sanctions by linking the ESI Funds to compliance with the Governance Regulation and third, access to legal remedies allowing environmental organizations to enforce Member States' NECP obligations before the ECJ. Taken together, these measures could compensate, at least in part, for the weaknesses of the Union's 'soft governance' approach.

[74] Falke (n 60) 248; Hacker, Spath and Hatt (n 44) 30-32; Römling and Lammers (n 55) 338; Ringel and Knodt (n 46) 135-136.

# *Case Review*

## Bathroom Fittings Cartel

## Review of Stuttgart Higher Regional Court, judgment from 20 November 2025

*OLG Stuttgart, Urt. v. 20.11.2025 – 2 U 263/21*

*Annika Schröder*[*]

### A. Facts of the Case

The court decision concerns the so-called bathroom fittings cartel[1] (*Badarmaturen-Kartell*). Prior to the judgment, manufacturers of bathroom fittings had formed a cartel between 1992 and 2004. In 2010, the European Commission imposed fines on the cartel members. In the present case, the claimant is the insolvency administrator of *Praktiker Deutschland GmbH* and its subsidiaries. The claimant alleges that between 1999 and 2005 it purchased cartel-affected bathroom fittings from various wholesalers and thereby suffered damages. According to the claimant, the prices paid were excessively high as a result of the cartel.

### B. Key Aspects of the Judgment

In determining the damages, the court did not rely on expert opinions but instead estimated the damage itself. It is particularly noteworthy that the court regarded the expert report submitted by the claimant as unsuitable for determining cartel damages. The court also did not believe that taking evidence would improve the situation. Rather, it considered the calculation of damages through econometric expert reports in adversarial cartel proceedings to be generally unsuitable. According to the court, such reports can only approximate the hypothetical amount of damage and are not capable of replacing or concretizing the court's overall assessment. Furthermore, the data underlying the claimant's expert report was considered insufficient. Correcting the datasets during the taking of evidence would also require excessive costs and effort.

Based on its experience in other proceedings, the Senate noted that evidentiary

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[1] OLG Stuttgart, 20 November 2025, 2 U 263/21, juris.

proceedings generally involve significant time and financial expense, while the results are often of limited value due to differing methodological approaches and therefore differing outcomes. The Senate assumed that no method exists that could make the determination of damages both more realistic and more efficient from a procedural standpoint. It therefore adopted its own independent estimation approach, making use of the discretion granted to it under section 287 of the German Code of Civil Procedure (*ZPO*).[2]

The Senate held that a court may estimate damages if the circumstances of the case provide a sufficiently reliable basis for doing so. For this independent assessment, the Senate developed a five-step estimation model.[3]

In the first step, the court determined whether the cartel had actually affected prices by establishing a cartel-induced price effect. It had to be shown with predominant probability that the cartel led to a price increase. In principle, there is a presumption that a cartel causes damage; only in exceptional cases would this not apply. Such exceptions would require specific indications, which were not present in this case.[4]

In the second step, the damage suffered was assigned to an estimation corridor. These values were based on the findings of various large-scale meta-studies. The court also examined whether this corridor could be further narrowed in light of the specific circumstances of the case. Studies focusing exclusively on the European market indicated values of approximately 15–18%. Ultimately, the court adopted an estimation corridor of 5–25% in the present case.[5]

Subsequently, the estimate within the identified corridor was further refined on the basis of the specific circumstances of the case. This was done using an assessment model divided into four categories: collusion, organization, market conditions, and customer response.[6]

The court then examined whether the damage had been passed on to the claimant and whether it had subsequently been passed further down the supply, distribution, and acquisition chain.[7]

In the final step, the court considered whether the claimant itself had been able to pass on part of the damages to customers, such that corresponding benefits would need to be taken into account.[8]

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[2] ibid paras 89 f.
[3] ibid paras 97 f.
[4] ibid paras 103, 108 f.
[5] ibid paras 104, 113 f.
[6] ibid paras 105, 130 f.
[7] ibid paras 106, 225 f.
[8] ibid paras 107, 265 f.

## C. Classification of the Judgment

This new estimation model was based on the findings of large-scale meta-studies. The court intended to save time, costs, and effort that would otherwise arise from obtaining expert opinions.[9]

Recently, several courts have already determined the amount of damages through their own estimations rather than relying on expert reports.[10] One criticism has been that party-appointed expert opinions are often not objective. While studies generally conclude that cartels almost always cause harm, expert reports submitted by defendants frequently arrive at a finding of zero damage. In addition, their conclusions often contradict judicial experience and common sense.[11]

## D. Assessment

The estimation model conserves resources, and expert reports often produce inconsistent results. This is true even where the same facts and datasets are used.[12] Consequently, such reports are often of limited usefulness while simultaneously requiring considerable effort and expense. The court's independent estimation therefore represents a helpful solution.[13]

In addition to independent estimation, courts could also consider other approaches in the future. For example, under section 144 paragraph 1 sentence 1 ZPO, courts may consult experts outside formal evidentiary proceedings. Furthermore, party-appointed experts could be encouraged to identify common positions through joint expert statements or be heard together during oral hearings.[14]

In any event, a departure from the previous practice of obtaining extensive court-appointed expert reports appears sensible.

[9] ibid paras 96 f.
[10] Gerhard Klumpe, 'Zur prozessualen Behandlung wettbewerbsökonomischer Gutachten im Kartellschadensersatz' (2024) WUW 12, 12 f.
[11] OLG Stuttgart (n 1) paras 95 f.
[12] Klumpe (n 10) 13.
[13] OLG Stuttgart (n 1) paras 96 f.
[14] Klumpe (n 10) 16 f.

# *Case Review*

## Taxation of fictional earnings on occasion of changes to double taxation agreements

## Review of German Federal Tax Court, judgements from 19 November 2025

*BFH, Urt. v. 19.11.2025 – I R 41/22, BeckRS 2025, 43749; DStR 2026, 775*

*BFH, Urt. v. 19.11.2025 – I R 6/23, BeckRS 2025, 43752; DStR 2026, 849*

*Michel Hoppe*[*]

Germany's Federal Tax Court (*BFH*) has rejected two appeals filed by different fiscal authorities against judgements denying their power to tax a certain type of (fictional) earnings. The legal problems in the cases concerned surround the circumstances under which mere changes to the law, namely double taxation agreements (DTA), may result in exit taxation upon leaving of the tax net (*Entstrickung*), and in which moment. In addition, the Court had to discern whether distributive articles contained in DTA and dealing with income from certain activities may be construed to cover income from the sales of the corresponding business assets as well, in absence of explicit rules to the contrary.

### A. Procedural Background

The BFH is the highest-ranking court within Germany's tax or, more accurately, finance judiciary (*Finanzgerichtsbarkeit*). These institutions are guaranteed by Article 95 paragraph 1 of the German constitution (*Grundgesetz*/*GG*) alongside the four other jurisdictions (ordinary, administrative, labour and social) and their respective federal courts. Unlike these other judiciaries, the tax courts are structured into two instead of three tiers. Thus, the regular, state-level tax courts always have jurisdiction concerning financial matters the first instance (section 35 of the Code of Tax Court Procedure or *Finanzgerichtsordnung*/*FGO*) while the Federal Tax Court possesses jurisdiction regarding appeals and complaints (sections 115 and following FGO).

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Also unlike the other aforementioned judiciaries, the tax court system lacks the possibility for appeals on points of fact and law (*Berufung*). The appeals at hand were therefore ones exclusively on points of law (*Revision*, see section 118 paragraph 1 FGO), without any new evidence being taken.

## B. Revision I R 41/22 (Tax Court of Münster)

### I. Facts of the case

In the first procedure, a German company was claimed to owe income tax for the year of 2013 due to the sale of shares in a Spanish corporation belonging to its business assets. In fact, the shares had not actually been sold. However, the DTA between Germany and Spain had been updated in 2011 to allow for the taxation of share deals by the state in which at least 50% of the company's actual net worth was situated. On 31 December 2013, the Spanish company owned immovable property in Spain which made up 51.1% of its actual net worth. Hence, the DTA now allowed for Spanish tax to be levied on a potential sale of those shares, and accordingly obliged Germany to give credit to the Spanish tax (credit method, compare Article 23B of the OECD Model Agreement/OECD-MA). The tax assessment was ultimately based on the consequences of that amendment.

### II. Context

German income tax is calculated according to profit (compare section 2 paragraph 2 sentence 1 Nr. 1 of the Income Tax Code or *Einkommensteuergesetz/EStG*). Per section 4 paragraph 1 sentence 1 EStG, the profit (*Gewinn*) is in principle equal to the difference between the business assets (*Betriebsvermögen*) at the close of the previous fiscal year and at the close of the current fiscal year, corrected by adding withdrawals (*Entnahmen*) and subtracting deposits (*Einlagen*). A withdrawal in this sense is defined as any withdrawal of goods for non-business purposes (section 4 paragraph 1 sentence 2 EStG). Additionally, it is equated to a withdrawal if the taxation rights of Germany with respects to the sale of business assets are excluded or limited, especially if assets are reattributed from domestic to foreign permanent establishments (section 4 paragraph 1 sentences 3 and 4 EStG). In this way, a (fictional) profit is generated by realising the positive difference between the affected goods' value on the books (*Buchwert*) and on the market (*gemeiner Wert*), the so-called "hidden reserves" (*stille Reserven*), without the goods having to actually be sold.[1]

[1] Xaver Ditz and Thomas Rupp, 'Entstrickung und Verstrickung: Aktuelle Fragen und ATADUmsG' (2021) 10 ISR 413, 413.

It was therefore up for the Fiscal Court of Münster in the first instance[2] and subsequently the Federal Tax Court to decide if the amendment made to the DTA Germany-Spain qualified as an exclusion or limitation of German taxation rights within the meaning of section 4 paragraph 1 sentence 3 EStG, leading to a fictional withdrawal of business assets.

## III. Decision

### 1. Question 1: On the principle taxability of passive exits from the tax net

The question at hand was first and foremost whether goods being "unsnared" from a business's assets according to section 4 paragraph 1 sentence 3 EStG (or similar provisions) also necessitates active behaviour by the taxpayer, or whether it also includes "passive" release from such attachment. This had previously been controversial in scholarship and unanswered by judicial jurisprudence. Objections had been raised, for example, concerning general rules of attribution as well as the capability of the taxpayer to perform without having actual sales profits at his disposal.[3] On the other hand, among others, instructions given by the Federal Ministry of Finance had been affirmative.[4]

The BFH ends up agreeing with these less critical voices.[5] Its reasoning picks up with what is essentially an argument from silence: The wording of section 4 paragraph 1 sentence 3 EStG does not, on its own, explicitly nor implicitly necessitate wilful conduct on the part of the taxpayer. Furthermore, the equivocation of limiting the Federal Republic of Germany's taxation rights with a withdrawal in the sense of section 4 paragraph 1 sentence 2 EStG is said not to extend to the conditional elements of that provision. Instead, it is restricted to the legal consequences of section 4 paragraph 1 sentence 2 EStG, namely that the value of the goods in question is always assessed by reference to their common or market value (see above as well as section 6 paragraph 1 number 4 EStG).

Additionally, it is contended by the BFH that attributing profits to the company does not demand wilful or controllable behaviour of the company or its agents. Rather, the affair should be considered a matter of mere causation. Stricter requirements within the bounds of section 4 paragraph 1 sentence 3 EStG cannot be drawn from the phrasing of more general provisions, such as the scope of application of income tax being tied to the "realisation of earnings" (*Erzielung von Einkünften*) by section 2 paragraph 1 sentence 1 number 2 EStG, or the coupling of the tax claim to the realization (*Verwirklichung*) of the

[2] FG Münster, Urt. v. 10.08.2022 – 13 K 559/19 G F, DStR 2022, 2413.
[3] ibid 2415.
[4] BMF, Schreiben v. 26.10.2018, BMF IV B 5 – S 1348/07/10002-01; DOK 2018/0734820, BStBl I 2018, 1104; BeckVerw 441700.
[5] For the authorities cited by the Court, see the respective decisions themselves.

elements of a tax law (*Steuertatbestand*) in section 38 of the Fiscal Code (*AO*). Alternatively, the BFH justifies the applicability of section 4 paragraph 1 sentence 3 EStG by disputing that taxation in the cases concerned occurs without any input by the taxpayer. On the contrary, the taxpayer is being taxed for continuing to keep the company shares as part of their operational assets. Taxing mere passive exits from the taxation net would therefore seem just as legitimate as taxing passive income in general (*Einkünfte aus Kapitalvermögen*, section 2 paragraph 1 sentence 1 number 5 and section 20 EStG).

The overall scheme of section 4 paragraph 1 EStG does not seem to hinder this line of thought either. Initially, the BFH acknowledges that the legislature intended section 4 paragraph 1 sentence 3 EStG to codify pre-existing jurisprudence, under which the taxation of passive exits had been rejected due to the lack of a statutory basis.[6] In contrast to this, the BFH had originally assumed that cases essentially now clarified as taxable by section 4 paragraph 1 sentence 4 EStG (i.e. assets being removed from establishments under German sovereignty to foreign establishments, the profits derived from which are exempted from German taxation by DTA) were taxable under section 4 paragraph 1 sentence 2 EStG. This theory of the final withdrawal (*Theorie der finalen Entnahme*) – "final" not as in "purposeful" but as in "ultimate" or "conclusive" - was abandoned in 2008 for much the same reasons as the taxation of passive exits had been dismissed decades earlier.[7] Section 4 paragraph 1 sentence 4 EStG was then inserted into the Tax Code to resolve interpretative issues revolving around section 4 paragraph 1 sentence 3 EStG that arose due to this change in jurisprudence.[8] Subsequently, it had been left open by the BFH whether the legal effects of a DTA may fulfil the elements of section 4 paragraph 1 sentence 3 EStG, as it was decided that this was inconsequential for the applicability of sentence 4 as a provision in its own right.[9]

According to the BFH, section 4 paragraph 1 sentence 3 EStG is supposed to create a sufficient legal basis for the taxation of *Entstrickung* in cross-border contexts and to summarise all the different possible constellations, all while allowing for further development in the area. It does not follow from the intent behind section 4 paragraph 1 sentence 3 EStG, therefore, that passive exits are still not covered. Quite the opposite: That provision now functions precisely as the sufficient legal basis for taxation. The catch-all

[6] BFH, Urt. v. 16.12.1975 – VIII r 3/74, BFHE 117, 563; BeckRS 1975, 22003453. The indirect application of tax statutes by way of analogy to the detriment of the taxpayer is considered under German constitutional law to be as heinous as an analogous application of criminal offences, which is explicitly prohibited by Article 103 paragraph 2 GG.

[7] For the history of *Entstrickungsbesteuerung*, see Xaver Ditz, 'Aufgabe der finalen Entnahmetheorie – Analyse des BFH-Urteils vom 17.7.2008 und seiner Konsequenzen' (2009) 18 IStR 115 and Julian Böhmer and Katharina Schlücke, 'Entstrickung trotz fortbestehendem deutschen Besteuerungsrecht?' (2026) 79 Der Betrieb 145.

[8] Klaus Dieter Drüen, '§ 4 EStG' in Bernd Heuermann and Peter Brandis, *Ertragsteuerrecht* (181st supplement, Vahlen February 2026) para 487.

[9] BFH, Urt. 26.03.2025 – I R 5/24 (I R 99/15), IStR 2025, 709 [21-22]; Böhmer and Schlücke (n 7) 147.

purpose of section 4 paragraph 1 sentence 3 EStG also explains why the legislature added the clause equating mere "limitations" on German taxation rights to outright "exclusions" of those same rights.

The Court then moves to refute objections not founded on the structure of German income tax law but on higher law, specifically the EU guarantee of free movement of capital (Articles 63 and following TFEU), the general right to equality (Article 3 GG), the principle of human dignity (Article 1 paragraph 1 GG), and the principle of the rule of law as manifested in the prohibition of *ex post facto* laws. In the matter of the fundamental freedom contained in Article 63 TFEU, the BFH cites the European Court of Justice (ECJ) decisions of 23 January 2014 and 21 May 2015,[10] allowing for the taxation of "hidden reserves" in cases where the member state cannot in fact exercise their taxation rights at the time in which these reserves are realised, under the condition that the taxpayer is granted a moratorium of five years. The BFH contends that section 4g EStG originally not covering passive exits does not preclude the application of section 4 paragraph 1 sentence 3 and that the retroactive amendment to section 4g EStG (as part of the Law implementing the EU Anti-Tax Avoidance Directive – *ATADUmsG*) was meant to fix just that. Moreover, the Court notes that even if the retroactive introduction of section 4g EStG would not satisfy the CJEU's demands, this would result not in the complete inapplicability of section 4 paragraph 1 sentence 3 in this case, but only constitute a right to such a memorandum.

As far as the right to equal treatment is concerned, according to the Court, the timing of taxation must under Article 3 paragraph 1 be judged merely by the standards of the prohibition on arbitrariness. Facilitating the levying of taxes by way of simplification and avoiding administrative deficits qualifies as sufficient reasonable grounds, accordingly justifying any unequal treatment. A violation of the fundamental guarantee of human dignity is, of course, handwaved away. The onset of taxation due to changes in the applicable DTA is said not to equate to the degradation of a human to the mere object of state or third-party behaviour, also taking into account the fact that the whole affair can also be traced back to the taxpayer's own behaviour, as mentioned earlier. Lastly, the "phony" retroactive effect (*unechte Rückwirkung*) of the introduction of section 4 paragraph 1 sentence 3 EStG is, in view of its stated goals, proportional and thus justified as well.

## 2. Question 2: The exact timing of taxation

Nevertheless, the tax assessment was judged as faulty, the "profits" in question being taxable not in 2013, as assessed, but rather back in 2012. In lieu of an actual withdrawal from the business assets, it had been questioned whether the relevant point in time

[10] Case C-164/12 *DMC* [2014] OJ C93/08 and Case C-657/13 *Verder Lab Tec* [2015] OJ C236/14.

corresponds to the actual occurrence of an exclusion or limitation of German taxation rights, as preferred by the government,[11] or the last "juridical" moment before the limitation becomes legally valid, which the BFH has now decided in favour of. Since Article 30 paragraph 2 letter b of the newer DTA Germany-Spain postulates that the DTA is applicable to taxes being levied for periods after the beginning of the year following the DTA coming into force (18 October 2012), German taxation rights were impeded from 1 January 2013 onwards, and the fictional withdrawal had to be considered as if it had happened in the last moments of 31 December 2012.

The Court cites section 6 paragraph 1 number 4 EStG once more, arguing that the teleology of Article 4 paragraph 1 sentence 3 EStG is directed towards establishing a final or concluding taxation (*Schlussbesteuerung*) of German hidden reserves. This result is also supported by the parallelism between section 4 paragraph 1 sentence 3 EStG and other examples of exit taxation, such as section 12 paragraph 1 of the Corporate Tax Code (*Körperschaftsteuergesetz/KStG*), section 6 of the Foreign Transaction Tax Act (*Außensteuergesetz/AStG*) or section 21 paragraph 2 sentence 1 number 2 of the Reorganisation Tax Act (*Umwandlungssteuergesetz/UmwStG*). In the case of section 6 paragraph 1 sentence 2 number 4 AStG (now section 6 paragraph 1 sentence 1 number 3 AStG), it is already recognised in jurisprudence - and subsequently by explicit statutory amendment to that effect (section 6 paragraph 1 sentence 2 number 3 AStG) - that tax liability is triggered at the point at which German taxation rights would otherwise be negatively affected.

## C. Revision I R 6/23 (Tax Court of Hesse)

In a parallel case, previously decided upon by the Tax Court in Kassel,[12] the BFH had to evaluate similar problems as applied to German corporate tax.

### I. Facts of the case

In 2009, the claimant had acquired property in Australia which it rented out to third parties. Article 6 of the DTA Germany-Australia allows for taxation of income from immoveable property in the state where said property is located (*situs*). The amended DTA from 2015, applicable from 1 January 2017, adopted Article 13 paragraph 1 OECD-MA and therefore now explicitly provided that income from the sale of such property was taxable by the state of *situs* as well. Accordingly, the authorities assessed that an exit tax on a fictional sale was owed due to the limitation on Germany's previous taxation rights.

[11] BMF (n 4).
[12] FG Hessen, Urt. v. 08.12.2022 – 4 K 1006/20, IStR 2023, 622.

## II. Context

Since partnerships are not corporations enumerated in section 1 paragraph 1 KStG, the Münster case had dealt with exit taxation within the Income Tax Code. In the Hessian Case, on the other hand, the company now operating as a partnership - albeit with a corporation as the personally liable partner (*GmbH & Co. KG*) - had, in the relevant time period, existed as a limited liability company (*GmbH*) and hence as a corporation in the sense of section 1 paragraph 1 number 1 KStG. Thus, the applicable regime for exit taxation was section 12 paragraph 1 KStG instead of section 4 paragraph 1 sentence 3 EStG, which it nevertheless closely corresponds to.

## III. Decision

In their second decision of the day, the BFH takes recourse to their principled affirmation of the possibility of a "passive exit" from the German tax net. However, they had to assess whether Germany had hitherto even enjoyed the right to tax the sale of immoveable property by German companies in Australia. Otherwise, such rights could logically not have been excluded or limited by amending the DTA.

Whether income from sales was covered by the general provision for income from immoveable property is a simple matter of interpretation. Firstly, the Court states that the plain wording of Article 6 DTA Germany-Australia had never been limited to current receipts and could therefore be construed to include income from sales without further ado. Such an inclusive reading is not contingent on a legal definition contained in the Treaty text, as an argument from the contrary would not necessarily have to be drawn from it. The same argument applies to a protocol to the DTA concluded by Germany and Spain, which extended the scope of Article 6 to income from the lease of land but did not preclude it being applied to the sale of land. In applying the DTA, it is immaterial whether the Treaty states have or have not, in the eyes of the tax authorities or the courts, realised the principle of *situs* in a consistent and consequent manner. Their decision as embodied in the existing Treaty would not and could not be corrected by the judiciary.

A mere memorandum enumerating income from sales as "other income" does not hinder the literal reading of the DTA either. Also, the interpretation of Article 6 of the 1972 DTA is not retroactively determined by the exclusion of income from sales from Article 6 of the 2015 DTA. Lastly, a restrictive interpretation of Article 6 of the 1972 DTA is not justified by subsequent agreements or practice as provided for by Article 31(3) of the Vienna Convention on the Law of Treaties. For one, the Convention did not apply to Germany before the transposing law in 1987. Even then, the Court simply states that the wording of Article 6 had been clear.

Since Article 6 – to the benefit of Australia - effectively functions as a distributive norm for all income stemming from immoveable property, neither Article 21 nor Article 22 paragraph 2 letter b of the DTA lead to exclusive German taxation rights. In the view of the BFH, the tax authorities could therefore not claim exit taxation on occasion of the amendment of the German-Australian DTA. In addition, they could not have claimed liability for 2017 but for 2016, the Court reiterating its opinion on at which point in time tax liability is realised.

## D. Criticism and Implications

### I. Exit taxation

The Court's conclusion that amendments to DTA might trigger exit taxation, while convincing, is a little less compelling than it may seem at first. While the open-ended phrasing of section 4 paragraph 1 sentence 3 EStG discourages a more restrictive interpretation, it does not necessarily determine that it should be applied to the greatest possible extent.[13] Instead, that result is ultimately implied in the stated goal of the provision, namely that German taxation rights concerning hidden reserves should be staunchly safeguarded, as far as it does not contravene EU law.[14]

Against this background, it is plausible that the more technical objections to passive exits from the tax net are ultimately rejected by the Court. Section 4 paragraph 1 sentence 3 EStG must be characterised as a legal fiction that is not conditional on an actual withdrawal or even a present action performed by the taxpayer, instead being based on normative elements.[15] The principle possibility of passive exit taxation is implied in the clarification on Brexit found in section 4g paragraph 6 EStG as well.[16]

One can scarcely argue on literal grounds that taxation rights are not "excluded" or "limited" if the German government and legislature willingly relinquish them in the course of negotiations.[17] Nonetheless, one could accuse the German state of legal abuse,

[13] Wolfgang Kessler and Alexander Spychalski, 'Die Tatbestandsvoraussetzungen einer passiven Entstrickung bei Änderung bilateraler Verträge – Kann rein staatliches Handeln die Aufdeckung stiller Reserven implizieren?' (2019) 28 IStR 193, 199.

[14] Klaus-Dieter Drüen, '§ 4 EStG' in Peter Brandis and Bernd Heuermann, *Ertragsteuerrecht* (181st supplement, Vahlen February 2026) para 486; BT-Drs 16/2710, 1.

[15] Peter Reiter, 'Entstrickung durch Abschluss oder Revision eines DBA' (2012) 21 IStR 357, 359.

[16] Martin Weiss, annotation of FG Hessen, Urt. v. 8.12.2022 – 4 K 1006/20, (2023) 32 IStR 2023, 626, 626. For the opposite view with regards to section 22 paragraph 5 UmwStG. see Ditz and Rupp (n 1) 420.

[17] cf Jan F Bron, 'Zum Risiko der Entstrickung durch den Abschluss bzw. die Revision von DBA - Überlegungen zu Outbound-Investitionen unter besonderer Berücksichtigung von Art. 13 Abs. 4 OECD-MA, § 6 AStG sowie von Umstrukturierungen' (2012) 21 IStR 904, 906-07.

taxing states of affairs entirely of his own doing.[18] While this should not be considered a breach of human dignity regardless of the circumstances, it is telling that the Court does not directly address the principle of performance ability (*Leistungsfähigkeitsprinzip*),[19] which is also subsumed under Article 3 paragraph 1 GG and functions as the *Magna Charta* of German tax law.[20] Exit taxation leads to unmitigated (economic) double taxation.[21] Seeing how taxation does not depend on an actual reduction in taxes owed in Germany due to taxation by the other Treaty state, the BFH's interpretation of section 4 paragraph 1 sentence 3 EStG substitutes a mere endangerment for a limitation.[22]

The Court also ignores that the onset of an exit taxation due to the introduction of new legislation in the form of DTAs may be classified as a genuine retroactive effect (*echte Rückwirkung*). While not categorically unjustifiable, the recognised case groups in which genuine retroactivity is deemed as justified – like clarifications of confusing or unequitable legal situations, as with the retroactive introduction of section 4g EStG – do not apply here.[23] Moreover, in view of the aforementioned economic hardships that enterprises may face due to the lack of actual profit at the time of taxation, even a phony retroactive effect may be considered unjustified.[24]

The contention that any taxation upon leaving the German tax net hinges on Germany possessing taxation rights in the first place is, of course, cogent.[25] What remains to be said is that the provisions providing for exit taxation should be applied paying respects to the specific circumstances of the DTA and the other Treaty state. It follows from this that changes to DTA must be considered with special attention towards the moment in time where they come into force.[26] On top of that, the other state's taxation praxis will have to be continuously observed. If the relevant DTA contains an applicable *subject-to-tax clause* and the other State does not actually tax the income as allowed for in the Treaty, taxation rights remain with Germany and neither section 4 paragraph 1 sentence 3 EStG nor

[18] Jens Schönfeld, 'Entstrickung über die Grenze aus Sicht des § 4 Abs. 1 Satz 3 EStG anhand von Fallbeispielen. Zugleich Besprechung der jüngsten BFH-Rechtsprechung zur Aufgabe der „Theorie der finalen Entnahme" sowie zur „finalen Betriebsaufgabe"' (2010) 19 IStR 2010, 133, 135-36.

[19] ibid 137.

[20] Ferdinand Wollenschläger, 'Art. 3 GG' in Peter M Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2024) para 279.

[21] Wolfram Birkenfeld, Clemens Fuest, Bert Kaminski and others, 'Die Systematik der sog. Entstrickungsbesteuerung. Eine kritische Gesamtbetrachtung anhand von praktischen Einzelfällen' (2010) 63 Der Betrieb 1776, 1778-79.

[22] FG Münster (n 2) 2416; Schönfeld (n 18) 134; Birkenfeld, Fuest and Kaminski (n 21) 1780-81; Florian Oppel, 'Allgemeiner Entstrickungstatbestand in 3 4 Abs. 1 Sätze 3 und 4 EStG' (2025) 78 Der Betrieb 2805, 2806. Note that this is not considered a transgression of the text by Drüen (n 14) para 486c.

[23] Reiter (n 15) 361.

[24] Kessler and Spychalski (n 13) 200-01; cf Bron (n 17) 906; cf Schönfeld (n 18) 135.

[25] Christoph Ott, annotation of BFH, Urt. v. 19.11.2025 – I R 6/23, [2026] DStR 853, 853.

[26] Erik Muscheites, 'Passive Entstrickung infolge DBA-Änderung. Anwendungsbereich und Besteuerungszeitpunkt nach BFH' (2026) 79 Der Betrieb 1111, 1112.

section 12 paragraph 1 KStG are fulfilled.[27]

Since the amendments concerned affected only the distributive articles and therefore German taxation rights as whole, the BFH did not have to deal with exchanges between exemption and credit method.[28] It is to be expected that the jurisprudence surrounding section 4 paragraph 1 sentence 3 EStG and section 12 paragraph 1 KStG will be extended to section 6 paragraph 1 sentence 2 number 4 AStG in the near future.[29]

## II. Treaty interpretation

Although the memorandum mentioned by the BFH could qualify as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention, any conclusions drawn from the memorandum would in turn also be *argumenta e contrario*. It is therefore still completely consistent to disregard the memorandum.[30]

The BFH is reinforced in this stance by the fact that the international treaties have to be interpreted autonomously (see Article 3 paragraph 2 OECD-MA), the German distinction between current receipts and income from sales (compare section 21 paragraph 1 sentence 1 number 1 and section 23 paragraph 1 sentence 1 number 1 EStG) which is implied in the dissenting interpretation of Article 6 DTA Germany-Australia 1972 therefore being of no concern.[31] In fact, section 2 paragraph 1 sentence number 7 EStG, section 22 number 2 and section 23 paragraph 1 sentence 1 number 1 EStG would hint that the term "income" does, in principle, include sales profits.[32] The BFH does not repeat some arguments employed by the lower court that are also appealing, such as the sales profits being the economic equivalent of current receipts that would be received in the future[33] or the generally extensive interpretation of distributive articles based on the *situs* principle.[34]

Save for the DTA with Poland from 1972 or DTAs that are out of force but concerning which there are still appeals pending, equivalents of Article 13 paragraph 1 OECD-MA are now present in every DTA concluded by Germany. Consequently, the interpretive issue at hand is no longer very relevant in practice.[35]

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[27] Ott (n 25) 854.
[28] Compare FG Münster (n 2) 2415; Reiter (n 15) 358; Kessler and Spychalski (n 13) 196.
[29] Against FG Köln, Urt. v. 17.6.2021 – 15 K 888/18, IStR 2021, 818 (Tax Court of Cologne) – appeal pending.
[30] Ott (n 25) 854.
[31] ibid.
[32] FG Hessen (n 12) 625.
[33] ibid 624.
[34] ibid 625.
[35] Weiss (n 16) 628.

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