

## GERMANY/ALLEMAGNE

*What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?*

### **1. Draft laws and statutory instruments (executive orders based upon enabling legislation)**

First, the Ministry with overall responsibility for the particular draft is responsible for examining draft legislation for its conformity with the Convention – before that Ministry submits it to the other Ministries for approval.

Second, ever since the Federal Republic of Germany was founded in 1949, the Federal Ministry of Justice has served as the central body within the Federal Government with responsibility both for examining whether draft laws and statutory instruments proposed by the federal ministries meet legal and formal requirements, and for advising the Ministries on preparing their legislative proposals.

Since that time, the Federal Ministry of Justice has been rising to these obligations on a daily basis. When it is involved at an early stage, the scrutiny of legislation can make a key contribution to improving the quality of legal provisions. The main task is to examine whether new provisions are consistent with the current legal system: Are they compatible with the Constitution? Do they conform to European and international law? Do they fit coherently into the existing system of legal provisions of the same rank?

To this end, the Joint Rules of Procedure of the Federal Ministries contain the following provision: “§ 46:

“Before a bill is submitted to the Federal Government for adoption, it must be sent to the Federal Ministry of Justice to be examined in accordance with systematic and legal scrutiny. ...”

Furthermore, the Rules of Procedure of the Federal Government say in § 26:

“According to these rules the Minister of Justice can protest against the adoption of a bill if it is inconsistent with the current law.”

In the case of executive orders based on enabling legislation, there will be an examination for conformity by the Ministry with overall responsibility for the order as well as, in the course of the scrutiny procedure, by the Federal Ministry of Justice.

Once the draft bill has been adopted by the federal cabinet, the Legal Affairs Committee of the Federal Parliament (*Bundestag*) and the Legal Affairs Committee of the Federal Council (*Bundesrat*) are responsible for further examining it for conformity with the Convention until the legislative process has been concluded.

Similar control mechanisms are in place on the level of the constituent states (Länder).

### **2. Laws in force or administrative practice**

All courts and administrative organs in Germany are bound by the Basic Law, the German Constitution, and must take into account developments in European and public international law. They must especially take into account the decisions of the ECtHR, as clearly established by the Federal Constitutional Court (BVerfG). The BVerfG has explicitly stated that the Convention, as interpreted by the ECtHR, must be considered when interpreting the provisions of the Basic Law.

When facing a problem of compliance with ECtHR judgments which require the adoption of general measures, the Courts will still have to apply the current law, since the ECtHR cannot declare national

laws invalid. However, the courts would have to interpret any legal provision as far as possible in light of the ECtHR's decision. It would also be possible to refer such a question to the Federal Constitutional Court for a ruling on the constitutionality (which generally includes compatibility with the Convention) of the relevant provision, if no helpful interpretation is possible.

If somebody takes the view that existing laws or administrative practice violate the Convention, he or she can bring forward this argument in court proceedings. It is also possible to argue likewise in an individual complaint before the Federal Constitutional Court after having exhausted the recourse to the lower courts.

Responsibility for execution process lies with the Agent's Office. The Agents must present the Action Plan to the Committee of Ministers, and in the process of drafting the Action Plan the necessary measures must be identified in cooperation with the responsible authorities within the German system. Since the national authorities are in a far better position than the Court to judge what is the most appropriate way to prevent further violations, specific instructions run the risk of excluding possible viable alternatives and should be used only in extraordinary cases.

There is no written procedure for the adoption of general measures. Once the judgment becomes final, the Agent's Office within the Federal Ministry of Justice will analyze the judgment and determine whether general measures are called for. If so, the Ministry will initiate the necessary steps – depending on the nature of the measures (federal legislation, Länder legislation, practice directions, etc.).

If the general measures in question involve federal legislation, the executive branch will be obliged to come up with a draft of the necessary legislative measures, which will then be examined by the legislative bodies. The federal Parliament (Bundestag) will usually leave the first draft to the executive branch, but it also has the right to initiate legislation.

As described, the Ministry of Justice will be the starting point for the identification of any need for legislation, but the coordination of such measures will fall to whichever Ministry is responsible for the respective field of legislation.

***What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?***

As far as the procedure of review as described above (see 1.) is concerned, it is well established and works well.

As far as jurisprudence and administrative practise are concerned, we have the following comments:

For a long time, nobody seriously thought that any major judgments would be issued which established a human rights violation in Germany. It was assumed that Germany had already done its homework with the creation of the Federal Constitutional Court. Therefore, many were surprised and even outraged when, in the year 2004, a chamber of the European Court of Human Rights established a violation of human rights in Germany for the first time – although the case had been thoroughly scrutinised by a panel of the Federal Constitutional Court and no violation of fundamental rights had been found. Since then, things have changed profoundly.

The Federal Constitutional Court has generally followed the ECtHR in its interpretation of Convention rights. The best-known recent judicial dialogue in this respect was concerned with preventive detention, where the Federal Constitutional Court specified the conditions for continued detention as required by the ECtHR in its *M v. Germany* judgment.

***Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?***

To date, the Court has found only very few cases where national law had to be changed to implement a judgment. Thus, the mechanisms in place work well. As such, no assessment is planned for the time being.