

## GERMANY

### 1. SUBSTANTIVE ASPECTS:

#### 1.1 Distinction:

*1.1.1. Does your national legislation differentiate between different categories of treaties? If it does, how are they categorised? Does the form of the instrument lead to a different category of treaty?*

The German legal framework distinguishes treaties based on their substance and the national entity concluding them as follows:

- a. Treaties regulating the political relations of the Federal Republic of Germany,
- b. Treaties relating to subjects of federal legislation,
- c. Executive agreements
  - i. Governmental agreements
  - ii. Ministerial agreements,
- d. Treaties concluded by the *Länder* (i.e. States of the Federation).

These distinctions are laid down in the German Constitution (the Basic Law) and explained in more detail in the Guidelines on International Treaties ("Richtlinien zur Behandlung völkerrechtlicher Verträge", RvV), issued by the Federal Foreign Office and binding all federal ministries according to Art. 72(6) of the Common Rules of Procedure of Federal Ministries ("Gemeinsame Geschäftsordnung der Bundesministerien", GGO).

According to Art. 59(2) of the Basic Law treaties regulating the political relations of the Federal Republic of Germany (a.) and treaties relating to subjects of federal legislation (b.) always require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply, *mutatis mutandis*.

The form of the instrument does not determine the category of treaty. The classification into specific category is based exclusively on the substance and the national entity concluding the treaty.

*1.1.2. What are the criteria for their classification into specific category (subject matter, scope, financial effects, etc.)?*

- a) Category: treaties concluded by the *Länder* (1.1.1.d.)

Whether treaties are concluded at the federal level or by the *Länder* follows the delineation of their legislative competences in Art. 70 et seq. of the Basic Law. *Länder* can conclude treaties in those areas in which they have legislative competence but they need the consent of the Federal Government to do so, Art. 32(3) of the Basic Law. The *Bund* (federal government) can conclude treaties also in areas belonging to the legislative competence of the *Länder*. This is contested in detail; the procedure to be followed has been laid down in the so-called "Lindau Agreement" of 1957 (see below 1.2.1).

- b) Treaties concluded by the *Bund* (federal government)

aa) Category: Treaties pursuant to Art. 59(2)(1) of the Basic Law (Treaties relating to subjects of federal legislation [1.1.1.a] and Treaties regulating the political relations of the Federal Republic of Germany [1.1.1.b]).

If the subject matter of the treaty falls within the federal legislative competence according to Art. 70 et seq. of the Basic Law, it comes within the purview of Art. 59(2)(1) of the Basic Law.

Treaties relate to subjects of federal legislation within the meaning of Art. 59(2)(1) of the Basic Law if they

- create rights or obligations for individuals,
- entail financial obligations, which require an authorization by law,
- entail rules whose implementation require federal or *Länder* legislation,
- prejudge the legislative process by preventing the change of existing laws, or
- change an existing treaty, which relates to subjects of federal legislation, section 30(1)(b) RvV.

Whether a treaty defines the political relations of the Federation pursuant to Art. 59(2)(1) of the Basic Law depends on its subject matter. The category encompasses treaties which substantially and directly affect Germany's existence, territorial integrity or independence, its position or weight among states, or the order of the international community. These include, for example, treaties of alliance, arms control treaties, adherence to international organisations but also political relations with other states.

As a general rule, treaties falling under the categories enumerated in Art. 59(2)(1) of the Basic Law shall be concluded as a state treaty, section 6(1) RvV.

bb) Category: Executive treaty pursuant to Art. 59(2)(2) of the Basic Law (1.1.1.c)

Any federal treaty not regulating the political relations of the Federation or relating to subjects of federal legislation is an executive treaty in accordance with Art. 59(2)(2) of the Basic Law.

Executive treaties shall be concluded as governmental or ministerial agreements, section 6(2) RvV. A ministerial agreement can only be concluded between ministries and if the subject matter of the treaty belongs to the sole competence of one ministry on the German side and does not require implementation by the federal government, § 6(2)(b) RvV.

Whether a treaty is concluded as a state treaty, a governmental agreement, or a ministerial agreement depends on the political importance of the matter, the other party's requirements and domestic regulations, and whether it is common in international relations to regulate the subject matter in a certain form of agreement. Special considerations can also play a role, e.g. the desire to avoid using a disputed state name, section 6 RvV.

### *1.1.3. What is the legal status of treaties not requiring parliamentary approval in the internal hierarchy of norms?*

International treaties as such have no status in the German internal legal order. They need to be transformed into federal legislation to take domestic effect. The type of domestic legislation (federal law, governmental regulation, etc.) determines their internal status. The same applies for treaties not requiring parliamentary approval.

## 1.2 Competence:

### *1.2.1. Which authority is responsible for drafting the text of each category of treaty?*

The responsibility for drafting a treaty to be concluded by the *Bund* lies with the federal ministry in whose competence the treaty falls, regardless of its category. If the treaty concerns the competence of more than one federal ministry, the leading ministry involves the other ministries as early as possible in the process, section 16(1) RvV. The ministry shall consult the *Länder* early on in the process, if the treaty touches upon substantial interests of the *Länder* and it must seek their approval early on if the treaty concerns their exclusive legislative competence, section 26(1)(a) RvV.

As early as possible in the process, a draft text is subject to a constitutional review by the Federal Ministry of the Interior and Community and the Federal Ministry of Justice, regardless of whether one of these ministries is the leading ministry or not, section 16(2) RvV. They also determine – on the basis of specialist preparation by the leading ministry – whether the treaty requires parliamentary approval, section 30(1) RvV. The Federal Foreign Office conducts a formal review of the final text to ensure that the draft conforms to international and domestic standards for international treaties, sections 16(4), 22 RvV.

### *1.2.2. In the process of drafting a treaty, which authority is responsible for the assessment of the legal character and category of an agreement?*

The leading ministry decides whether to conclude a binding or non-binding agreement and, in case of the former, which category of a binding agreement to conclude. This is also subject to the abovementioned constitutional and formal review, sections 16(2), 30(1) RvV. If the leading ministry intends to conclude a non-binding agreement, the Federal Foreign Office also conducts a review ensuring that no legal obligations are entered into, section 41(3) RvV.

### *1.2.3. Which authority has the general responsibility for ratification / approval / confirmation procedures for treaties (is it generally the responsibility of the Parliament and only certain categories are confirmed by the government or vice versa)?*

The general responsibility for concluding treaties, including their approval and confirmation, lies with the executive. Treaties of general importance for internal, external, economic, social, financial, or cultural affairs, require approval of the federal government. This concerns all state treaties and most government agreements, save for purely technical ones. Ministerial agreements only require governmental approval if they are of high political significance, section 25 RvV. Otherwise they can be concluded by the competent ministry on its own.

Only treaties falling under the two enumerated categories of Art. 59(2)(1) of the Basic Law are subject to parliamentary approval by way of federal law. The responsibility for ratification formally lies with the Federal President (see below 2.2.1.).

### *1.2.4. What are the responsibilities of the line ministries and the Ministry of Foreign Affairs throughout the procedure of conclusion and ratification of each category of treaty?*

The leading line ministry is responsible for the substance of the treaty, including the choice of the appropriate treaty category. Before entering negotiations, it must inform, consult, and obtain authorization from the Federal Foreign Office, section 17(1) RvV. The Federal Foreign Office in general leads negotiation delegations, but can delegate this task to the leading ministry, section 17(2) RvV.

The Federal Ministry of the Interior and Community, the Federal Ministry of Justice and the Federal Foreign Office conduct the abovementioned constitutional and formal reviews. The Federal Foreign Office also identifies the need for, and, if necessary, obtains full powers from the Federal President for the person designated to sign the treaty, sections 27(3), 28(2) RvV. The Federal Foreign Office coordinates ratification procedures upon the line ministry's request, section 31(3) RvV.

### *1.2.5 What is the competence of autonomous regions/territories for the conclusion of a treaty?*

International treaties can be concluded on the federal level or by the *Länder* (see 1.1.2). The German legal framework does not entail further competences of other autonomous regions/territories for the conclusion of a treaty.

### *1.2.6 Does the Ministry of Foreign Affairs have delegated competence to conclude less significant treaties on its own, by producing full powers signed by the Minister of Foreign Affairs? If it does, what typically characterises these agreements?*

See 1.2.3. above. The Federal Foreign Office can conclude ministerial agreements with other ministries if the subject matter of the treaty lies in the sole competence of the Federal Foreign Office and the treaty does not require implementation by the federal government, section 6(2)(b) RvV. These treaties can enter into force upon signature.

## **2. PROCEDURAL ASPECTS**

### 2.1 Procedure before conclusion/signature

#### *2.1.1. What are the procedures required for the conclusion of different categories of treaties? Can a treaty be concluded through a simplified procedure? If yes, please provide a detailed presentation of the circumstances in which such procedures can be applied and describe the procedures.*

The procedure before conclusion/signature of treaties does not differ according to the category of treaty to be concluded. There is no denominated simplified procedure for concluding international treaties. Depending on the treaty's subject matter and importance, it requires additional consultation and/or approval by the *Länder* or the Federal Government (see above 1.2.1.).

#### *2.1.2. Do you have a procedure to review the harmonization and compliance of treaties not requiring parliamentary approval with existing national laws? What authority does the review and when?*

The Federal Ministry of the Interior and Community and the Federal Ministry of Justice conduct a constitutional review, section 16(2) RvV. If Germany is responsible for the first draft of a treaty, the review takes place before the leading ministry sends it to the other side(s), section 18(1) RvV. If another state provides the first draft, the review takes place at the latest when the main content of the treaty is agreed upon and negotiations over concrete formulations begin, section 16(2) RvV.

#### *2.1.3. Do these procedures have one or two phases (before and/or after signature)? Can a treaty enter into force upon signature?*

These procedures are conducted only before signature.

A treaty can enter into force upon signature, unless its conclusion or implementation requires the consent or consultation of domestic entities which can or could not be obtained prior to conclusion. This concerns:

- treaties governed by Art. 59(2)(1) Basic Law, i.e. treaties regulating the political relations of the Federation and treaties related to subjects of federal legislation, as they require parliamentary approval;

- administrative treaties concluded as state treaties;
- treaties that require implementing acts by the executive;
- treaties to which the *Länder* must consent because it concerns their sole legislative competence (see above 1.2.1), if that consent could not be attained prior to conclusion; and
- treaties that require the consent of the *Bundesrat*, the "upper house" of Parliament, through which the *Länder* participate in federal legislation, because their implementation needs an executive regulation that requires consent of the *Bundesrat*, section 6(1), (2)(a) RvV.

*2.1.4. Are there any differences in the procedures when considering multilateral vs bilateral treaties?*

There is no principled difference in procedures between multilateral and bilateral treaties. The procedure differs in certain points for so-called "mixed agreements" to which the European Union as well as its member states become party. Since usually the European Commission is the lead negotiator for such treaties, the competent ministry needs to involve the Ministry of the Interior and Community and the Ministry of Justice, as well as the Federal Foreign Office already when the negotiation mandate of the European Commission is agreed upon between member states, section 33(4)(a) RvV. Parliament needs to be informed in accordance with sections 5 et seq. of the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union. These require substantial, comprehensive and timely reporting by the Federal Government to parliament. Since mixed agreements can only be implemented jointly by the member states and the European Union due to distribution of competencies between them, ratification requires coordination with the European Union.

*2.1.5. Are there certain denominations of treaties, which, according to your domestic law, always imply a treaty in simplified form according to your domestic law? (for example, "Memorandum of Understanding", "Minutes" etc.)*

No. Germany understands "Memorandum of Understanding" to denote a non-binding agreement, although it seeks to avoid the term in practice because of its ambiguity, section 41(2) RvV.

*2.1.6. Is the procedure for obtaining the mandate for negotiations differentiated according to different categories of treaties? If yes, how?*

The Federal Foreign Office leads all negotiation delegations, unless it delegates that task to the line ministry, section 17(2) RvV. It issues credentials for state treaties and government agreements, § 19(3)(a) RvV.

*2.1.7. Are the signatories of all categories of treaties required to produce full powers upon signature or just some of them?*

This depends on the requirements of international law and agreements with the other parties. It does not depend on the treaty category.

*2.1.8. Do you allow for electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?*

No, the German legal framework does not allow either for electronic signature of treaties or an electronic transmission of treaties instead of the exchange of physical copies. Treaties must be signed in writing; section 24 RvV read in conjunction with Annex F sets out specific requirements for the physical copy (e.g. special paper and folder).

## 2.2 Procedure after conclusion

*2.2.1 Does the internal procedure for expressing consent to be bound change based on different categories of treaties (i.e., ratification, approval, acceptance, etc.)? If so, please explain.*

Generally, confirmation of all relevant entities is sought before signing the treaty, so that no further approval or acceptance is necessary. Only when treaties require domestic implementation or enactment measures is there a special ratification or a substitute procedure.

Ratification requires that the President signs the instrument of ratification, accession, acceptance, or approval after the minister for foreign affairs countersigned it in accordance with Art. 58 of the Basic Law, section 31(1) RvV.

The procedure substituting ratification requires the production of a notification that all domestic requirements for the entry into force of the treaty are met. The President must approve that notification prior to it being sent, section 31(2) RvV.

The Federal Foreign Office coordinates both procedures upon the leading ministry's request. The request is predicated upon the completion of all necessary domestic processes, section 31(3) RvV.

*2.2.2. Is entry into force of a treaty possible on the date of their signature? If yes, what are the procedural requirements that enable such entry into force?*

Entry into force upon signature is possible if the treaty does not require any domestic implementation or enactment measures, section 12(4) RvV. In this case there are no special procedural requirements for an entry into force. Only if exceptionally Germany signs a treaty that is not subject to ratification but requires domestic implementation measures, the signatory must sign with the addition "subject to ratification / approval", section 27(1)(c) RvV.

*2.2.3. If entry into force is not possible on the date of the signature, is it possible to use provisional application for an earlier application of such treaty?*

Unconditional provisional application is, in principle, only possible if the treaty does not require domestic implementation measures. If that is not the case, provisional application must be predicated upon a notification that all domestic requirements are met or that provisional application occurs "in accordance with domestic law", section 12(9) RvV.

## 2.3 Form

*2.3.1. Do different categories of treaties require specific form when the text is prepared for signature (i.e. printing on treaty paper, sealing, treaty folder)?*

In principle no. Germany refrains from sealing treaties, except if the other party so wishes and the treaty in question is a state treaty of high significance, section 24(3) RvV.

*2.3.2. Who prepares the text of different categories of treaties for signature?*

The Federal Foreign Office prepares original texts of bilateral state treaties and governmental agreements. The competent ministry prepares original texts of bilateral ministerial agreements, section 24(1) RvV.

When it is incumbent on Germany to prepare the original texts of multilateral agreements, the competent ministry prepares the original texts, whereas the Federal Foreign Office coordinates the creation of the treaty binder in which all original texts are bound, section 24(2) RvV.

## 2.4 Implementation

*How are treaties not requiring parliamentary approval implemented in national legislation in order to ensure respect of the principle of pacta sunt servanda in accordance with Article 26 of the VCLT?*

In the case of treaties not requiring parliamentary approval the provisions concerning the federal administration shall apply, mutatis mutandis, Art. 59(2)(2) of the Basic Law. Hence, the implementation of treaties not requiring parliamentary approval lies in the competence of the executive. The executive implements the treaties not requiring parliamentary approval within the existing legal framework via administrative regulations or acts in accordance with the provisions concerning the federal administration.

## 2.5 Publication, Registration and Depository

### *2.5.1. Do all categories of treaties have to be published?*

All treaties the Federal Republic of Germany concludes must be published, section 76(2) No. 1 GGO.

### *2.5.2. If not, which categories do not need to be published and made available to the general public? Is there room for discretion?*

Exceptionally, the competent ministry with the approval of the Federal Foreign Office can refrain from publishing treaties when compelling reasons speak against publication, section 76(2) GGO, section 34(1), (7) RvV.

### *2.5.3. Which authority decides whether a treaty should not be published?*

See prior question.

### *2.5.4. Where is each category of treaty published (Official Gazette, website, database, etc.)?*

All treaties are published in the Official Gazette (Bundesgesetzblatt Teil II), section 76(2) No. 1 GGO.

### *2.5.5. Which categories of treaties are registered with the UN Secretariat?*

In keeping with Art. 102(1) UN-Charter, Germany registers all international treaties if the parties agreed to entrust Germany with that function, regardless of their category, section 36 RvV.

### *2.5.6. Where are the originals (or certified true copies) of different categories of treaties kept (e.g., MFA, authority responsible for their implementation, state archives)?*

They are kept in the Political Archive of the Federal Foreign Office, section 37(2) RvV.