

42nd SESSION

Report
CG(2022)42-16prov
28 February 2022

Original: English

Monitoring of the application of the European Charter of Local Self-Government in Germany

Committee on the Honouring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee)

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Summary

This is the second monitoring report on Germany since the country ratified the Charter in 1988. It follows the remote monitoring meetings carried out from 26 to 28 May 2021. The report welcomes the high standards of local democracy and a sophisticated legal framework covering all aspects of local autonomy, the level of judicial protection offered to local self-government progress. The report also highlights the wide scope of responsibilities and high level of organizational autonomy enjoyed by German local authorities.

However, the rapporteurs draw attention to, among other things, the increasing needs in the social sector that have reduced local authorities' financial autonomy, the poor counties' taxation power and the lack of diversification and flexibility of their system of revenue.

Consequently, they call German authorities to, among others, ensure that local authorities have adequate financial means that allow them discretion in how to spend these resources; to revise the financial status of counties and extend their taxation powers to provide more diversification and flexibility to the system of counties' revenue while making sure that relevant taxes are not levied to the detriment of municipalities that are part of the counties. Rapporteurs also called German authorities to sign and ratify the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.

1. L: Chamber of Local Authorities / R: Chamber of Regions.
EPP/CCE: European People's Party Group in the Congress.
SOC/G/PD: Group of Socialists, Greens and Progressive Democrats.
ILDG: Independent Liberal and Democratic Group.
ECR: European Conservatives and Reformists Group.
NR: Members not belonging to a political group of the Congress.

DRAFT RECOMMENDATION²

1. The Congress of Local and Regional Authorities of the Council of Europe refers to:

- a. Article 2, paragraph 1.b, of the Charter of the Congress of Local and Regional Authorities appended to Statutory Resolution CM/Res(2020)1 relating to the Congress, stipulating that one of the aims of the Congress is “to submit proposals to the Committee of Ministers in order to promote local and regional democracy”;
- b. Article 1, paragraph 3, of the Charter of the Congress of Local and Regional Authorities appended to Statutory Resolution CM/Res(2020)1 relating to the Congress, stipulating that “The Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member States and in States which have applied to join the Council of Europe, and shall ensure the effective implementation of the principles of the European Charter of Local Self-Government.”
- c. Chapter XVIII of the Rules and Procedures of the Congress on the organisation of monitoring procedures;
- d. Sustainable Development Goals (SDG) of the United Nations 2030 Agenda for Sustainable Development, in particular Goals 11 on sustainable cities and communities and 16 on peace, justice and strong institutions;
- e. Guidelines for civil participation in political decision making, adopted by the Committee of Ministers on 27 September 2017;
- f. Recommendation CM/Rec(2018)4 of the Committee of Ministers to member States on the participation of citizens in local public life, adopted on 21 March 2018;
- g. Recommendation CM/Rec(2019)3 of the Committee of Ministers to member States on supervision of local authorities’ activities, adopted on 4 April 2019;
- h. previous Congress Recommendation 320(2012) on the monitoring of the application of the European Charter of Local Self-Government in Germany;
- i. the explanatory memorandum on the monitoring of the application of the European Charter of Local Self-Government in Germany.

2. Preliminary draft recommendation approved by the Monitoring Committee on 10 February 2022 (remote meeting).

Members of the committee:

G. MOSLER-TOERNSTROEM (Chair); M. BUFI; E. VELIAJ; A. HARUTYUNYAN; E. YERITSYAN; H. WENINGER; A. IBRAHIMOV; T. TAGHIYEV; M. COOLS; M. HARDY; J. NACHTERGAELE; M. CAVARA; S. JUJIC; M. MAHMUTBEGOVIC; N. AHMEDOVA replacing: A. MIMENOV; K. ANASTASOVA replacing G. STOYANOVA; A. BLAZEVIC; I. HANZEK; A. JOZIC; A. VYRAS; Z. BROZ; J. FISCHEROVA; P. KULHANEK; K. BILLE; R. MONDORF; M. JUHKAMI; A. KALEVA; J. KOKKO; X. CADORET; T. GUIGNARD; M-L PENCHARD; O. GRIGOLIA; L. ZHORZHOIANI replacing: K. KALADZE; N. KAVTARADZE; G. BERGMANN; H. KLEMP; C. LAMMERSKITTEN; S. SCHUMACHER; R. SPIEGLER; B. VOEHRINGER; N. FARMAKIS; K. KOUKAS; I. TSAMIS; G. ILLES; A. MAGYAR; K. SZEMEREYNE PATAKI; K. T. MAGNUSSON; J. CROWE; G. NI MHUIMNEACAIN; P. AGABITI; S. MINERVA ; B. TOCE; L. TOSOLINI; F. TRAVAGLINI; P. VERCELLOTTI; G. KAMINSKIS; J. HASLER; V. MITROFANOVAS; D. BIANCALANA; M. FAVA; G. MARSAN; P. SMOLOVIC; J. BENGEOVOORD; H. BERGMANN; L. VERBEEK; B. A. GRAM; G. M. HELGESEN; S. T. LOKSLID; M. GOLASZEWSKI; B. HORDEJUK; B. KLIMEK; V. FURDUI; M. GALIT; V. GORODINSCHII; I. LUNGU; E. OPREA; C. PATAKI; C. RADULESCU; V. BELIKOV; S. LEVSHIN; O. MELNICHENKO; K. TOLKACHEV; V. VARNAVSKIY; E. ZABOLOTNYI; A. BINDI; R. FEJSTAMER; N. JOKSIMOVIC; S. TUCAKOVIC; M. SAGAN replacing: J. HLINKA; M. TURCAN; V. PREBILIC; N. ALEMAN OJEDA; L. GARLITO BATALLA; A. GONZALEZ RODRIGUEZ; G. IGUALORTIZ; A. KNAPE; J. ROCKLIND; D. ERAY; B. HIRS; H. AKGUN; C. BAS; T. BUYUKAKIN; S. DOGUCU; L. BEKTAS replacing: B. KERIMOGLU; R. VERGILI; O. KORINNYI; M. LUKASHUK; L. PASHYNNA; H. ZAMAZEVA; R. DODD replacing: A. BOFF; A. BOYES; S. DICKSON; A. LEADBETTER; S. PANDOR; B. RUDKIN.

N.B.: The names of members who took part in the vote are in italics.

Secretariat of the committee: S. POIREL, Secretary to the committee and S. PEREVERTEN, co-Secretary to the committee.

j. the contemporary commentary on the explanatory report to the European Charter of Local Self-Government adopted by the Congress Statutory Forum on 7 December 2020.

2. The Congress points out that:

a. Germany joined the Council of Europe on 13 July 1950, signed the European Charter of Local Self-Government (ETS No. 122, hereinafter "the Charter") on 15 October 1985 and ratified it without reservations on 17 May 1988. The Charter entered into force in Germany on 1 September 1988.

b. Germany has not signed the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207).

c. The Committee on the Honouring of Obligations and Commitments by member States of the European Charter of Local Self-Government (hereinafter referred to as Monitoring Committee) decided to examine the situation of local and regional democracy in Germany in the light of the Charter. It instructed Konstantinos KOUKAS, Greece (L, EPP/CCE) and Jani KOKKO, Finland (R, SOC/G/PD), with the task of preparing and submitting to the Congress a report on monitoring the application of the European Charter of Local Self-Government in Germany.

d. The monitoring meetings took place remotely from 26 to 28 May 2021. On this occasion, the Congress delegation spoke with the representatives of various institutions at all levels of government. The detailed programme of the remote meetings is appended to the explanatory memorandum.

e. The co-rapporteurs wish to thank the Permanent Representation of Germany to the Council of Europe and all those whom they spoke during the remote meetings.

3. The Congress notes with satisfaction that in Germany:

a. there are high standards of local democracy and a sophisticated legal framework covering all aspects of local autonomy;

b. the level of judicial protection offered to local self-government and the rule of law can be labelled as paradigmatic;

c. local authorities enjoy a wide scope of responsibilities and a high level of organisational autonomy.

4. The Congress expresses its concerns on the following issues:

a. increasing needs in the social sector have reduced local authorities' financial autonomy;

b. counties' (*Kreise*) taxation powers remain poor, and their system of revenue needs to be further diversified and made more flexible;

c. standards and criteria for the implementation of the commensurability principle have yet to be adopted;

d. participation and consultation of associations of local authorities at the federal level is less systematic than at the *Länder* level due to the limits the federal system provides to direct consultation of local authorities;

e. several *Länder* have not introduced the power of counties to exercise their initiative in county matters that are not excluded from their competence (general competence).

5. In light of the foregoing, the Congress requests that the Committee of Ministers invite the authorities of Germany to:

a. ensure that local authorities have adequate financial means that allow them discretion in how to spend these resources;

b. revise the financial status of counties and extend their taxation powers to provide more diversification and flexibility to the system of counties' revenue while making sure that relevant taxes are not levied to the detriment of municipalities that are part of the counties; this would allow the declaration on article 9 para. 3 of the Charter to be withdrawn and the relevant scope of the Charter to be extended to all entities having direct political legitimacy;

- c. adopt concrete standards and criteria for the implementation of the commensurability principle in order to provide transparency in the whole financial calculation and planning process;
 - d. further strengthen participatory and consultation rights of associations of local authorities at the federal level by increasing the regularity of consultation;
 - e. consider introducing a general competence clause for local affairs at the county scale in the federal constitution and *Länder* legislations;
 - f. sign and ratify the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (ETS No. 207).
6. The Congress calls on the Committee of Ministers and the Parliamentary Assembly of the Council of Europe to take account of this recommendation on the monitoring of the application of the European Charter of Local Self-Government in Germany and the accompanying explanatory memorandum in their activities relating to this member State.

EXPLANATORY MEMORANDUM

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1. INTRODUCTION: AIM AND SCOPE OF THE VISIT, TERMS OF REFERENCE

1. Article 1, paragraph 3, of the Charter of the Congress of Local and Regional Authorities appended to Statutory Resolution CM/Res(2020)1 relating to the Congress, stipulates that “The Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member States and in States which have applied to join the Council of Europe, and shall ensure the effective implementation of the principles of the European Charter of Local Self-Government”.

2. The Federal Republic of Germany joined the Council of Europe on 13 July 1950; it signed the European Charter of Local Self-Government (ETS No. 122, hereafter “the Charter”) on 15 October 1985 and ratified it on 17 May 1988 with entry into force on 1 September 1988. Germany made some reservations during ratification, declaring that the scope of Article 9, Paragraph 3³ does not apply to the municipal associations “*Verbandsgemeinden*” and counties (*Kreise*) in the state (*Land*) of Rhineland-Palatinate, while in all other states (*Länder*), the same paragraph does not apply to the *Kreise*. None of these exceptions, expressed in a declaration made on 1 September 1988, have been removed since then.

3. In the domain of local and regional democracy, Germany has also ratified:

- the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106) on 21 September 1981 (entry into force 22 December 1981).
- the Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 159) on 16 September 1998 (entry into force on 17 December 1998).
- Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation (ETS No. 169) on 2 October 2001 (entry into force 3 January 2002).
- Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) (ETS No. 206) on 8 November 2012 (entry into force 1 January 2013).

4. Germany has not signed the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (ETS No. 207).

- The Congress has adopted the following previous recommendation on local and regional democracy in Germany: Recommendation 320 (2012)

5. The Committee on the Honouring of Obligations and Commitments by member States of the European Charter of Local Self-Government (hereinafter referred to as Monitoring Committee) decided to examine the situation of local and regional democracy in Germany in the light of the Charter. It instructed Konstantinos KOUKAS, Greece (L, EPP/CCE) and Jani KOKKO, Finland (R, SOC/G/PD), with the task of preparing and submitting to the Congress a report on the Application of the Charter of Local Self-Government in Germany. The official remote monitoring mission in Germany was carried out by the aforementioned rapporteurs. The delegation was accompanied by the Congress secretariat and was assisted by Prof. Nikolaos CHLEPAS (expert), member of the Group of Independent Experts on the European Charter of Local Self-Government. The rapporteurs wish to express their thanks to the expert for his assistance in the preparation of this report. This group of persons will be hereinafter referred to as “the delegation”.

6. The monitoring meetings took place remotely from 26 to 28 May 2021. On this occasion, the Congress delegation spoke with the representatives of various institutions at all levels of government. The detailed programme of the remote meetings is appended to the explanatory memorandum;

7. The co-rapporteurs wish to thank the Permanent Representation of Germany to the Council of Europe and all those whom they met during the visit.

2. INTERNAL AND INTERNATIONAL NORMATIVE FRAMEWORK

8. The Federal Republic of Germany is a federal parliamentary democracy, and it comprises sixteen *Länder* (constituent states), each one having its own constitution and largely autonomous internal political structure. The relationship between the Federation (Bund) and the *Länder* is specified by the German constitution, the

3 Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.’ (Art. 9 Para. 3).

Basic Law (BL-*Grundgesetz*). The *Länder* have their own state authority and administrative structures. Under the law relating to the organisation of the state, local authorities are part of the *Länder*. As to the relationship to international law, the German legal system is a monistic one, as, the general rules of international law are an integral part of federal law, taking precedence over domestic laws.

9. The *Länder* have the power to legislate unless the Basic Law bestows legislative competencies on the Federation. The *Länder's* most important legislative powers relate to education and culture, broadcasting, and general police and regulatory law. Municipal law also falls within the jurisdiction of the *Länder*. At federal level, the legislative power is vested in the bicameral parliament, consisting of the directly elected Federal Parliament (Bundestag) and of the Federal Council (Bundesrat), a legislative body representing the sixteen *Länder*. The Bundesrat is considered to be, next to the U.S. Senate, the most powerful second (not "upper") house in existence.

10. The head of state is the Federal President, who is elected by the so-called Federal Convention (*Bundesversammlung*), as an institution consisting of the members of the *Bundestag* and an equal number of members elected by the parliaments of the *Länder* on the basis of proportional representation. The federal executive power is exercised by the federal government, headed by the federal chancellor, who is elected by, and responsible to the *Bundestag*.

11. The independence of the Judiciary is guaranteed by the Basic Law. The judicial power is vested in the judges and is exercised by the federal courts provided for in the Basic Law, and by the courts of the *Länder*. The Federal Constitutional Court (*Bundesverfassungsgericht*) is also an integral part of the judiciary, and is responsible for constitutional matters, for example, the constitutional review of the legal statutes.

12. German democracy is described as "full democracy", ranking 14th best in the world⁴ and characterized by a consensual political culture. Reaching, again, one of the best scores (94/100) it is labeled as a "free country"⁵. Regarding the perception of corruption, Germany ranks 9th best in the world (score: 80),⁶ which could also be an explanation why it ranked sixth best concerning trust in government among the EU28.⁷ Regarding the level of Local Autonomy, a recent comparative study on Local Autonomy in 39 European countries, has shown that the pertinent score of Germany has been relatively stable since 1990, while it ranked 7th highest in the period 2010-2014.⁸

2.1 Local government system (constitutional and legislative framework, reforms)

13. According to Art. 28 para. 1 (BL)⁹, the constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each *Land*, county (*Kreis*), and municipality (*Gemeinde*) the people shall be represented by a body chosen in general, direct, free, equal, and secret elections. In county and municipal elections, persons who possess the citizenship of any member state of the European Union are also eligible to vote and to be elected in light of the EU regulations. In municipalities a local assembly may take the place of an elected body.

14. According to the second paragraph of the same article municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities (consortia) shall also have the right of self-government in accordance with the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

15. As a major rule and within the limits of the law, local authorities are entitled to regulate and administer all local public affairs which are not conferred on other public authority (*Allzuständigkeit*). Local governments have, within the framework of the law, rights and powers to:

- a. exercise general scope of authority in their own area (*Gebietshoheit*);
- b. determine their internal administrative organisation (*Organisationshoheit*);
- c. recruit their personnel, and determine their division of work (*Personalhoheit*);

4 Score 8,67 according to the Global Democracy Index 2020: <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>.

5 <https://freedomhouse.org/country/germany/freedom-world/2021>.

6 <https://www.transparency.org/en/cpi/2020/index/nzl>.

7 <https://data.oecd.org/gga/trust-in-government.htm>.

8 See Ladner/Keuffer/Baldersheim/Hlepas/Swianiewicz/Navarro (2019), Patterns of Local Autonomy in Europe, New York: Palgrave MacMillan, p. 240. According to this study, Switzerland reached the highest score (79,5) among these countries, followed by Finland (79,4) and Iceland (78,5); The German score was 73,6.

9 <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

- d. have their own budget, with the responsibility for their resources (including taxation) and expenditure (*Finanzhoheit*);
- e) regulate local public affairs in an autonomous way (*Rechtsetzungshoheit*).

16. According to the third paragraph of article 28 BL, the Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of the two previous paragraphs (s. above). In addition, according to article 31 BL, federal law shall take precedence over *Land* law.

17. The constitutions of the *Länder* entrench also constitutional guarantees, but the level of protection cannot be lower than that of the federal Basic Law. The most common constitutional safeguards at the *Land* level are also the general scope of responsibility of local authorities in local matters, their right to be heard in all decisions affecting their interests, the principle of concomitant financing, the right to own tax revenues and to have a share in financial equalisation.

18. In Germany, local government issues belong to the competence of the *Länder*. Thus, the institutional arrangements, the allocation of competences and the system of finance of local authorities fall within the range of responsibility of the *Länder*, which may regulate them with great autonomy. Therefore, considerable institutional differences appear between their respective local government systems. In fact, the only restriction in *Land*-level regulation of local governments is that the constitutional order of the *Länder* (including their municipalities) must be based on the principles of (republican, democratic and social) rule of law (*Rechtsstaatlichkeit*). This principle of harmonisation (the so-called *Homogenitätsgebot* or *Homogenitätsklausel*) is the guarantee for not only the unity of constitutionalism in the country, but also for the democratic structure of local authorities in all its *Länder*.

19. According to the German local government law, the right to self-government is provided for the territorial units of the *Länder* (*Gebietskörperschaften*). This category embraces not only the municipalities, but also the municipal associations (*Gemeindeverbände*), to which the counties (*Kreise*) and the institutional forms of local government cooperation belong. The detailed rules of local authorities are laid down by *Land* level legislation in separate local government laws (*Kreis-* and *Gemeindeordnungen*). The functions of local authorities are also determined by the *Länder*, while the federal government has no power, since the constitutional amendment of 2006, to confer mandatory functions directly to local authorities.

20. Today's territorial structure of local self-government in Germany is the result of successive and asymmetric reforms. Beginning in the late sixties, some *Länder* have tried to tackle disparities by merging small communes into more powerful municipalities. Especially in Hesse, North Rhine-Westphalia and Saarland territorial reforms in the 1970s led to the creation of considerably larger, 'unitary' municipalities ('*Einheitsgemeinden*'). In Hesse, for example, the number of municipalities decreased from a total of 2691 in 1960 to only 416 in 1978. A similar pattern can be seen in North Rhine-Westphalia, where the number of municipalities dropped from 2277 in 1968 to 396 in 1978. In Saarland, which had 345 municipalities before the reform, only 50 existed afterwards.

21. In the new states of Saxony and Saxony-Anhalt too, there was a significant reduction in the number of municipalities at the municipal level after German reunification. However, unlike in Hesse, North Rhine-Westphalia and Saarland, the model of the unitary large municipalities was not consistently applied in these states. Here, and also in particular in Baden-Württemberg, Bavaria, Brandenburg, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate, Schleswig-Holstein and Thuringia, together with a few unitary large municipalities, considerably high numbers of small municipalities continue to exist, which have been combined into municipal associations/consortia acting below the county level to compensate for their lack of capacity. These associations, described as administrative partnerships (*Verwaltungsgemeinschaften*), municipal offices (*Ämter*), or association municipalities (*Verbandsgemeinden*), are essentially distinguished by the fact that they perform most of the administrative tasks of their member municipalities in a quasi-managing capacity and are thus able to provide the necessary administrative structures. The member municipalities of such associations/consortia also have their own mayor and a municipal representative body (municipal council).

22. Today, the municipalities and especially the counties are the main operational level for implementing the state laws. This weight at the communal level (municipalities, consortia, and counties) is underlined by the number of personnel and size of the communal budget: the communal level covers around one-third of the public service personnel and public budgets (excluding social security). Based on their traditional roots of the early nineteenth century, the modern communal administration and local self-government contribute significantly to the quality of public service delivery and to legitimation acceptance of public administration in general. The decentralised system with a wide range of responsibilities and decision-making authority has

provided the basis that facilitates initiatives and approaches to modernising public administration and reforms in various fields.¹⁰

23. A major strength of the German administrative system is that it promotes territorial and functional variations, which allow for flexible models of subnational intergovernmental organisation. This variety of institutional set-up and reform approaches encourages piloting, adjustments, and learning. However, different models can lead to differences in service provision, treatment of citizens and varying institutional progress of local administration. Furthermore, a balance needs to be found between 'too small' and 'too big' territorial jurisdictions. A continuous monitoring of local governments' service quality and performance seems indispensable for identifying new reform requirements in due time and for adjusting institutional settings accordingly.¹¹

2.2 Status of the capital city

24. Berlin, the capital city of Germany, has a special administrative status, which does not stem from its position as the capital, but rather from its status as a *Land*. However, a constitutional amendment introduced a new provision into the Basic Law (in article 22) naming Berlin as the capital city of the Federal Republic of Germany and stating that its status shall be regulated by federal law. Berlin has a two-tier administrative system. It has 12 boroughs (*Bezirke*), which are seen as local government units without legal personality.

25. The representative body of the central administration of Berlin is the House of Representatives (*Abgeordnetenhaus*) composed of at least 130 members, who are elected by those German nationals entitled to vote in general, equal, free, secret and direct elections. The executive body is the Senate, which consists of the Governing Mayor and a maximum of eight other members. While the Governing Mayor is elected by an absolute majority of the members of the House of Representatives, the other Senate members are appointed and removed by the Governing Mayor. The relationship of the legislative and executive bodies is based on parliamentary government, which means that the Governing Mayor is required to have the majority support of the *Land* parliament.

26. As to the second level of Berlin's government, the borough assembly bears the legislative and decision-making responsibilities. Each of them is composed of 55 members, who are elected at the same time as the House of Representatives in a general, equal, secret, and direct election. The executive functions are performed by the borough mayor and the councillors of the borough (*Bezirksstadträte*) elected by the borough assembly. The boroughs have their own functions and tasks, but the Senate may issue guidelines and general administrative provisions relating to their activities. The Senate supervises their application and the lawfulness of their administrative activity.

2.3 Legal status of the European Charter of Local Self-Government

27. As already mentioned, the primacy of international law is provided by article 25 BL: '*The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory*'.

28. However, whenever a treaty especially affects a *Land*, this *Land* should be consulted: Article 32 [Foreign relations] para. 2 BL provides that: '*Before the conclusion of a treaty affecting the special circumstances of a Land, that Land shall be consulted in timely fashion*'.

29. According to Article 100 BL (concrete judicial review) para. 2 BL, '*If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court*'.

30. As already mentioned, Germany has made two declarations on the scope of the Charter in Germany. These were announced in two letters from their Permanent Representative, dated 17 May 1988, and handed to the Council of Europe at the time of deposit of the instrument of ratification. According to these declarations, Article 9, paragraph 3 of the Charter would not apply to the *Verbandsgemeinden* and the *Kreise* (counties) in Rhineland Palatinate, and the same paragraph of the same Article would not be applied to the *Kreise* in all other *Länder*. According to the German authorities, the reason for these reservations is that the federal Basic Law recognises the relevant right to financial autonomy (including the ability to establish the

¹⁰ Kay Ruge, Klaus Ritgen Local Self-Government and Administration (2021), in: S.Kuhlmann et al. (eds), Public Administration in Germany, New York: Palgrave MacMillan.

¹¹ Sabine Kuhlmann, Jörg Bogumil, Administrative Reforms in the Multilevel System: Reshuffling Tasks and Territories (2021), in: S.Kuhlmann et al. (eds), Public Administration in Germany, New York: Palgrave MacMillan.

rates of local taxes) only for municipalities. During the previous monitoring visit, the Congress delegation has been informed that the withdrawal or modification of these declarations are not on Germany's political agenda.

31. The previous monitoring report has noted that German authorities have expressed their view about the legal nature of these declarations arguing that they are *"in a strict sense" not reservations, but "announcements" circumscribing the scope of application of the Charter. The opinion of the Congress delegation was that although it is not clear what the significance of this differentiation is, the Vienna Convention on Law of Treaties of 1969 defines the concept of reservation unambiguously declaring that (article 2, use of terms): "(d) »reservation« means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".*

2.4 Previous Congress reports and recommendations

32. During the previous Congress' monitoring of local and regional democracy in Germany in 2011¹² the following main shortcomings relating to the implementation of the Charter have been identified:

a. although the financial situation of local authorities, already evaluated as "critical" in 1999, has seen some improvement due to a positive tax yield at local level, the situation of local authorities remain preoccupying due to the rise in social welfare spending, structural deficits of the financing of local authorities and an increasing imbalance between them;

b. many *Länder* have not set up practical guarantees for concomitant financing although they have enshrined the principle in their constitutions;

c. the participatory rights of associations of local authorities both at federal and *Land* level need strengthening, since although the mode of consultation with these associations is formally recognised in the procedural rules of the federal government, they do not appear in the standing orders of the federal as well as the *Land* parliaments;

d. counties do not have the right to impose taxes directly, beyond the available and rather insignificant taxes and that this is one of the reasons Germany upholds the explanations made in 1988 concerning the exclusion of the effect of Article 9, para. 3 of the Charter.

33. In the light of this, the Congress requested that the Committee of Ministers invite German authorities to:

a. fully respect the constitutional guarantees for local finances, ensuring that local authorities can be associated to the decision-making process regarding the structure and the yield of taxes at local level, in spite of the prevalent negative economic trends and that, given the high level of indebtedness of local and *Land* governments, local authorities be provided with adequate financial means that allow them discretion in how to use these resources;

b. establish standards and criteria for concomitant financing of local authorities providing transparency in the whole financial calculation and planning process thereby providing practical guarantees and reinforcing the framework of this principle with real planning mechanisms involving local government interests;

c. strengthen and institutionalise the participatory rights of associations of local authorities both at federal and *Land* level by inscribing them in the standing orders of the federal as well as the *Land* parliaments;

d. extend counties' rights to impose taxes directly beyond the available county taxes, in line with the Congress objective to extend the scope of the Charter to all entities having direct political legitimacy, ensuring at the same time that such taxes are not levied to the detriment of municipalities that are part of the counties, or by impinging on their fiscal yield;

e. sign and ratify, in the near future, the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207).

¹² Local and Regional Democracy in Germany, Monitoring Committee Rapporteur: Britt-Marie LÖVGREN, Sweden (L, ILDG), 22nd SESSION CG(22)7, 14 March 2012.
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3. HONOURING OF OBLIGATIONS AND COMMITMENTS: ANALYSIS OF THE SITUATION OF LOCAL DEMOCRACY ON THE BASIS OF THE CHARTER (ARTICLE BY ARTICLE)

3.1 Article 2 – Constitutional and legal foundation for local self-government

Article 2 – Constitutional and legal foundation for local self-government

The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.

34. The Basic Law grants municipalities and associations of municipalities (*Gemeindeverbände*) the right of self-governance in all matters relating to their local community. The principle of local self-government is also recognized in the constitutions of the *Länder*. For instance, according to article 11 of the Constitution of the Free State of Bavaria, the 'municipalities are original administrative units under public law. They shall be entitled to order and manage their affairs themselves within the framework of the laws and in particular to elect their mayors and representative bodies' (para. 2). 'The self-administration of the municipalities shall serve the purpose of establishing a democracy in Bavaria from the bottom up' (para.4).

35. Another example is article 78 of the Constitution of North Rein-Westphalia: "The municipalities and associations of municipalities are territorial authorities with the right of self-government through their elected bodies. The councils in the municipalities, the district councils, the county councils and the assembly of the Ruhr Regional Association are elected by universal, equal, direct, secret and free suffrage...." (para. 1). "The municipalities and associations of municipalities are the sole bodies responsible for public administration in their area, unless the law stipulates otherwise" (para. 2). "The state can oblige the municipalities or associations of municipalities by statute or ordinance to take over and carry out certain public tasks if provisions are made at the same time to cover costs" (para. 3).

36. The existing municipal and county codes in the federal states primarily contain regulations on the organisational rights of municipalities and counties. These municipal and county codes, which in some federal states have also been incorporated into a single law, are supplemented by laws that regulate the local right to vote ('local electoral law'), the right to levy local taxes ('local taxation law') and the cooperation between local authorities.

37. The principle of local self-government is recognized both in the federal and *Land* constitutions, while relevant laws of the *Länder* repeat and specify this status. Germany fully complies with article 2 of the Charter.

3.2 Article 3 – Concept of local self-government

Article 3 – Concept of local self-government

1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.
2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.

3.2.1 Article 3.1

39. When it comes to the division of powers between the Federation and the *Länder*, the Basic Law accords the *Länder* what is known as the "presumption of competence". The Federation thus only has powers in regard to legislation, administration and the administration of justice if these are explicitly assigned to it under the Basic Law. The majority of legislative powers lie with the Federation. The *Länder* exert a strong influence on federal legislative processes through the Bundesrat, the upper house of parliament. The *Länder's* most important legislative powers relate to education and culture, broadcasting, and general police and regulatory law. Municipal law also falls within the jurisdiction of the *Länder*. The *Länder* hold the majority of administrative powers. They are not only responsible for executing their own *Land* laws but also the overwhelming majority of federal law.

40. Art. 28 par. 2 BL entails a guarantee of local autonomy which in its roots dates back to the first half of the 19th century. Today it isn't understood as a fundamental right anymore but as a constitutional guarantee that wants to secure that democracy can function bottom up. Against this backdrop any withdrawal or imposition of competences is considered an infringement of the autonomy laid down in art. 28 par. 2 BL which can be justified but which also has to meet the requirements of the principle of proportionality. The

same applies to the right of local communities to decide – within existing laws – on their organisation, their staff, planification and budget.

41. The Basic Law grants municipalities and associations of municipalities the power of self-governance in all matters relating to their local community. This power of self-governance encompasses all local matters falling within the jurisdiction of the public authorities, with the focus on building, local public transport, road cleaning, local water and energy supplies, waste disposal, savings banks and hospitals, burials, adult education, as well as maintaining theatres, museums, local archives and sports facilities. As already mentioned, according to legal doctrine and jurisprudence, local autonomy includes financial autonomy or “sovereignty” (*Finanzhoheit*), personnel sovereignty (*Personalhoheit*), planning sovereignty (*Planungshoheit*), statutory sovereignty (*Satzungshoheit*) and organizational sovereignty (*Organisationshoheit*).

42. The array of functions assigned to local authorities by their *Länder* is also reflected in the structure of local authorities’ expenditures (s. below in table 1). With regard to the expenditures for social benefits, however, it is important to note, that the expenditures are measured in gross terms. Since the Federation finances a substantial share of social benefits, the net burden of social benefit expenditures is much lower for local authorities.

Table 1 – Structure of local authorities’ expenditures (2019)

Human resources expenditure	25.2 %
Social benefits (gross)	23.2 %
Operating expenditure	20.9 %
Grants	13.2 %
Construction projects	9.3 %
Asset purchases	3.7 %
Interest expenditure	0.9 %
Other expenditure	3.7 %

Source: Federal Ministry of Finance. Compiled using data from the Federal Statistical Office

43. In 2020, total expenditures of local authorities amounted to 293.2 bn. Euro (8.8 % of GDP), while total revenues of local authorities to 295.2 bn. Euro (8.8 % of GDP). The total expenditures of the *Länder* amounted to 487.2 bn. Euro (14.6 % of GDP) in 2020, while total revenues were 453.8 bn. Euro (13.6 % of GDP). Insofar as the relative weight of the local authorities in public finances is concerned, the central budgets of the local authorities cover roughly one- third of public expenditure (excluding social security). However, the real picture of municipal expenditure is not fully reflected in the central budgets of the local authorities; special budgets established for the different local goods (local public transportation, water provision and sewage, waste collection, institutions of culture, etc.) should also be taken into consideration. In addition, the local authorities implement a major share of the public investments (often co-financed by the states or out of the federal programmes).¹³

44. Concerning the notion of “local authorities” in Germany, it should be remarked that the term “*Kommunen*” (“Communes”) is used as a generic term, including first and second tier local governments. But the Basic Law makes a distinction: Similar to article 3 para. 1 of the Charter, Article 28 (2), first sentence BL grants municipalities the right to take responsibility for all matters of the local community. In addition to the municipalities there are the associations thereof (Article 28 (2), second sentence BL). In the Basic Law, this notion essentially refers to the counties. The counties have a dual nature. On the one hand, a county is an association of municipalities, which are therefore also referred to as ‘municipalities belonging to a county’. On the other hand, counties—like the municipalities—are also considered local authorities (or “*Kommunen*”: Communes) with the constitutional right of self-government.

45. This distinction between municipalities and counties is important for the allocation of tasks. Obviously, the counties are predestined to perform tasks, which by their nature have a supra-local reference that goes beyond the boundaries of the municipalities belonging to them. This applies, for example, to ensuring local

¹³ Kay Ruge, Klaus Ritgen Local Self-Government and Administration (2021), in: S.Kuhlmann et al. (eds), Public Administration in Germany, New York: Palgrave MacMillan, p. 125.

public transportation in rural areas. Due to their size and administrative power, counties are also more efficient than municipalities. This distinction, however, is suspended when it comes to the structure of county-free cities. County-free cities are considered municipalities that do not belong to an overarching municipal association. The local level in county-free cities incorporates both the first and the second tier of local self-government, since county-free cities fulfill both the tasks of a municipalities as the ones of a county. In this way the vertical structure of public administration is reduced and simplified by one level.

46. In 2017, there were 11,455 local authorities in Germany, including 107 county-free cities, 294 counties and 11,054 municipalities belonging to a county. These territorial self-governments are responsible for a variety of original tasks as well as for the implementation of large parts of federal and *Land* laws. Local authorities are usually entrusted by the *Länder* with the implementation of federal or *Land* laws. This leads to a largely decentralised administration in Germany.¹⁴

47. The administrations of the local authorities are embedded in the politico-administrative system of Germany and cover significant functions. Two central indicators that underline the weight of the local authorities and the management of a “substantial share of public affairs” (article 3.1. of the Charter) by them are the finances (s. above) and the number of personnel. The local authorities account for 30% of public service personnel (s. the following table). This high number of personnel reflects the functions of local authorities to deliver most of the public services in direct contact with the citizens (the number of personnel in the states is only higher due to large numbers of public servants working in the three areas of education, that is schools and universities, police and courts). The first and most important point of contact for citizens and companies regarding most administrative matters is either the town hall of their town or municipality, or the county administration of their county. These services are often organised in centres of administrative services called *Bürgerämter* (one-stop shops)¹⁵.

Table 2: Civil Service Staff¹⁶

Sector	FTE ¹⁷	%
Federation	474,100	11.3
Federal states	2,105,200	50.4
Local authorities	1,271,300	30.4
Social security	328,500	7.9
Total	4,179,100	100

Source: German Federal Statistical Office (2019) *Finances and taxes. Civil service staff 2018. Special series 14, Series 6, p. 25.*

48. The rapporteurs conclude that Germany has a fully-fledged system of local self-government and the local authorities do manage a substantial share of public affairs under their own responsibility and in the interests of the local population. Therefore, Germany complies with the first paragraph of article 3 of the Charter.

3.2.2 Article 3.2

49. Article 28 (1), second sentence of the Basic Law, stipulates the representation of the people in the municipalities and counties. Members of the local representative bodies are directly elected by the citizen (city, municipal or county councillor) as well as mayors and, in most states, county heads (*Landrat*) too. The term of office for the local representative bodies is now five years in almost every state, with the exception of Bavaria, which is six years.

50. The main body of every local authority is the local representative body, that is the municipal and city council as well as the county council. The council is the central leading body, and it takes precedence over all others at the local level (BVerfGE 47, 253, 275). Consequently, the most important management and control tasks for each local authority must be reserved for the representative bodies. In principle, the representative bodies are responsible for all matters unless they are explicitly assigned to another local body, particularly to an elected executive officer (mayor or head of the county) or to a ‘third’ body (municipal board or county committee).

¹⁴ Ibid, page 124.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ FTE = full-time equivalent.

51. Mayors employed full-time are directly elected by the people and also heads of counties are directly elected in the majority of states, but not everywhere. Mayors and Heads of Counties are usually responsible for executing the council's decisions and for managing all the ongoing administrative matters. They are also responsible for the external representation of the local authority. In some federal states, the head of a county is not only the chief administrative officer, but he also acts as the lowest tier of the regional authority.

52. Despite an ongoing harmonisation of local "constitutional" systems (design of main bodies and their competences: "*Kommunalverfassungen*"), there are still important differences between the federal states in this regard. Most *Länder* have now at least reduced the number of their local bodies to two. Thus, the local representative body only has to face one executive body. This dualism has been implemented in the states of Bavaria (at municipal level), Baden- Württemberg, Hesse, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland (at municipal level), Saxony, Saxony-Anhalt, Thuringia and Schleswig-Holstein.

53. In most of these states, the executive body is organised monocratically and is represented by a mayor or a head of the county. It is only in Hesse where executive power is still (in some cases) the hands of a collegium, namely the municipal board or, respectively, the county committee. This body consists of the respective mayor or head of a county and the deputies.

54. In the states of Brandenburg, Lower Saxony and North Rhine-Westphalia local authorities have three bodies. In Bavaria and Saarland (only) the counties have a third body. In these states, besides the representative body and the mayor or the head of the county, there is another body to which a certain number of deputies or members of the representative body belong.

55. Important differences among the different *Länder* also exist in the rules that determine the design of each respective electoral system, especially as Article 28 (1), second sentence of the Basic Law allows for considerable flexibility. In general, the voting right is granted to German citizens who have reached the age of 18. However, the voting age in some states is 16, depending on the local electoral law. Article 28 (1), third sentence of the Basic Law extends the voting right to citizens of other member States of the European Union, while third-country nationals are not entitled to vote at local level.

56. Direct citizen participation in local affairs has a long tradition in Germany. Today citizens have the opportunity, through referendums, to take binding decisions in place of the local representative bodies. In fact, since the 1990s, the respective regulations have been incorporated into all the municipal charters at both municipal and county level. Obviously, due to their complex procedures, such instruments cannot replace the continuing resolution of the local representative body, but only supplement it on a case-by-case basis. Hence, under Article 28 (2), second sentence of the Basic Law, the local level has a clear precedence over representative democracy.

57. The procedure for direct democratic decision-making at the local level is two-staged. At the stage, a so-called citizens' initiative takes place. If it is declared admissible and receives the necessary support from the citizens, the local representative body must then decide if it wants to allow the initiative. If the application is rejected, a referendum follows. The objective and contextual applicability of direct democracy at the local level is limited; certain matters cannot be made subject of citizens' initiatives and referendums. The list of matters for which such instruments are not allowed varies from state to state. Referendums typically exclude personnel matters, budget statutes and the internal organisation of the local administration.

58. Germany has not signed nor ratified the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207), in spite of explicit request in relevant recommendation 320/2012. After consulting with the *Länder*, Germany decided not to sign the Additional Protocol as Bavaria and Lower Saxony are against such a move. Bavaria continues to refuse to sign the Additional Protocol because, in its view, this would entail an additional obligation to enact freedom of information legislation at the *Land* level (Art. 2, Sect. 2, point ii) b) of the Additional Protocol). Lower Saxony continues to express the same concerns, although it has not yet concluded its own review of whether freedom of information legislation would need to be enacted.

59. The rapporteurs regret that this situation poses challenges to Germany's joining the Additional Protocol and call on the German authorities at all levels to adopt all appropriate measures to sign and ratify this international legal instrument.

60. Notwithstanding the above-mentioned development, the rapporteurs conclude that in Germany a fully-fledged local democracy exists, and relevant provisions of the German law are in accordance with the Charter, therefore Germany fully complies with the second paragraph of article 3 of the Charter.

3.3 Article 4 – Scope of local self-government

Article 4 – Scope of local self-government

1. The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.
2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.
3. Public responsibilities shall generally be exercised, in preference, by those authorities who are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.
4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.
5. Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.
6. Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.

3.3.1 Article 4.1

61. Under the Basic Law, an important part of legislative powers lies with the Federation (Article 70 BL), while the *Länder* – and in the *Länder* mostly the local authorities – are responsible for executing federal law (Article 83 BL) since there are very few federal field services. In most cases, the *Länder* execute federal law as what are known as “own matters”. That means they are also largely solely responsible, on account of establishing authorities and administrative procedures, for the appropriateness of the responsibilities they discharge. In such cases the Federation only exercises oversight to ensure that the *Länder* are executing federal law in accordance with applicable law (legal oversight). Only in a few cases, to which explicit reference is made in the Basic Law, are the *Länder* more closely bound by instructions (“administration by commission” pursuant to Article 85 BL).

62. Concerning the local level, the Constitution considers local authorities to be part of the *Länder*. Thus, the competences of the local authorities are in principle set out in the legislation of each *Land*. Furthermore, the Basic Law forbids the Federation from entrusting local authorities with any tasks under federal law (Article 84 (1) BL). The right to assign state tasks to local authorities outside of local self-governance is reserved to the *Länder* (Article 86 (1) sentence 7, Article 85 (1) sentence 2 BL), who can also assign to local authorities’ tasks for the implementation of federal law.

63. This means that, similar to most countries, German Communes are fulfilling tasks assigned to them by the state, in addition to their original tasks for local affairs. The heterogeneity of the municipalities certainly presents a challenge for a legislator who wants to transfer tasks to the local authorities. It is necessary to ensure that tasks are entrusted to those local authorities where the performance required for implementation can be expected. For counties and county-free cities, on the other hand, it is easier to cope with the fulfilment of state delegated tasks, since these communes have more capacities.

64. As already emphasized in the comment to the implementation of article 3 para. 1 of the Charter, German communes have a wide array of functions and actually they fulfill a very big part of the tasks of public administration in Germany. The responsibilities of German counties and municipalities are described, often in detail, in the different municipal statutes (*Gemeindeordnungen*), the county statutes (*Kreisordnungen*) and other laws of the federal states. In the following, the most common responsibilities are indicatively mentioned:

At the municipal level:

- Several state administrative tasks, for example ID and civil status registration; these services are typically provided in special centres of administrative services (one-stop shops).
- Planning sovereignty grants municipalities the power to organise and shape their territory by creating *Land-use* and development plans, whereas the counties issue building permits;
- authorities of schools and adult education centres where a county is not responsible;
- nurseries (can also be provided by welfare organisations or private companies);
- kindergartens, nursery schools, after-school clubs;
- fire departments and brigades;
- cultural institutions such as libraries and museums, and other public facilities, namely sports facilities and parks, swimming pools, city halls and communication centres;
- funeral services and cemeteries;
- maintenance of public road network (municipal roads);

- public utilities and services (sometimes provided through municipal enterprises), such as water and sewage, electricity, garbage collection

65. Most common responsibilities of counties (and county-free cities besides their municipal tasks) are the following:

- miscellaneous administrative tasks, such as motor vehicle registration, weapons law enforcement, issue of building permits etc. ('transferred tasks', "*Übertragene Aufgaben*").
- authority for secondary schools or vocational schools, adult education centres;
- fire and disaster protection as responsible body over the lower disaster control authorities.
- public health and veterinary inspection;
- county hospitals;
- organisation of the emergency and ambulance services in the rural area;
- public child and youth welfare (Social Code Book: SGB VIII);
- 'classic' social welfare (e.g. financial support for those of retirement age receiving very small pension, or for those who are unable to earn their living due to illness (SGB XII);
- waste disposal, including maintenance of *Landfills* and waste consulting; environment protection and nature conservation;
- guarantee of public transportation in rural areas and maintenance of county roads;
- financial support for job seekers according to Social Code Book (SGB II), including integration/re-integration in the labour market. This task is either performed by local job centres or joint institutions together with the Federal Employment Agency;
- integration of refugees and other migrants (besides communes, social welfare organisations and others);
- economic development (e.g. guaranteeing an extensive broadband supply; own companies for development of commercial zones).

66. Among the aforementioned responsibilities, there are several traditional tasks characterising the operation of local government in Germany and would certainly be included the "basic powers" (art. 4 para. 1 of Charter) according to the Contemporary Commentary of the Congress¹⁸. In this regard moreover, the Federal Constitutional Court of Germany has recently emphasized the constitutional protection of these tasks (VerfGE 138, 1 ff. - *Schulnetzplanung Sachsen*, see below in the comment to the implementation of article 11 in Germany). In view of the fully developed legal framework on the responsibilities of local authorities in Germany, the rapporteurs conclude that Germany complies with the first paragraph of article 4 of the Charter.

3.3.2 Article 4.2

67. The Basic Law empowers the municipalities to take care of all matters of the local community. This is their sphere of responsibility, where a general competence principle ('*Allzuständigkeit*') applies. As far as local community matters are concerned, the municipalities may act without any further legal mandate, and they can "invent" new responsibilities for themselves ("*Aufgabenerfindungsrecht*"). Local matters are those tasks which concern the living conditions and the coexistence of local people or have a specific reference to it. However, there is no such regulation for the counties in the Basic Law and according to the famous *Rastede*-Decision of the Federal Constitutional Court¹⁹, the counties can only act if this is provided by law and their constitutional status does not include the power to invent new responsibilities. Nevertheless, some county codes of the *Länder* (e.g. articles 1 and 5 of the Bavarian County Code²⁰, article 2 para. 1 of the County Code in Schleswig-Holstein²¹) transfer the right to perform relevant supra-local public tasks to the counties, according to a general clause.

68. It is obvious, therefore, that the Basic Law is placing special emphasis on public administration at local level. It has equipped municipalities with comprehensive jurisdiction (in the sense of the right to assume responsibility for areas of action) for matters of local concern. These matters include those needs and interests rooted in the local community or having special relevance for it²²; they are thus shared by local residents, as these matters affect their lives as members of a community²³. There is no such guarantee for counties (*Kreise*)²⁴, but by virtue of *Land* law, comprehensive jurisdiction is usually extended to them with

¹⁸ <https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c>

¹⁹ BVerfGE 79, 127; Beschluß des Zweiten Senats vom 23. November 1988 -- 2 BvR 1619, 1628/83 --.

<https://www.servat.unibe.ch/dfr/bv079127.html>

²⁰ <https://www.gesetze-bayern.de/Content/Document/BayLKrO>true>

²¹ http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=148797,1

²² See Federal Constitutional Court decisions BVerfGE 8, 122 [134]; 50, 195 [201]; 52, 95 [120]; 79, 127 [151 f.]; 83, 363 [382]; 86, 148 [220 f.]; 110, 370 [400].

²³ See Federal Constitutional Court decisions BVerfGE 79, 127 [151 f.]; 83, 363 [382]; 86, 148 [220 f.]; 110, 370 [400].

²⁴ BVerfGE 79, 127 [147].

regard to their area of responsibility (BVerfGE 83, 37 [54]). In these areas, their right to regulate all local affairs on their own responsibility is guaranteed (BVerfGE 21, 117 [129]).

69. A county is an association of municipalities within the meaning of Article 28 (2) sentence 2 of the Basic Law and has the same rights of self-government as municipalities (BVerfGE 61, 82 [105]; 83, 363 [383]). However, the principle of a division of tasks expressed in Article 28 (2) sentence 1 of the Basic Law ensures municipalities, also vis-à-vis counties, an area of responsibility that encompasses all matters of concern to the local community. In this way, the Basic Law does not assign the counties a specific area of responsibility (BVerfGE 21, 117 [128 f.]; 23, 353 [365]). Article 28 (2) sentence 1 of the Basic Law does not distinguish between local-municipal and supra-local county tasks, and its guarantee does not extend to counties (BVerfGE 79, 127 [150, 152]). Under Article 28 (2) sentence 2 of the Basic Law, the right of associations of municipalities to self-government is guaranteed only to a limited extent, namely within the limits of their functions. The Constitution does not describe the tasks of counties (unlike municipalities), but instead it delegates the definition of tasks to lawmakers (BVerfGE 119, 331 [353]). Their room for maneuver in defining counties' area of responsibility reaches its limits where the constitutional guarantee of counties' right to self-government would be worthless.

70. Regarding their discretion of whether and how to fulfill their duties local authorities have different possibilities, depending on the sorts of responsibilities. In local public affairs who are the primary mandatory functions of local governments (Pflichtaufgaben), local authorities decide how to accomplish them, (BVerfGE 119, 331, 362; BVerfGE 138, 1, 17) while in case of voluntary tasks (*freiwillige Aufgaben*, especially regarding sports, culture and business promotion), municipalities have the widest discretionary power.

71. In practice, according to representatives of the national associations, already before the pandemic there were great disparities among municipalities. Especially the financially weak municipalities had hardly any leeway for voluntary tasks and investments. Inadequate financial resources would undermine local democracy and would cause loss of confidence to institutions.

72. Apart from the aforementioned economic obstacles to local initiative, which is common in many countries, in Germany there is a particular legal shortcoming regarding counties in *Länder* which have not introduced the power of counties to exercise their initiative in matters that are not excluded from their competence, nor assigned to another authority. According to the commentary in the explanatory report to the Charter²⁵, this is important to the conception of local authorities as political entities acting in their own right to promote the general welfare of their inhabitants that they have the right to exercise their initiative in these matters. Because of this shortcoming regarding the counties, the rapporteurs conclude that Germany partially complies with the second paragraph of Article 4.

3.3.3 Article 4.3

73. This paragraph of Article 4 of the Charter introduces the "subsidiarity principle", whereby public responsibilities should be exercised "in preference" by those authorities or bodies that are closest to the citizen. In this respect, it is essentially a political principle since its aim is to bring decision-making as close as possible to the citizen. It underlines the unavoidably political character of decentralisation²⁶.

74. The principle of subsidiarity has a long tradition in Germany and the political-administrative is following, to great extent, this principle. Germany's largely decentralised administration has proved its worth. It allows concrete administrative decisions to be taken at that administrative level which is closest to citizens and based on a particular knowledge of the local situation. In several cases, attempts to transfer responsibilities to higher levels have been frustrated by the judiciary (s. the comment regarding the implementation of article 11 in Germany. And in several cases, responsibilities have been transferred closer to the citizen. For instance, recent changes (May 2021) in the Federal Building Code improved local authorities' powers to plan and manage construction (*BauLandmobilisierungsgesetz*), following the principle of subsidiarity.²⁷

75. The rapporteurs conclude that Germany fully complies with the third paragraph of Article 4 of the Charter.

²⁵ <https://rm.coe.int/16800ca437>

²⁶ <https://rm.coe.int/a-contemporary-commentary-by-the-congress-on-the-explanatory-report-to/16809cbf8c>

²⁷ <https://www.bundestag.de/dokumente/textarchiv/2021/kw18-de-bauLandmobilisierungsgesetz-836886>

3.3.4 Article 4.4

76. According to article 83 BL the *Länder* shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit. With a view to the execution of federal laws by *Länder* on their own right, the Federal Government may be authorised by a federal law requiring the consent of the Bundesrat to issue instructions in particular cases. They shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent (Art. 84.5 BL). As already mentioned, the Basic Law stipulates (articles 84 para. 1 (7) and 85 paras. 1 (2) BL) that federal laws may not entrust municipalities and associations of municipalities with any tasks. However, this does not mean that the *Länder* themselves are not allowed to engage local authorities, as parts of the *Länder* administration, in the execution of federal laws.

77. The clear delimitation of roles in the Basic Law is in line with the spirit of Charter, and especially with the fourth paragraph of article 4. According to Recommendation CM/Rec (2007)4 of the Committee of Ministers to member States “on local and regional public services”, lawmakers should establish a clear definition of the responsibilities of the various tiers of government and a balanced distribution of roles between these tiers in the field of local services. Such distribution of roles, accepted by the stakeholders concerned, would make it possible to avoid both a power vacuum and the duplication of powers. Moreover, this allocation of responsibilities should promote predictability and guarantee continuity in the provision of certain local public services that are considered to be essential for the population²⁸.

78. In spite of the complexity of the federal system in many aspects, the rapporteurs observed that the distribution of power is, for the most part, clear in Germany and in some cases where doubts and conflicts lead to litigations, the courts succeeded in resolving them (s. below, about the implementation of article 11 of the Charter). Therefore, the rapporteurs conclude that Germany fully complies with the fourth paragraph of article 4 of the Charter.

3.3.5 Article 4.5

79. The right to assign state tasks to local authorities outside of local self-governance is reserved to the *Länder* (Article 86 (1) sentence 7, Article 85 (1) sentence 2 BL). The Federation has its own administrative structures only in very few areas of responsibility, generally comprising only higher federal authorities, legal bodies and institutions as well as foundations under public law which perform their respective tasks centrally for the whole of the federal territory (see Article 87 (3) Basic Law).

80. According to art. 85 (1) BL, where the *Länder* execute federal laws on federal commission, establishment of the authorities shall remain the concern of the *Länder*, except insofar as federal laws enacted with the consent of the Bundesrat otherwise provide. As already mentioned, federal laws may not entrust municipalities and associations of municipalities with any tasks, but local authorities, as parts of the *Land* administration may execute federal laws. The *Land* authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest *Land* authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest *Land* authorities (art. 85 para. 3 BL).

81. The Protection against Infection Act is an example of the general framework under the Basic Law (legislative power of the Federation pursuant to Article 74 (1) no. 19 BL); execution of federal law (in this case the Protection against Infection Act) is a task of the *Länder* pursuant to Articles 83, 84 BL; pursuant to Article 87 (3) sentence 1 BL, the Federation only has administrative powers in relation to individual areas which of necessity have to be dealt with centrally (in this case the Robert Koch Institute and the Paul Ehrlich Institute).

82. One special feature of the “Protection against Infection” Act (which was also created by the parliamentary legislature and has not yet been amended) is that the *Länder* are responsible for concretizing those rules which are set out in federal law, essentially on the basis of their power to enact orders and authorisations to issue statutory instruments. The *Länder* are, therefore, primarily responsible for those rules relating to protection against infection which are applicable in the *Länder* and for implementing these at the local level. This also makes sense, given that infection rates can vary across territories and the principle of proportionality alone requires that rules be adapted accordingly. At the same time, this means that the Federation and the *Länder* must reach political agreement and coordinate their measures, as was done in the regular meetings at a very high political level. In addition to fulfilling legal requirements, these meetings also serve to ensure that such rules gain acceptance.

83. In the course of the reform of federalism, it was stipulated that the Federation may not transfer any new tasks to Communes. However, it may create or define tasks in federal laws without specifying who implements the task. The *Länder*, insofar as they are fundamentally responsible for the implementation of the task according to the constitution, then transfer the tasks to the municipalities, if necessary, if the implementation is not the responsibility of the state *Land* authorities themselves.

84. An interesting example for the impact on municipalities stemming from decisions taken at the federal level is the allocation of certain tasks to municipalities which were obliged to carry out a heavy burden in the course of the refugee crisis in 2015/2016. The accommodation of protection seekers is an obligatory task of the municipalities. With structured concepts, they must ensure that sustainable living conditions are created for the refugees and other persons seeking protection. The municipalities take care of accommodation and health care for those seeking protection, offer language courses and provide school and kindergarten places. The municipalities help with job placement and educational participation and thus contribute to integration and social cohesion.

85. Delegation of *Land* tasks to the municipalities is explicitly provided and sometimes combined with instruction powers of the *Land* in some state constitutions. For instance, the Constitution of the Free State of Saxony stipulates (article 85 para. 3) that "in the event of the transfer of public duties, the Free State may reserve the right to issue directives in accordance with provisions of the law".

86. Concerning the degree of discretion that is potentially granted regarding delegated tasks, a distinction should be made. If the transferred tasks become the local authorities' own tasks ('monistic system'), the state can not only oblige the local authorities to perform the tasks, but also grant itself a right to issue instructions regarding the method of task fulfilment to fulfill according to instructions': *Pflicht aufgaben zur Erfüllung nach Weisung*). In those states where tasks do not lose their state character even after they have been transferred to the local authorities ('dual system'), that is external tasks for local authorities ('matters of mandate': *Auftragsangelegenheiten*), this right to issue instructions already follows from the remaining state character of the task.

87. Following their contacts and observations, though, the rapporteurs concluded that in many cases where this is legally and practically feasible, local authorities do have a certain space of discretion when executing delegated tasks. Therefore, they conclude that Germany in general complies with the fifth paragraph of article 4 of the Charter.

3.3.6 Article 4.6

88. In Germany the federal system guarantees a strong influence of federal states (*Länder*) in the legislative process. The *Länder* have the power to legislate, unless the constitution bestows legislative competences to the Federation. The *Länder* moreover participate through the Federal Council (*Bundesrat*) in the legislation and administration of the Federation and in matters concerning the European Union (article 50 BL). According to section 47 (1) sentence 1 of the Joint Rules of Procedure of the Federal Ministries (GGO), draft legislation must be sent to the *Länder*, national associations of local authorities and representations of the *Länder* to the Federation as early as possible, if their interests are affected. According to the Federal Ministries of Finance, and of the Interior, Building and Community, this is a standard state practice that ensures that the interests and participatory rights of the municipalities are sufficiently upheld.

89. At the federal level, the consultation with local authorities is coordinated through their national associations (*kommunale Spitzenverbände*). Their participatory rights are enshrined in the rules of procedure of the Bundestag: if a committee discusses a bill referred to it as the lead committee which affects major interests of municipalities and associations/consortia of municipalities, the local authorities' associations at federal level shall be given the opportunity to state their position before a decision is taken in the committee. 'Major interests' of municipalities are those which are affected by laws which have to be implemented in whole or in part by municipalities or associations/consortia of municipalities, directly affect their finances, or have an impact on their administrative organisation (Rule 69 para. 5).

90. When bills within the meaning of the latter rule are the subject of a hearing by the lead committee, the local authorities' associations at federal level shall be given an opportunity to participate in the hearing (Rule 70 para. 4). The main points of the position of local authorities' associations stated according to the aforementioned rule 69 para. 5 must be contained in committee reports submitted to the Bundestag and containing the recommendations of the lead committee including the reasoning, the dissenting opinion of the minority and the comments of the committees concerned (rule 66 para. 2).

91. The Committee on Building, Housing, Urban Development and Local Government, has underlined in a relevant answer to the Congress, that it respects aforementioned consultation rights of local authorities' associations. Since the setting up of this Committee in April 2018 these associations have taken part in all four public hearings concerning bills referred to the Committee as the lead committee (Federal Building Code, housing benefits, animal welfare, non-profit rental housing). Additionally, they participated in a number of other public hearings affecting their interests (situation of downtown areas, equal standards of living, promotion of urban development, homelessness etc).

92. The Committee furthermore meets with these associations to discuss matters that concern them and that have been raised in public hearings. The intended meeting schedule (once or twice a year) could not, however, be sustained in 2020/2021 due to the COVID-19 pandemic.

93. Consultation of local authorities is in some cases prescribed by constitutions of the *Länder*. For instance, art. 83 par. 7 of the Constitution of the Free State of Bavaria provides that 'the central municipal associations should be heard in good time before any matters affecting the municipalities or associations of municipalities are regulated by law or statutory instrument.'²⁹ And also art. 84 par. 2 of the Constitution of the Free State of Saxony provides that municipalities and municipal associations should be consulted in due time before regulations affecting them are being introduced.³⁰

94. According to information provided by the state government of Saxony, associations can represent the interests of the municipalities in the legislative process. In addition, the associations are also involved in advance through many other consultations and regular consultations with the state at the operational level for a joint exchange on focal points of work and are called upon to contribute their ideas. Within the state government, each department is responsible for involving the municipalities in a timely manner within the scope of its sectoral responsibility.

95. According to the National Associations of Local Authorities, opportunities for participation within the legislative framework of legislation are generally rated positively, but the time limits granted are often too short. Earlier involvement of the local authorities could be helpful. Moreover, in some cases, there is no consultation without objective reasons (e.g. emergency).

96. In the recommendation 320/2012 the Congress suggested that the German authorities strengthen and institutionalise the participatory rights of associations of local authorities both at federal and *Land* level by inscribing them in the standing orders of the federal (including the Bundesrat) as well as the *Land* parliaments. In the Bundesrat it is the *Länder* who are represented, not the Communes. These recommendations should be revisited since the rules of procedure in the federal parliament (as well as in *Land* parliaments) institutionalise consultation rights. On the other hand, the German authorities should further guarantee consultation in a timely manner and without exceptions that are not based on objective reasons (e.g. emergency). Therefore, the rapporteurs conclude, after their contacts and observations, that situation has improved but there are still some deficits regarding timely consultation without ungrounded exceptions, and Germany partially complies with the sixth paragraph of Article 4 of the Charter.

3.4 Article 5 – Protection of local authority boundaries

Article 5 – Protection of local authority boundaries

Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.

97. Mergers of municipalities (territorial reforms) are not seldom in the federal states. In Saxony-Anhalt the number of counties was reduced from 21 to 11 in 2007. In Saxony the number of counties was reduced in 2008 from 22 to ten, and the number of county-free cities from seven to three. Since September 2011, Mecklenburg-Western Pomerania has had, instead of originally 12, only 6 counties, five of which are the largest counties in Germany in terms of area.

98. The last territorial change in Bavaria took place in 2018 in the area of the counties of Cham (Administrative District/*Regierungsbezirk Oberpfalz*) and *Straubing-Bogen* (Administrative District/*Regierungsbezirk Niederbayern*) as well as in the area of the counties of Pfaffenhofen a.d. Ilm (Administrative District/*Regierungsbezirk Oberbayern*) and Kelheim (*Regierungsbezirk Niederbayern*). As a matter of principle, the affected local authorities must be consulted prior to any change of territorial

29 https://www.bayern.Landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16.pdf

30 https://www.Landtag.sachsen.de/dokumente/Landtagskurier/SaechsischeVerfassung_Neuaufgabe2017.pdf

boundaries (cf. Art. 11 of the Bavarian Municipal Code - GO, Art. 8 of the County Code - LKrO, Art. 8 of the Administrative District Code - BezO).

99. According to representatives of National Associations, municipal associations were always asked by the state governments prior to the implementation of a territorial reform. The main points of discussion in all reforms have always been the retention of a concrete spatial reference, which must ensure that proximity to citizens and the manageability of municipal services.

100. The rapporteurs conclude that Germany fully complies with Article 5.

3.5 Article 6 – Appropriate administrative structures and resources

Article 6 – Appropriate administrative structures and resources for the tasks of local authorities

1. Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management.
2. The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.

3.5.1 Article 6.1

101. Within the framework of organisational autonomy or “sovereignty” (*Organisationshoheit*), the communes (municipalities and counties), as a consequence of the constitutional guarantee of self-government, have the power to decide on their own responsibility on the internal organisation of their administration. In Germany, the communes can, in principle, autonomously decide about their organization chart, the number of departments, directorates, services, offices etc. (*Dezernate, Ämter* etc.) about the sort and the numbers of permanent positions and jobs. The legislator is not allowed to violate this organisational sovereignty, however he/she is allowed to impose the obligatory establishment of certain units, or positions, for instance of a municipal equal opportunities officer (*Gleichstellungsbeauftragte*), or to impose restrictions concerning, for instance, the maximum numbers of employees in order to ensure prudent management of resources. In addition, the legislator can adopt measures for the modernization of municipal administration.

102. Recently, the anti-COVID 19 protection measures have also increased the pressure on local authorities to digitalise work processes more quickly. This was a forced digitalisation push that has also been helpful for the contact between the public and the administration: many municipalities have introduced digital appointment booking systems at short notice in order to enable access to administrative services despite COVID 19 and lockdown measures. In many places the council met digitally, and citizens' consultation hours were offered online. At the same time, working arrangements had to be made to enable mobile working. Mobile terminals were set up in the shortest possible time and secure digital access points were created. Home office became the new standard in many places. The flexibility of the employees went beyond a mere change of work, many took on completely new tasks, e.g. in contact tracing via municipal corona hotlines. A major challenge for many municipalities has been to maintain all core tasks in addition to combating the pandemic.

103. Considering the above, the rapporteurs conclude that Germany complies with the provisions of this paragraph.

3.5.2 Article 6.2

104. Within the framework of personnel sovereignty (*Personalhoheit*), the communes (municipalities and counties), as a consequence of the constitutional guarantee of self-government, have the power to decide on their own responsibility on the recruitment of their employees (respecting article 33 para. 2 BL: “Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements”), define criteria for career and promotion, select modes of employment and introduce rules and priorities for the management of their human resources.

105. As employers, German communes have to abide by labour law, binding collective agreements on salaries and wages and especially concerning employees with civil servant status they have to implement the existing legal framework for civil servants, both at the federal state and the federal level, starting from article 33 para. 5 of the Basic Law: “The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service”.

106. Germany has a very strong tradition on vocational and advanced training who are offered by various entities. However, as it happens in many countries, several municipalities, especially the ones which are

considered, due to their size and/or location, not to be very attractive to employees are facing problems of shortage of skilled workers. This is particularly evident in the areas of IT, construction and health, which are also in demand outside the administration.

107. Considering the above, the rapporteurs conclude that Germany complies with the provisions of this paragraph.

3.6 Article 7 – Conditions under which responsibilities at local level are exercised

Article 7 – Conditions under which responsibilities at local level are exercised

1. The conditions of office of local elected representatives shall provide for free exercise of their functions.
2. They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.
3. Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.

3.6.1 Article 7.1

108. In general, local elected representatives (mayors, municipal councillors, county heads and county councillors) have a strong position and good conditions in the municipal parliaments due to modern equipment, the existing rights to information and scrutiny, and the financial resources of political parties and independent lists. Mayors (*“Bürgermeister”* and County Heads (*“Landräte”*) are elected civil servants for a fixed term, whereby their civil servant status is established by direct election, and these are the only political offices in Germany which are filled after direct election by the citizens. Members of municipal and county assemblies do not have the status of parliament members, but there are legal guarantees for their free mandate and legal bans preventing impediment to fulfilment of their mandate.³¹

109. Proximity to citizens and frequent public appearances of Mayors and other local politicians (German Mayors often walk in several public places in order to meet citizens, are ceremonial masters of public festivities etc.) make them vulnerable to aggression. In recent years, aggression against local politicians has dramatically escalated. A representative survey commissioned by the Körber Foundation³² shows threat to local democracy. According to this survey, more than half (57%) of the mayors have been insulted, threatened or physically assaulted. The majority (68%) has even changed their behaviour out of fear of insults or attacks. More than a third (37%) have largely refrained from using social media. No less affected are the municipal administrative staff. Often, the perpetrators do not limit themselves to the person of the mayor, but also interfere in their private and family lives: 25% of those affected reported hostility and threats against people close to them. Particularly worrying for democracy seems the fact that one-fifth of mayors and mayoresses (19%) that have been threatened, out of concern for their own safety or that of their families, contemplate quitting politics; one third (30%) are less likely to speak out on certain political issues than before.

110. Federal President Dr Frank-Walter Steinmeier launched the online portal "Strong in Office" as patron in 29 April 2021³³. This portal offers mayors and councillors direct access to information and services in order prevent assaults against local politicians and help victims of hate. In view of defamation, threats and assaults against local politicians, an amendment has been introduced in the Criminal Code (Section 188), improving the protection of local politicians against malicious gossip and defamation. The issue of hostility against elected politicians at the local level was at the agenda of the recent conference of federal and *Länder* ministers of the interior in June 2021.

111. Considering the above, and especially the fact that German authorities have undertaken several measures in order to face threats and aggression against local elected representative, the rapporteurs conclude that Germany complies with this paragraph of the Charter.

3.6.2 Article 7.2

112. The provisions governing the remuneration of local elected representatives in Germany are set out in local authority codes and ordinances enacted at *Land* level. The remuneration differs with respect to the requirement of the position filled. In this context, for honorary representatives at the local level, the

³¹ On the free mandate of councillors: J. J. Nolte, *Das freie Mandat der Gemeindevertretungsmitglieder*, DVBl. 2005, pp. 870.

³² <https://www.koerber-stiftung.de/gegen-hass-und-gewalt-kommunalpolitiker-wappnen-sich-2334>

³³ www.stark-im-amt.de

municipality typically has some scope for judgment evaluation in determining its representatives' fair remuneration

113. In the Free State of Bavaria, for instance, Honorary first mayors (that means 891 out of the 2.056 Bavarian Mayors) who are mostly Mayors of municipalities with less than 5.000 inhabitants receive a monthly compensation of 1,000 euros to 4,800 euros, mainly depending on the number of inhabitants of the municipality. The classification of full-time mayors and county heads depends on the number of inhabitants of the municipality or county. It ranges from grade A 13 (4.250 Euros gross payments per month) for mayors of municipalities with up to 2,000 inhabitants to grade B 11 for the mayor of the city of Munich (13.744 Euros). County heads receive grades B 5 to B 7 (9.500-10.551 Euros). In addition, full-time mayors receive monthly service allowances of between €195 and €997, County heads between €789 and €1,086. The range of remuneration in the *Länder* is roughly comparable. In the city of Freiburg in Baden-Württemberg, for instance, municipal councillors work on a voluntary basis and receive an expense allowance of € 1,150 per month (for ordinary city council sessions). Relevant legislation in the federal states provides for the compensation, remuneration and social welfare protection of local elected representatives.³⁴

114. Considering the above, the rapporteurs conclude that Germany complies with this paragraph of the Charter.

3.6.3 Article 7.3

115. This paragraph deals with compatibility between the holding of a representative position at local level and other positions or activities, either public or private. The institute of incompatibilities is considered to be necessary in order to protect the free mandate and abide by the principle of equality.³⁵ In Germany, provisions about incompatibilities are usually included in laws about elections in Communes (*Kommunalwahlgesetze*). For instance, Article 13 of the Law on elections in Communes of Northrhine-Westphalia (*Gesetz über die Kommunalwahlen im Lande Nordrhein-Westphale*),³⁶ introduces certain incompatibilities for civil servants and other employees of communes (they cannot be elected in municipalities or counties where they are working, civil servants exercising supervision duties cannot be elected in supervised local authorities etc.).

116. Taking into consideration the legal framework, their observations and their contacts the rapporteurs conclude that Germany complies with this paragraph of the Charter.

3.7 Article 8 – Administrative supervision of local authorities' activities

Article 8 – Administrative supervision of local authorities' activities

1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute.
2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.
3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.

3.7.1 Article 8.1

117. When *Länder* execute federal law in their own right (Art 84.3 BL), the Federal Government shall exercise oversight to ensure that the *Länder* execute federal laws in accordance with the law. For this purpose, the Federal Government may send commissioners to the highest *Land* authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities, e.g. *Kreise* or municipalities (84.3 BL). Should any deficiencies that the Federal Government has identified in the execution of federal laws in the *Länder* not be corrected, the Bundesrat, on application of the Federal Government or of the *Land* concerned, shall decide whether that *Land* has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court (84.4. BL).

118. Where the *Länder* execute federal laws on federal commission (article 85.1 BL), establishment of the authorities shall remain the concern of the *Länder* (only the latter can entrust municipalities and associations of municipalities with relevant tasks), except insofar as federal laws enacted with the consent of the

³⁴ See for example in the Free State of Bavaria: <https://www.gesetze-bayern.de/Content/Document/BayVwV96578/> true

³⁵ T. Schneider-Häßler, Inkompatibilität im Kommunalrecht. Ausgestaltung der Inkompatibilitätsvorschriften und gesellschaftlicher Wandel, Richard Boorberg Verlag, 2017

³⁶ http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=146804,14

Bundesrat otherwise provide. According to the fourth paragraph of the same article, federal oversight shall extend to the legality and appropriateness of execution. For this purpose, the Federal Government may require the submission of reports and documents and send commissioners to all authorities.

119. Apart from the aforementioned federal oversight, in the three city states (Berlin, Bremen, Hamburg) the respective city governments are not supervised by a superior level of government in the way the other municipalities are. It is only the Federation exercises oversight in these city states concerning their functions as *Länder* executing federal law. Apart from that, legal control over actions of these cities is exercised by the courts, especially by the constitutional and administrative courts of these *Länder*.

120. In the rest of Germany, the *Länder* are responsible for supervision over local authorities and relevant regulations are included in municipal and county codes of the federal states. That supervision is, in principle, limited to legal oversight, i.e. ensuring that the performance of municipal tasks complies with applicable law, but it does not cover the appropriateness of the discharge of municipal responsibilities. In the Free State of Saxony, for example, there is a multistage system of municipal supervision. The county-membered municipalities are subject to approval and notification obligations towards the "lower legal supervisory authority", which is established by the county administration. The county-free cities and the counties are supervised by the next higher legal supervisory authority (*Landesdirektion Sachsen*). The State Ministry of Interior is the highest legal supervisory authority.

121. The main provisions governing the planning, structure, execution, and accounting of local authority budgets as well as the regulations on financial supervision are set out in local authority codes and constitutions enacted at *Land* level. The specific details of these tasks are regulated in ordinances enacted by the interior ministries of the *Länder*. The principles that apply to budget management by local authorities conform largely to those that apply to the Federation and the *Länder* and are set out in local authority codes.

122. Considering the above, as well as the exchanges held during the remote monitoring, the rapporteurs conclude that Germany complies with the requirements of this paragraph.

3.7.2 Article 8.2

123. Supervision has a different nature when it relates to the fulfillment of delegated tasks. *Land* authorities may determine the way these powers are exerted by the local administration, as well as control the effectiveness of the use of the transferred funds. In the Free State of Saxony, for instance, the examination of expediency is solely incumbent on the technical supervision ("*Fachaufsicht*") especially provided in the respective law, which is based on Article 85 (3) of the Saxon Constitution; in these so-called "instruction tasks" (*Auftragsangelegenheiten*), the supervisory authority thus controls not only the legality but also the expediency of the municipal action.

124. Art. 83 (4) of the Bavarian Constitution (BV) places the municipalities under the supervision of the authorities of the Free State of Bavaria. State supervision ensures that the municipalities and associations of municipalities carry out their tasks in accordance with the constitution and the law, thus implementing the principle of the lawfulness of administration (cf. Art. 20 para. 3 GG, Art. 3 para. 1 sentence 1, Art. 55 No. 1 BV). In terms of state supervision of the municipalities, a legal distinction must be made between legal supervision and technical supervision (cf. Art. 109 GO, Art. 95 LKrO, Art. 91 BezO). Legal supervision in the municipalities' own sphere of action is limited to control of legality. Technical supervision in delegated matters basically also includes the handling of the municipal administrative discretion.

125. Compliance with the law is sometimes thoroughly examined, especially with regard to financial matters. In the *Länder*, there are legal formulations of the general budgetary principles which serve as a guideline for the entire budgetary management and whose compliance is to be ensured by the self-governing bodies and their supervisory authorities within the framework of legal supervision and public financial control. In Bavaria, for instance, in the field of property and assets management, there is the legal prohibition of giving away and transferring municipal assets free of charge, the principle that assets may generally only be sold at their full value, that the municipality may only establish, take over or significantly expand an enterprise only if a public purpose requires this enterprise and the latter has, in terms of type and scope, a reasonable measure by comparison to the municipality's capacity and to its anticipated needs.

126. The supervisory authorities also assess the legality of the respective budget and its implementation. The supervisory authorities in the Free State of Saxony are included in the supra-local audit procedures of the State Court of Audit (SRH) by law (§ 109 Saxon Act on Municipalities [*Sächsische Gemeindeordnung – SächsGemO*- section 4 and 5). In the course of these audits, an analysis is carried out, among other things,

as to whether the municipality has sufficient financial scope in order to carry out its tasks on a permanent basis. The SRH informs both the municipality and the legal supervision authority of the results of the audit.

127. The auditing focus is on legality (of expenditure), but also the assessment of the adequacy of expenditure is provided by § 72 section 2 sentence 1 *SächsGemO*: The budgetary has to manage by the principles of efficiency and economy. This is taken into account in the audits by SRH. An important criterion is, whether a performance analysis has been carried out before substantial financial decisions are made. Audit examination is mainly carried out ex post, while an audit ex ante or accompanying takes place only in individual cases, for example in selected construction projects.

128. According to information provided by the Saxon State Court of Audit, the currently most recurring problem (for many municipalities and/or over several years) is the non-compliance with the legal deadline to compile the annual account after change from budget (cash) to double-entry (communal accrual) accounting on 01.01.2013 (regular case). The experience of recent years shows that the measures taken by the legal supervisory authority are also having too little effect. Other deficiencies, which are often criticised, concern, for example, the procurement of public contracts. To the extent that the municipality does not remedy the deficiencies on its own, the legal supervision has to take the necessary measures.

129. Supervision on financial matters has been further developed during the previous decade since consolidation of municipal finance and prudent fiscal management climbed up in the policy agenda. In 2010 as part of the second stage of Germany's federal reforms, the Stability Council (*Stabilitätsrat*) was enshrined in Article 109a of the Basic Law as a joint body of the Federation and the *Länder*. Together with Germany's balanced budget rule, the Stability Council strengthens the institutional framework for safeguarding the long-term sustainability of public budgets on the federal and *Länder* levels.

130. One of the Stability Council's main tasks is to monitor the budgets of the Federation and the *Länder* on a regular basis. The Council's purpose is to recognize impending budgetary emergencies at an early stage so that appropriate countermeasures can be initiated in a timely manner. Furthermore, the Stability Council plays an important role with regard to compliance with the EU requirements for budgetary discipline. In particular, the Council monitors the budgets of the Federation, the *Länder*, local authorities and social insurance funds, to make sure that these, taken together, comply with the upper limit for the general government structural deficit of 0.5% of gross domestic product, as stipulated in the Budgetary Principles Act.

131. Considering the above, as well as the exchanges held during the remote monitoring, the rapporteurs conclude that Germany complies with the requirements of this paragraph.

3.7.3 Article 8.3

132. This paragraph enshrines the principle of proportionality in the administrative supervision of local authorities' activities by higher-tier bodies. This principle is well known and applies to many different legal contexts. Here it stands for the premise that the intervention of the supervisory authority should be proportionate to the importance of the interests it intends to protect. In this connection, in 2019, the Committee of Ministers recommended that the governments of member States adopt appropriate measures to "put in place an appropriate legal, institutional and regulatory framework for supervision of local authorities' activities which is proportionate, in law and in practice, to the interests which it is intended to protect."³⁷

133. Consequently, under the principle of proportionality, the state authorities should intervene only to the extent necessary, taking into account the relevance of the public interest at stake, or the seriousness of the legal violation allegedly committed by the local authority. It should first consider the possibility of "de minimis" action (warnings, requests, negotiations) before using more intrusive powers, such as annulling or suspending a decision, plan or project adopted at local level. On the other hand, a system under which local authorities must obtain prior approval from state bodies for minor or even trivial decisions would not comply with the principle of proportionality.

134. In fact, German laws has developed a series of different supervision means and measure, which gradually escalate: There are measures that aim at the self-correction of the municipality/county such as the "rebuke" (*Rügeanweisung*) or the "supervisory complaint" (*Beanstandung*) when the supervision authority demands a correction (pertinent municipal act cannot be executed then) and in some cases the supervision authority orders that this self-correction happens within a certain deadline (*Anordnungsrecht*). Another

³⁷ Recommendation CM/Rec(2019)3 of the Committee of Ministers to member States on supervision of local authorities' activities.

category of supervision measures which are stricter, include the repeal (*Aufhebung*) of the municipal act, may be even the substitution (*Ersatzvornahme*) and, in extreme cases the engagement of Commissioners (*Kommissarbestellung*),

135. During the remote monitoring and afterwards, the rapporteurs did not receive any complaints from the elected representatives at local and regional levels and their associations about the lack of respect of the principle of proportionality of supervision in practice. It appears that proportionality as understood by the Charter in this paragraph is observed.

136. Considering the above, it seems to the rapporteurs that Germany complies with the requirements of this paragraph.

3.7.4 Article 9 – Financial resources

Article 9 – Financial resources of local authorities

1. Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.
2. Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.
3. Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.
4. The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.
5. The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.
6. Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.
7. As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.
8. For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.

3.7.5 Article 9.1

137. According to the Basic Law, each level of government is in principle responsible for financing its own expenditure. Responsibility for financing a state function generally falls to the government level that bears administrative responsibility for the function in question (Article 104a (1) BL). The fundamental link between administrative and financial responsibility contained in this burden-sharing rule means that financial responsibility generally lies with the *Länder*, given the fact that the *Länder* are generally responsible for the administration and for executing laws. In consequence, the costs of the execution of federal laws is generally borne by the *Länder*. The Federation may finance only those tasks for which it has an administrative responsibility under the provisions of the Basic Law.

138. To finance the discharge of the *Länder* responsibilities, the provisions of the German Constitution entitle the federal states to specific tax revenues (in the case of some taxes jointly with the Federation). The main constitutional guarantee of an adequate financial endowment for the *Länder* is laid down in the norms governing the distribution of VAT revenues between the Federation and the *Länder* (Article 106 (3), (4) BL). These provisions stipulate that the Federation and the *Länder* must be equally entitled to cover their necessary expenditures using current revenues. In due consideration of this target, the respective shares of VAT revenues are determined by a federal law requiring the consent of the Bundesrat.

139. The Basic Law guarantees local authorities the right of self-government, which includes the financial bases of autonomy (Article 28 (2) BL). The Federal Constitutional Court has repeatedly emphasised that under Article 28 (2), third sentence of the Basic Law the state is bound to provide the municipalities with the funds necessary to fulfill their tasks. The term 'state' stands primarily for the federal states (BVerfGE 138, 1, 19). Therefore, according to the German constitutional order, the *Länder* are responsible for the adequate financing of local authorities. Allocations from the *Länder* to the communes constitute a significant share of *Länder* expenditures and serve to cover the financial needs of local authorities where the revenue from local taxes, charges and contributions is not sufficient. Such allocations from the *Länder* also serve to finance local investments for specific purposes.

140. The principal source of revenue for sub-federal authorities in Germany is taxation. Taxes are intended to cover general financing needs. Local authorities can partly influence the amount of local tax revenues: for example, they have the right to set multiplier for real property tax and trade tax, and they have the option of introducing their own local taxes on certain nonessential spending and consumption. These latter taxes have subordinate importance from a fiscal perspective, however.

141. Contributions and fees are charges for municipal services used by companies and private citizens. They are based on the cost-of-service principle and, where possible, should be calculated to cover costs. Exceptions to this cost-covering principle are possible for reasons of social policy.

Table 3 – Structure of local authorities 'revenues (2019)³⁸

Tax Revenues	39.5 %
Grants and reimbursements by the <i>Länder</i>	38.9 %
Fees and contributions	8.4 %
Asset sales	1.8 %
License fees	1.2 %
<i>Other revenue</i>	10.1 %

Source: Federal Ministry of Finance. Compiled using data from the Federal Statistical Office

142. Counties, however, do not have the right to raise and/or determine the rate of taxes, nor do they have a direct share in tax revenues. Nevertheless, as local providers of social assistance, youth welfare, refugee housing, and many other social services (nursing care, people with disabilities etc.), they depend on an adequate share of state and municipal taxes. According to interlocutors from counties, it is becoming increasingly apparent that the current "sandwich position" of the counties is reaching its limits, since higher county levies ("*Kreisumlage*") from the municipalities are politically hardly enforceable despite the growing tasks of the counties.

143. The amount of the county levy (the county's share of municipal revenue, calculated on the basis of municipal taxation yield and earmarked grants) is often a subject of conflict between the counties and the municipalities belonging to the counties. For the counties, this levy is the most important source of funding today. In municipalities with scarce own resources, an increase in the county levy can hardly cause solvable problems. In some *Länder*, the counties are rather cautious in setting the levy. This is also due to the fact that the members of the county council primarily represent the interests of their municipality of origin. Accordingly, depending on the *Land*, fiscal deficits are sometimes found more in the counties, sometimes more in the municipalities; this reflects different power relations between districts and municipalities.

144. In this context, one ruling is worth mentioning: On June 16, 2015, the Federal Administrative Court (*Bundesverwaltungsgericht* Case No. BVerwG 10 C 13.14)³⁹ ruled that the supervisory authority may instruct a county to raise the county levy to remedy a budget emergency. In the specific case decided, the county of Kassel had waived an increase in the county levy rate after hearing the municipalities. As a condition for the approval of the unbalanced 2010 county budget, the supervisory authority then instructed the county to raise the levy rate by three percentage points to 35.5%. The county felt that this violated its right to local self-government and argued that the state had a financing obligation to the municipalities; the increase in the levy was not reasonable for the municipalities concerned. In contrast, the Higher Administrative Court (*Oberverwaltungsgericht*) in the *Land* Hesse (a lower court by reference to the Federal Administrative Court), came to the conclusion that the interests of the municipalities belonging to the Kassel County, which must retain a minimum level of funding, had been sufficiently protected; the Federal Court agreed with this.⁴⁰

38 Due to the fiscal impact of the pandemic on the sub-federal budgets, the data on revenues and expenditures for 2020 is not representative for the composition of the sub-federal budgets in general. Thus, Table 3 to 6 provide data on the budget composition for 2019.

39 <https://www.bverwg.de/160615U10C13.14.0>

40 These court rulings, however, provoked fierce criticism from the county. According to media reports, the county head of Kassel, Uwe Schmidt (SPD), announced that as a consequence of the ruling "we will no longer let the state of Hesse get away with consolidating at our expense". He said the county would bill the Hessian Ministry of Social Affairs for the costs of caring for asylum seekers, which had been accumulated since 2009 and not taken over by the state, amounting to about 14 million euros: https://www.focus.de/regional/hessen/kommunen-hessen-darf-Landkreise-zur-erhoehung-der-kreisumlage-verpflichten_id_4756055.html

145. While in the case of the Kassel county the courts ruled that the financial interests of the relevant municipalities were sufficiently protected, in another, more recent case the court came to a different conclusion: The Higher Administrative Court of the *Land Rheinland Palatinate* has ruled (Oberverwaltungsgericht *RheinLand-Pfalz*, Urteil vom 17.07.2020, Az.: 10 A 11208/18)⁴¹ the following:

- The municipalities - like the counties - have the constitutionally guaranteed right to financial resources adequate to their tasks.
- Raising the county levy to a level that violates this right (e.g. when they are forced, therefore, to take liquidity loans over a longer period) is not permissible.
- In such a constellation, a requirement by the supervisory authority to increase the county levy is unlawful.

146. The latter case law is illustrating conflicts arising when most of the county revenue derives from the county levy (*Kreisumlage*) and both the county and the municipalities are under fiscal pressure. Transferring this pressure from the second tier (counties) to the first tier of local self-government will especially affect weaker municipalities. From the point of view of the county finance administration, a possible way out would be the direct participation of the counties in tax revenue, e.g. sales tax. In several counties, the current financial situation would be difficult, especially with a view to the medium-term planning period. A budget balance would hardly seem possible under the given general conditions and investments can currently only be financed by loans, as some local interlocutors from counties in the Free State of Saxony have stressed. For the majority of counties in Saxony, financing by loans is possible, due to the fact their moderate levels of debt. In general, it should be underlined that counties financially depend on county levies (*Kreisumlage*) and this system of financial resources does not provide for adequate financial resources since an increase of county levies negatively affects the first tier of local self-government; moreover, it is not of a sufficiently diversified and buoyant nature (s. comments to Art. 9.4) and this situation is not in accordance with the Charter.

147. Complaints about inadequate financial means have also been expressed by representatives of national associations. They claimed that German municipalities are “structurally underfunded for over 20 years”. As a consequence, investment challenges are immense, and according to a survey among local government officials, their perceived backlog of municipal investment amounts to 149 billion euros (*KfW-Kommunalpanel 2021*). Enormous additional investment needs exist in several fields, e.g. in the areas of climate adaptation, demographic change, and digitalisation. The German municipalities would need financial resources that are concomitant to their tasks in the long run.

148. The rapporteurs note that despite some difficulties municipalities have a status and an array of revenue that meet the requirements of this paragraph. On the contrary, counties are short of their own resources and their situation is obviously not in line with this paragraph of the Charter. Consequently, they conclude that Germany partially complies with this provision.

3.7.6 Article 9.2

149. The financial situation of the *Länder* (including local authorities) seems, at first glance, to be in principle commensurate with their competences and tasks stipulated by the Constitution and legislation, as this is guaranteed by the basic principle for distributing VAT revenues in Germany drawn from Article 106 (3) and (4) of the Basic Law. In principle, VAT revenues are to be split between the Federation and the *Länder* such that both are equally entitled to cover their necessary expenditures using current revenues.

150. In this context, the coverage ratio is calculated as the mathematical ratio between revenue (excluding revenues from borrowing) and expenditure (excluding payments of principal) and serves as an index to assess the financial situation of the *Länder* in respect of the financial situation of the Federation. For the fiscal equalisation system applicable from 2005 onwards, coverage ratios were also enshrined in the Standards Act (*Maßstäbengesetz, MaßStG*) as the standard for distributing VAT revenue between the Federation and the *Länder*. In accordance with the two-tier structure of the German state, calculations of *Länder* coverage ratios take local authorities into account, with an adjustment being made for financial flows between the *Länder* and their local authorities (especially measures to equalise local authority finances).

151. Table 4 provides an overview of the coverage ratios of the Federation and the *Länder* (including local authorities) from 2005 to 2020. In most years, the Federation had a lower coverage ratio than the *Länder*

41 <https://ovg.justiz.rlp.de/de/startseite/detail/news/News/detail/Landkreis-kaiserslautern-nicht-zur-erhoehung-der-kreisumlage-verpflichtet/>

and their local authorities. In 2020, the coverage ratio of the Federation was significantly below the coverage ratio of the *Länder*. The coverage ratios for 2020, once again, highlight the fact that the fiscal costs of the pandemic for the most part accrue to the Federation's budget.

Table 4 – Coverage ratios of the Federation and *Länder* (including local authorities) 2005–2020

Year	Federation			<i>Länder</i> / Local Authorities		
	Expenditure € billion	Revenue € billion	Coverage ratio (%)	Expenditure € billion	Revenue € billion	Coverage ratio (%)
2005	259.8	228.6	88.0	357.6	331.7	92.8
2006	261.0	233.1	89.3	360.4	352.8	97.9
2007	270.4	256.1	94.7	365.1	380.3	104.2
2008	282.3	270.7	95.9	378.0	386.1	102.1
2009	292.3	258.1	88.3	397.6	363.0	91.3
2010	303.7	259.6	85.5	400.0	372.4	93.1
2011	296.2	278.8	94.1	410.7	399.5	97.3
2012	306.8	284.2	92.7	414.5	411.4	99.2
2013	307.8	285.7	92.8	428.5	428.0	99.9
2014	295.5	295.4	100.0	442.6	443.4	100.2
2015	299.3	311.4	104.1	459.8	463.6	100.8
2016	310.6	317.1	102.1	478.5	491.1	102.6
2017	325.4	330.7	101.6	490.5	512.3	104.5
2018	336.7	347.9	103.3	517.1	539.3	104.3
2019	343.2	356.7	103.9	541.3	556.1	102.7
2020	441.8	311.3	70.5	620.4	581.5	93.7

Source: *Financial relations between the Federation and Länder on the basis of constitutional financial provisions*, Federal Ministry of Finance, 2020.1 Including seigniorage.

152. Under the Basic Law, the *Länder* are primarily responsible for the financial resources of the local authorities. In determining financing for local authorities, each *Land* must take into account the distribution of functions between the *Land* and local authorities so that the financial situation of the local authorities is commensurate to financing their assigned functions. This principle has applied without restriction since the prohibition on the transfer of tasks via federal law was introduced. In the case of a breach of this principle, local authorities can file an action against their *Land* to reinforce a financial endowment that is commensurate with their assigned functions.

153. Also, the constitutions of the *Länder* adopt the principle of concomitant financing. In the Constitution of the Free State of Bavaria, for instance, art. 83 par. 3 stipulates that 'If the state delegates tasks to the municipalities, if the state obliges them to perform the tasks within their own sphere of activity or if the state has special requirements regarding the performance of existing or new tasks, it must simultaneously adopt provisions for covering the costs. If the performance of those tasks results in an extra burden on the municipalities, adequate financial compensation must be provided'⁴².

154. Where a *Land* delegates tasks to its local authorities, the principle of "whoever places the order pays", as set out in the *Land* constitutions, applies. It is up to the *Länder* to regulate the distribution of state tasks at the *Land* level and to provide local authorities with the relevant and appropriate funding. Apart from direct financial compensation, state support can take other forms, just as it happened, for instance, with measures that lightened the financial load of local authorities, and a relevant example was the increase in housing benefits (*Wohngeldstärkungsgesetz*) that lessened municipal expenses for housing. The Federation will also increase its share of cost coverage for heating by 25% and is further promoting local investments.

155. There are however some deficits regarding the implementation of the commensurability principle, especially at the level of the counties (*Kreise*). According to information provided by counties in the Free State of Saxony, problems repeatedly arise in the discrepancy between the allocation of tasks and the provision of the necessary funding. This applies in particular to the area of social services, which are growing due to standards set by the federal government, the state, or the EU without the financial resources provided growing to a sufficient extent. Often, partial (and sometimes quite complicated) compensation mechanisms are created, which initially absorb the additional burdens, but after a certain time, they are no longer

42 https://www.bayern.Landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16.pdf.

adequate. On the other hand, representatives of the Saxon Court of Audits (SCA) have stressed that, concerning the municipal level, the SCA does not have any findings on *general* deficits in the compulsory tasks, while the balance (deposits minus payouts) has been positive since 2012 in the sum of all municipalities. Overall municipal debt declined until 2019, while Investment activity has been increasing since 2016, including 2020. Nevertheless, the financial situation would deviate across individual municipalities.

156. According to representatives of the National Associations of local authorities many tasks, especially in the fields of education and social affairs, are passed on, within the framework of federalism, to the municipalities. These tasks are often associated with considerable additional investment. At the same time, many municipalities in Germany have to contend with old debts (among other things their own investments in schools), which increasingly reduces the free financial space. As a result, autonomy is in practice severely restricted by limited financial discretion. There have been several *Land* constitutional court decisions on the question of the adequate financial status of local self-government, most recently in the federal state of Rhineland-Palatinate. In December 2020, the Constitutional Court of this *Land* declared the financial equalization law unconstitutional since relevant calculations were based on the amount of the *Land* revenue and not on the tasks themselves (*'fehlender Aufgabenbezug'*) whose adequate financing should be ensured according to the article Art. 49 para. 6 of the Rhineland-Palatinate Constitution. Moreover, the Court criticized the lack of explicit provisions for additional funding that would face the problem of over-indebtedness in some municipalities that would not be able to consolidate their finances without state assistance.⁴³

157. The National Associations of Local Authorities also stressed the fact that the legal form of the commensurability principle and the level of protection varies across the *Länder*. In addition, there are some important gaps: for instance, commensurate financial resources 'are not provided when EU regulatory requirements are implemented'. In addition, there would be in reality no commensurability in cases where federal laws subsequently expand or increase social benefits. At the *Land* level, commensurability regulations would be partly neutralized through deductions from general grants of the *Land* to the municipalities.

158. Some recent decisions of the Federal Constitutional Court are particularly interesting. For instance, the decision on the needs for education and participation in activities (*'Bildung und Teilhabe'*: Decision of 07.07.2020 - 2 BvR 696/12 -) underlined and strengthened the constitutional prohibition on the transfer of tasks from the Federation to municipalities (Art. 84 para 1 sentence 7 BL - "Federal law may not transfer tasks to municipalities and associations of municipalities"). The Federal Constitutional Court ruled that a case of article 84 para. 1 sentence 7 BL exists if a federal law assigns to the municipalities for the first time a specific task or a functionally equivalent extension of a task already assigned by federal law. Therefore, a series of norms in the Social Code (*Sozialgesetzbuch*) were declared unconstitutional⁴⁴. The decision is already having a practical effect insofar as seven towns and counties from North Rhine-Westphalia have lodged a municipal constitutional complaint against section 94(1a) of the Social Code XII, which was enacted in December 2019 on recourse claims of the social welfare agencies against relatives of beneficiaries.

159. According to representatives of National Associations, recommendation 320/2012 of the Congress has not been implemented. In this recommendation it was suggested that standards and criteria should be adopted for the implementation of the commensurability principle, making financial calculations and the planning process more transparent, and providing practical guarantees by including municipal stakeholders. Due to the federal states' competence, the current situation can only be assessed at the state level, since a unitary federal regulation is legally not possible. In some *Länder*, there were some interesting regulations. For example, in the state of North Rhine-Westphalia (but similarly also for Rhineland-Palatinate) there is already the instrument of cost impact assessment and a corresponding legal framework, providing also for consultation and participation. Operational standards and criteria for the implementation of the commensurability principle have not, however, been adopted and this deficit persists.

160. In line with the concerns expressed above the rapporteurs consider that Germany is partially complying with the principle of commensurability.

3.7.7 Article 9.3

161. Under the exception of real property tax, the Federation has concurrent legislative powers (Article 105 (2), second sentence, BL) over taxes whose revenue flows entirely (like taxes on consumption) or partly to

43 <https://verfgh.justiz.rlp.de/de/startseite/detail/news/News/detail/kommunaler-finanzausgleich-in-rheinLand-pfalz-muss-neu-geregelt-werden-aktueller-finanzausgleich-i/>

44 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/07/rs20200707_2bvr069612.html
30/49

the Federation (for example, the three “joint taxes”, i.e. income tax, corporation tax and value-added tax, whose revenue is shared between the Federation and the *Länder* (Article 106 (3), first sentence, BL). The Federation also has concurrent legislative powers over taxes for which federal-level legislation has been deemed necessary in accordance with the criteria stipulated in Article 72 paragraph (2) of BL (for certain policy topics, such as public welfare ‘if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest”).

162. To ensure legal and economic consistency on a nationwide basis, the Federation has made extensive use of its concurrent legislative powers in the area of taxation. This means that the *Länder* (together with local authorities) retain the power to levy taxes mainly in the form of local excise duties, as long as such duties are not equivalent to taxes governed by federal law (Article 105 (2a), first sentence, BL).

163. In addition, the *Länder* have the exclusive power to determine the tax rate for real property transfer tax (Article 105 (2a), second sentence, BL). Local authorities have the right to determine the multipliers (*Hebesatz*) that are applied to the basic rates of real property tax and trade tax (Article 106 (6), second sentence, BL) and that influence the amount of revenue collected by local authorities.

164. By amending the Basic Law in 2019, the Federation was assigned concurrent legislative powers regarding real property tax, regardless of the criteria stipulated in Article 72 paragraph (2) BL (Article 105 (2), first sentence, BL). At the same time, the *Länder* were given the option, via an addition to Article 72 paragraph 3 of the Basic Law of issuing *Land* legislation that deviates from federal legislation (Article 72 (3) no 7 BL).

165. The Basic Law itself jointly allocates several particularly important taxes to the Federation, the *Länder* and, to a degree, the local authorities. These taxes are therefore referred to as joint taxes. Table 5 presents the joint taxes in Germany and displays the respective regional and local government shares in these tax revenues as of 2019:

Table 5: Shares in joint tax revenues in 2019

	Federation	<i>Länder</i>	Local authorities
Income tax Article 106 paragraph (3) of the Basic Law in conjunction with section 1 of the Local Authority Finance Reform Act	42.5 %	42.5 %	15 %
Final withholding tax on interest and capital gains Article 106 paragraph (3) of the Basic Law in conjunction with section 1 of the Local Authority Finance Reform Act	44 %	44 %	12 %
Corporation tax Article 106 paragraph (3) of the Basic Law)	50 %	50 %	-
Value added tax Article 106 paragraph (3) and paragraph (4) of the Basic Law in conjunction with section 1 of the Fiscal Equalisation Act	48.9 %	47.7 %	3.4 %

166. The local and *Land* government shares in income (including the final withholding tax on interest and capital gains) and corporation tax revenues have remained constant for many years. On the other hand, as depicted in Table 6, the local and regional government shares in the value added tax revenues have significantly increased over the last years. This development reflects the fact that the apportionment of value added tax revenues has been used to an increasing degree by the Federation to direct financial assistance to local and regional governments, e.g. since 2018 the local authorities’ share is increased by 2.4 bn. Euro

p.a. (at the expense of the Federation) to support the financial situation of local authorities on a national scale.

Table 6: Development of shares in Value added tax revenues 2011 – 2019

	2011	2012	2013	2014	2015	2016	2017	2018	2019
Federation	53.9	53.4	53.4	53.5	52.3	49.4	50.7	48.9	48.9
<i>Länder</i>	44.1	44.6	44.6	44.5	45.5	48.3	46.6	47.7	47.7
Local	2.0	2.0	2.0	2.0	2.2	2.2	2.7	3.2	3.4

167. The municipalities in Germany have the right, within the framework of the law, to set the assessment rates for property tax and trade tax (Article 106 (6) sentence 2 BL). In addition, the municipalities can levy so-called local consumption and expenditure taxes as long as and to the extent that these are not similar to taxes regulated under federal law. In Germany, the municipalities also have a local tax invention right ("*Steuererfindungsrecht*") derived from their taxation power, which they can use within the framework of local tax statutes. This applies, for example, to the local dog tax ("*Hundesteuer*").

168. However, the yield from that latter kind of taxes does not constitute a considerable share of local government revenue. In the Free State of Bavaria, for instance, the share of the revenue from the dog tax and the tax on second homes (as relevant cases of application in the area of local consumption and expenditure taxes) amounted in 2020 to 0.3% of the total tax revenue of the Bavarian municipalities. In the same year, the share of total tax revenues of the Bavarian municipalities in their total revenues was around 41.2 %.

169. Nevertheless, German municipalities are also entitled to levy contributions and fees for the (possibility of) using their public facilities. The right to issue levy statutes is an essential part of the guarantee of self-government and is an expression of municipal fiscal sovereignty.

170. Even though the relative importance of autonomous taxation or local tax rates seems to decline, a part of municipal revenue still derives from local taxes and charges, as shown in table 7 below. The rapporteurs conclude that Germany complies with this paragraph.

3.7.8 Article 9.4

171. The financial basis of local authorities has been enlarged in recent years. For instance, laws amending articles 104b, 104c and 104d of the Basic Law which were enacted between 2016 and 2019 adapted the federal system and its financial regime to the changed circumstances in Germany, thereby enabling the Federation to contribute financial assistance towards, inter alia, the local educational infrastructure and affordable housing.

172. The Federation has increased its influence on *Länder* and local governments: through the exercise of the legislative powers, through policymaking and also through programmes and federal subsidies in areas that are actually the responsibility of the *Länder* and municipalities. For example, the financing of local public transport depends, among other things, on the federal funds made available. There is state financial contribution in various areas, through wireless LAN in schools (*Digitalpakt Schule*), or special aid to cover the costs of integration.

Table 7: Revenue of the Communes from 2017 to 2019⁴⁵

Billion euro	2017	2018	2019
Revenue	243.80	253.94	264.6
Taxes	95.90	101.21	103.4
<i>Including:</i>			
Property taxes	12.50	12.69	12.8
Trade tax revenues	40.06	42.21	42.2
Share of income tax	36.30	37.92	39.2
Share of VAT	5.51	6.79	7.5
Fees	19.41	19.96	20.5

45 Kay Ruge, Klaus Ritgen Local Self-Government and Administration (2021), in: S.Kuhlmann et al. (eds), Public Administration in Germany, New York: Palgrave MacMillan, p. 126 (further elaborated by the authors).

Current allocations from state/ federal government	88.43	91.42	97.1
Investment allocations from state/ federal government	7.42	8.44	10.6
Other revenue	32.63	32.91	32. 95

Source: Local Government Associations, *Deutscher Landkreistag*, October 2019: 499. The figures for 2019 are based on surveys, statistics and projections position, also vis-à-vis the *Länder* and the Federation.

173. Further diversification of the financial basis of local authorities/communes is an obvious need in Germany especially for counties who are extremely dependent on the mechanism of *Kreisumlage* (allocation of municipal revenue to the Counties), while many additional tasks or the enlargement of already existing tasks is imposed by laws issued and decisions taken at higher levels of governance (Federation, *Land*).

174. A particular yet very significant problem affects cities who are offering services to commuters from a wider area. This situation forces these cities to increase tax rates or even take loans, in order to meet increased demand, stemming from commuters and other residents of surrounding municipalities. In Freiburg, for instance, the city's own taxation is already at the top in the state Baden-Württemberg. Increases in the current situation for trade are not representable; in addition, in the case of commercial settlements, there is a competitive situation with the surrounding area, which benefits from the municipal infrastructure (theatres, museums, trade fairs, concert halls, vocational schools) without contribution.

175. A comparable but different situation has been faced by the city-state of Bremen in previous years when a big part of the urban population moved to surrounding settlements which belonged to a different federal state (Niedersachsen) where they paid taxes, while they were working and/or using the services and the infrastructure of Bremen. In order to cope with this situation, Bremen has been obliged to increase taxation (and lose attractiveness for people and businesses) and, even worse, increase its debt, finally leading to a vicious circle of indebtedness.

176. In view of the aforementioned, the rapporteurs assume, regarding the counties, that their system of revenue needs further diversification and flexibility. In addition, urban municipalities providing, on an ordinary and constant basis, services and infrastructure to big numbers of citizens coming from surrounding areas, should be given additional possibilities of taxation and fees. Due to relevant shortcomings, Germany partially complies with this paragraph.

3.7.9 Article 9.5

177. On 1 January 2020, the Federal Government launched the Federal Funding System for Structural Development Regions which aims to achieve equivalent living conditions by promoting living and working conditions in structurally weak regions.

178. Nevertheless, since local governments are parts of the *Länder* and their financial situation largely depends on them, the equalisation mechanisms affecting the *Länder* should be presented, apart from what has already been mentioned in the comments to article 9.3 (s. above). Article 107 of the Basic Law in conjunction with the Fiscal Equalisation Act stipulates that the *Länder* share of VAT revenue is distributed in a way that appropriately balances the fiscal capacities of the federal states. *Länder* with below-average fiscal capacities receive top-ups that are financed through contributions from *Länder* with above-average fiscal capacities (horizontal equalization). The sum of top-ups equals the sum of contributions, since both are calculated using a linear schedule that covers 63 % of the gap (positive or negative) between a *Land's* tax revenue and the *Länder* average.

179. After fiscal equalisation among the *Länder* has been carried out, the federal budget provides general supplementary grants to cover part of the remaining gap between the fiscal capacity and equalisation indices for those *Länder* with below-average capacity. These general grants cover 80 % of the gap between the fiscal capacity index and 99.75 % of the equalisation index.

180. In addition, supplementary federal grants for special needs are received by:

- the new *Länder* (excluding Berlin) to cover the costs associated with high unemployment benefits (in connection with Hartz IV benefit reforms); these grants totaled 1 bn. Euro per year until 2011, ca. 0.7 bn. Euro per year in 2012 and 2013, and since 2014 total approx. 0.8 bn. Euro per year.

- Ten smaller *Länder* with below-average fiscal capacity, to offset the disproportionately high costs of their political administrations (total volume about 0.5 bn. Euro per year).
- *Länder* with below-average local authority tax revenues receive an additional 53.5 % of the gap between their per-capita local tax revenues and 80 % of the average local tax revenues collected nationwide.
- *Länder* whose below-average performance in promoting research facilities would cause them to receive a below-average allocation of federal research grants (Article 91b BL) receive an additional federal grant amounting to 35 % of the difference between the per capita research funding already provided under Article 91b of the Basic Law and 95 % of average per capita research funding nationwide. These monies are sometimes called "supplementary research grants", but in reality, they are not tied to any specific spending purpose.

181. Fiscal equalisation between local authorities is conducted on the *Länder* level and respective regulations governing the equalisation schemes (*Kommunale Finanzausgleichssysteme*) are always set out in local authority codes at *Land* level. Accordingly, the specificities of the equalisation systems can differ between *Länder* in many details. However, the general set-up of the fiscal equalisation systems is comparable nationwide.

182. First, fiscal equalisation serves the purpose of guaranteeing all local authorities in a given *Land* a minimum level of fiscal resources, taking into account the average magnitude of tasks they must fulfill (this is the vertical, quantitative dimension of the fiscal equalisation system). Second, fiscal equalisation is undertaken to even out differences in the fiscal capacity of individual local authorities (this is the horizontal, redistributive dimension of the system). This entails reducing only the structurally related fiscal differences between local authorities, and not those for which they are themselves responsible. Thus, financially weak local authorities generally receive proportionally higher grants than those with stronger sources of tax revenue. The effect of the equalisation system can be boosted by an additional tool called the fiscal equalisation apportionment (*Finanzausgleichsumlage*), a method of redistributing funds from better-off local authorities to financially weaker ones within the *Land*.

183. Each *Land* is responsible for the vertical and horizontal distribution of these funds. The guiding principle is that the distributed funds should cover fiscal needs. The highest possible degree of equitable distribution is considered to have been reached if every local authority receives a grant to meet its needs that is appropriate in relation to the total amount available for all local authorities. In practice, this goal can never be fully realised. As a result, the structure of the equalisation system leads to competition among local authorities for finite fiscal resources.

184. The sharing of tax revenues has been a core element of the fiscal equalisation system since 1956, when it was enshrined in Germany's constitution. Under Article 106 paragraph (7), first sentence of BL, a certain percentage of the *Länder* share of revenue from joint taxes is passed on to local authorities and associations of local authorities (referred to as "obligatory revenue-sharing"). The exact percentage is set by the *Länder* legislatures themselves. This amount is referred to as the "sharing rate", and it differs depending on how the functions between a *Land* and its local authorities have been distributed historically. Thus, even the bases of revenue sharing can vary as a result. The needs-based system of fiscal equalisation among local authorities follows a different procedure, which is based on a calculation of the financing needed to carry out local authority functions. In such cases, notification of the sharing rate is provided for information purposes only.

185. In addition, *Land* legislatures can decide whether, and at what percentage, revenue from *Länder* taxes (i. e., as opposed to joint taxes) will be shared with local authorities (this is referred to as "optional revenue-sharing"). *Länder* policies in this area vary as well.

186. Furthermore, the *Länder* grant their local authorities additional financing from general reserves in the *Länder* budgets (regulated partly by existing legislation on fiscal equalisation, partly by special legislative provisions and partly by provisions contained in specific budgets). It is not possible to compare the financial grants the individual *Länder* pay to their local authorities. This is because the structure of these grants differs within the various systems of fiscal equalisation, and because functions are distributed differently between the various *Länder* and their local authorities (and this distribution can itself change from year to year).

187. The fiscal equalisation system of Saxony can be used as an example to present an equalization framework within a *Land*. Relevant norms are included in article 87 of the Saxon Constitution (local financial equalisation), in the following paragraphs:

- 1: The Free State shall ensure, that the municipal institutions of self-government can fulfill their tasks.
- 2: Municipalities and counties have the right to levy their own taxes and other levies in accordance with the law.

- 3: The municipalities and counties shall be involved in its tax revenue, taking into account the tasks of the Free State within the framework of mutual financial equalisation.
- 4: More details are determined by law:

188. This law is the Saxon Financial Equalisation Act (*SächsFAG*), it provides for balancing between the state and local authorities, and also for equalisation within the municipal level. The following stages are included in the equalization procedure:

1. Determination of the financial compensatory mass,
2. Identification of financial needs,
3. Identification of financial strength,
4. Compensation of the existing gap

189. The adjustment of the financing system in the *SächsFAG* takes place every 2 years. Due to this rhythm of, however, the financial equalisation cannot respond to sudden needs and strong deviations of tax revenue in individual municipalities. This is partially bridged by the so-called needs allocations.⁴⁶

190. In light of the above, the rapporteurs consider that Germany complies with this provision.

3.7.10 Article 9.6

191. As already mentioned, according to rule 69 para. 5 of the Bundestag rules of procedure, if a committee discusses a bill referred to it as the lead committee which affects major interests of municipalities and especially if the bill directly affects their finances, the local authorities' associations at federal level shall be given the opportunity to state their position before a decision is taken in the committee. The Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*, GGO) contain comprehensive rules on local government associations' participation in respect of bills tabled by the Federal Government (e.g. sections 41, 47 (1) of the Joint Rules).

192. Consultation on financial matters is also provided by constitutional norms of the *Länder*. For instance, article 83 para. 7 of the Constitution of the Free State of Bavaria stipulates that 'the State Government shall agree on a consultation procedure with the central municipal associations in order to implement the principle of connexity' (meaning the principle of commensurability, according to para. 3 of the same article, as above under 3.8.2.).⁴⁷

193. At the level of the federal constitution, however, relevant consultation rights are not provided. Nevertheless, the Federal Government has the organisational power to decide how it exercises its right to initiate legislation. The *Länder* exert a strong influence on federal legislative processes through the Bundesrat. Municipalities can approach the higher-ranking authorities of the *Land* to trigger the initiative of a *Land* government in the Bundesrat. At the Federal level, it is left to the discretion of the legislative bodies and their committees as to which associations and experts are to be heard in what form in hearings which are not prescribed under the Basic Law (*BVerfGE* [Decisions of the Federal Constitutional Court] 36, 321 [330]). There is not constitutionally guaranteed right of individual participation in such procedures (*BVerfGE* 139, 148 [176 et seq., margin no. 55]).

194. According to the federal Ministries of Finance and Interior, Building and Community, the right of municipalities to be heard is upheld in state practice, ensuring that the municipal side has a voice in the legislative process and other important issues affecting it. The right of municipalities to be heard is anchored in the law on rules of procedure and therefore has a sufficient legal basis. The law on rules of procedure is also an appropriate place for such a provision. Including such procedural provisions in the Constitution would not provide any added value and would overload the Basic Law (see Bundestag printed paper 12/6000, p. 48). In addition, it should be noted that there are constitutional limits to participation. For example, the principle of federalism bars the Federation from negotiating directly with individual municipalities in the legislative process and thereby circumventing the *Land* affected (*BVerfGE* 39, 96 [125]; 56, 298 [320]).

195. The rapporteurs acknowledge the fact that the federal system provides limits to direct consultation of local authorities at the national level. On the other hand, however, it is primarily the federal level and not the *Land* level that is accountable for meeting international obligations stemming from the Charter; moreover, federal decisions concerning social welfare or environmental protection can have a heavy impact on the financial situation of counties and/or municipalities. Also based on their observations and discussions, the

46 Saxon Ministry of Finance: "The Communities and their Finances": <https://publikationen.sachsen.de/bdb/artikel/29597>

47 https://www.bayern.Landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16.pdf.

rapporteurs conclude that stronger consultation at the federal level is needed, and Germany partially complies with this paragraph.

3.7.11 Article 9.7

196. In 2015 a 7-billion Euro fund was created to promote local investment (*Kommunalinvestitionsförderungsfonds*). Via this fund the Federation provides financial resources for the *Länder* to help financially weak municipalities to invest in infrastructure. Additional help was also provided to regions affected by the end of coal mining. As already mentioned, in 2019 the Basic Law was changed to allow the Federation to co-finance local and regional (*Länder*) investments, in order to improve the digital infrastructure in education (*Digitalpakt Schule*), to financially contribute to social housing or to increase federal funds for local transport infrastructure.

197. The investment activity of local authorities has constantly been increasing over the last years, with an average growth rate of 9.6 % in the years from 2015 to 2020. This development shows that local authorities have the financial resources to plan and execute investment projects, e.g. in road infrastructure, schools or urban development.

198. The Federation stimulates local authorities' investment activities by investment support programs in areas of federal importance. In context of the Federation's stimulus package, the funding of multiple programs was increased in 2020 and 2021 (see Table 8). Further, not in relation to the pandemic, the Federation has recently decided to increase the funding of important investment support programmes, the financially most relevant being:

- *Gemeindeverkehrsfinanzierungsgesetz* (GVFG) – The Federation provides funds to the *Länder* to support local authorities' investment in rail-bound local public transport. In 2020, in line with its climate target, the Federation decided to structurally increase the annual funds stepwise over the next years, from 332 million Euro in 2019 to 2 bn. Euro from 2025 onward.
- *Strukturwandel Kohleregionen* – In 2020, the Federation has agreed to support the economic transition of areas in the former coal regions with up to 30 bn. Euro in the years from 2020 to 2038. In parts, the federal funds will be used to support local authorities in their programs to foster the local economic, ecologic and socially sustainable transformation.

199. Economic development is a key element of local authorities' investment activities. Given that local authorities' revenues depend to a significant degree on real property and sales taxes, local policymakers have a strong incentive to invest in economic infrastructure to foster local economic growth. In economically less-favoured areas, the Federation assists sub-federal authorities in their economic development functions in the context of the joint task *Verbesserung der regionalen Wirtschaftsstruktur* (GRW)⁴⁸.

200. Within the scope of the joint task GRW, the Federation provides half of the funding for the relevant measures undertaken by sub-federal authorities to foster local economic development. Among others, local authorities can receive financial support by the Federation for investments in their economic infrastructure, e.g. the development of commercial parks or alike.

201. Interlocutors from the city of Freiburg emphasized that federal and state grants are earmarked and for some tasks there are no or only few grants (e.g. investments in schools...). Other interlocutors have also highlighted the importance of earmarked grants, in general, however, the rapporteurs did not have the impression that the provision of such grants decisively restricts policy discretion of local authorities in relevant fields. Therefore, they conclude that Germany complies with this paragraph.

3.7.12 Article 9.8

202. Unlike the Federation and the *Länder*, local authorities are bound by special rules that govern the raising of revenue. Local supervisory authorities supervise compliance with these rules. The revenues needed to fulfil local authority functions are to be generated firstly by means of special charges (such as administrative fees, usage fees, and contributions for public infrastructure), to the extent that this is reasonable and necessary, for services provided by the local authority. Thereafter, these functions are to be

⁴⁸ Where certain functions performed by the *Länder* are of considerable importance for the future development of the country as a whole, the Basic Law allows the Federation to participate in the implementation and financing of such functions if this is necessary for the improvement of living conditions (cf. Article 91a paragraph (1) of the Basic Law). Such functions are referred to as joint tasks.

financed by taxes insofar as the other sources of revenue (including transfers from reserves, cost reimbursements and general fiscal grants from the *Länder*) do not suffice.

203. As a last recourse, funds may be obtained by borrowing only if they cannot be obtained in any other way or if other methods of financing would prove uneconomical. In slight difference, local authorities are allowed to take up credits for financing investments, if it proves to be the most economical method of financing and the future financial commitments from the credit are sustainable for the local authority. Local supervisory authorities may prohibit municipal borrowing based on legal provisions adopted at *Land* level if the financial commitments arising from such borrowing would place a local authority's long-term economic performance and budget management at risk.

204. The Federal Ministry of Finance has no legal competence to impose a limit on the indebtedness of the *Länder* or their local authorities. The Ministry of Finance collects no detailed information regarding the financing conditions for the *Länder* or the local authorities.

205. In 2009, however, the Federation and the *Länder* agreed on the introduction of a balanced budget rule, which was enshrined in Article 109 paragraph 3 of BL⁴⁹. The so-called "golden rule" or 'debt brake' requires that the budgets of the Federation and the *Länder* shall, in principle, be balanced without revenue from credits. The *Länder* themselves regulate details for their budgets within the framework of their constitutional powers. Importantly, the rule contains an exception clause for times of a natural disaster or unusual emergency situations beyond government control and substantially harmful to the state's fiscal capacity, enabling the Federation and the *Länder* to tackle the economic and social challenges of the pandemic with the adequate fiscal responses.

206. Structurally, the financing conditions for the *Länder* do not differ from those for the Federation. The ability of local authorities to conduct their own debt management, however, may depend on the size of the respective local authority. In general, local authorities have a broad array of financing instruments at their disposal and obtain credit primarily from local banks and savings institutions as well as regional *Girozentralen*.

207. The legal framework for the financial management of municipalities is issued by the *Länder*. In Bavaria, for instance, it is explicitly stated in the law that the fiscal norms for municipalities are based on the principle of the continuous fulfilment of municipal tasks, the securing of permanent efficiency and the avoidance of over-indebtedness (e.g. Art. 61 Para. 1 of the Municipal Code in the Free State of Bavaria).⁵⁰

208. Following this line, the total amount of borrowing for investments and investment promotion measures within the framework of the budget statutes requires the approval of the legal supervisory authority. Approval is to be granted or refused under the aspect of orderly budget management; as a rule, it is to be refused if the credit obligations are not in line with the permanent capacity of the municipality.

209. Despite the particularly good financial situation of Germany, some regions and local authorities face liquidity problems, and there are also several cases of over-indebtedness⁵¹. The number of local authorities in difficulty varies considerably from region to region, as well as the political assessment of the situation and of possible remedies. In some cases, the *Länder* have introduced "tailor-made" consolidation programmes for indebted municipalities, adjusted to the peculiarities of each case and based on bilateral contracts.

210. It is also interesting that a city state facing problems of indebtedness, namely Bremen, has made such an agreement with the Federation. In anticipation of the federal constitutional debt brake, the state of Bremen committed itself to a restructuring agreement with the federal government to balance the budget, which had

49 Article 109 [Budget management in the Federation and the *Länder*], para. (3): "*The budgets of the Federation and the *Länder* shall, in principle, be balanced without revenue from credits. The Federation and *Länder* may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted. Details for the budget of the Federation shall be governed by Article 115 with the proviso that the first sentence shall be deemed to be satisfied if revenue from credits does not exceed 0.35 per cent in relation to the nominal gross domestic product. The *Länder* themselves shall regulate details for the budgets within the framework of their constitutional powers, the proviso being that the first sentence shall only be deemed to be satisfied if no revenue from credits is admitted.*"

50 "Art. 61 Allgemeine Haushaltsgrundsätze (1) 1Die Gemeinde hat ihre Haushaltswirtschaft so zu planen und zu führen, daß die stetige Erfüllung ihrer Aufgaben gesichert ist. 2Die dauernde Leistungsfähigkeit der Gemeinde ist sicherzustellen, eine Überschuldung ist zu vermeiden": <https://www.gesetze-bayern.de/Content/Document/BayGO/true>

51 Hubert Heinelt & Philipp Stolzenberg (2014) 'The Rhinish Greeks'. Bailout funds for local government in German federal states, Urban Research & Practice, 7:2, 228-240, DOI: 10.1080/17535069.2014.910934.

been in deficit until then, by the time the debt brake came into force. In return, the federal government committed itself to providing an annual amount of € 300 million as restructuring aid.

211. Local authorities do have access to the national capital market according to the aforementioned rules and restrictions. Therefore, the rapporteurs conclude that Germany complies with this paragraph.

3.7.13 Article 10 – Local authorities’ right to associate

Article 10 – Local authorities’ right to associate

1. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.
2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.
3. Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.

3.7.14 Article 10.1

212. The principle of autonomy includes the power of local authorities to decide for themselves whether a certain task can be performed autonomously or together with other administrative bodies (the so-called right to cooperation, *BVerfGE* 138, 1, 17ff.). This right of intermunicipal cooperation is further developed by the federal states in their own laws. Intermunicipal cooperation can take place institutionally, for example through a single purpose administrative association (e.g. in the legal form of a *Zweckverband*), or it can be regulated by contract.

213. Germany has a long tradition when it comes to local and regional cooperation. Examples of inter-municipal cooperation include policy to develop settlement areas and commercial premises, *Land* conversion, the formulation of development concepts, general economic services (esp. local public transport, sewage and waste disposal, and health) and finding sites on which to build large-scale shopping centres. Intermunicipal cooperation has for years also been an expression of a new understanding of the planning process. Actors from the realms of politics, administration, business, and science network their skills and competences and use them to mutual benefit. This new form of cooperation presupposes a large degree of openness to new approaches, mutual trust, a willingness to compromise and thinking in terms of the bigger picture. It ranges from legal requirements and incentives to voluntary cooperation in order to use synergies.

214. Inter-municipal or regional cooperation occurs at various levels, sometimes across regional borders (inter-regional cooperation). Besides cooperation between towns/cities and their surrounding areas (e.g. the Berlin-Brandenburg Local Neighbourhood Forum and the Lower Saxony/Hamburg Neighbourhood Forum), such cooperation can be found in Germany’s 12 metropolitan regions, which provide a suitable regional frame of reference for cooperative projects in various sub-areas. Initiatives aimed at developing urban regions can also be found beyond these metropolitan regions in the shape of self-organisation processes based on regional players’ initiatives. They can especially be found in regional concepts (e.g. the Rostock Regiopol Region and other members of the German Regiopol Network).

215. The New Leipzig Charter, which was adopted in late 2020 during Germany’s EU Council Presidency by the ministers responsible for urban development to provide a framework for integrated and sustainable urban development in Europe, explicitly welcomes inter-municipal cooperation and calls on local authorities to coordinate their political strategies and measures with surrounding and urban regions, in particular when it comes to housing, commercial premises, mobility and energy supply. Intermunicipal cooperation can make an important contribution to boosting the transformative power of towns/cities and municipalities so they can become sustainable, resilient and liveable spaces.

216. The Territorial Agenda 2030, which was adopted in December 2020 during Germany’s EU Council Presidency by the ministers responsible for regional planning, regional development and/or territorial cohesion in order to provide an action-oriented framework for promoting territorial cohesion in Europe, variously emphasises the need for inter-municipal cooperation to meet global social challenges and to improve working, living and business conditions. A particular focus is placed on the priority areas “functional regions” and “integration beyond borders”.

217. In the State of Saxony, the performance of tasks within the framework of inter-municipal cooperation is an important option for municipal action that preserves the autonomy and identity of the municipalities. Special-purpose associations, the so called “*Zweckverbände*” and special-purpose agreements, the so-called “*Zweckvereinbarungen*” are the most frequently used legal forms of municipal cooperation. The main areas in which Saxon municipalities cooperate are in the fields of water supply and sewage disposal, registry

office and registration, tourism promotion, fire brigade and rescue service, EDP and IT, spatial planning and development, public order and local public transport, economic and regional promotion.

218. By far, most of cooperation exists in the area of wastewater/water management; this cooperation has proven to be particularly effective, as many municipalities are too small for the optimal size of operation and the provision of services is extremely capital-intensive. In this area, the costs of the municipalities can be reduced through cooperation. The organisation in the form of a special-purpose association far outweighs the other options, as the complete task is handed over to the special-purpose association as the new task bearer.

219. In the areas of registry office and fire/rescue services, the aim is not only to reduce fixed costs but also to make efficient use of human resources. Larger municipalities often take over the tasks for smaller ones, which is why the conclusion of special-purpose agreements dominates in these task areas.

220. The tasks of spatial planning and development and economic and regional promotion are among the typical areas of municipal cooperation; here there is a higher proportion of cooperation in working groups where the focus is on regular exchange and coordination in the run-up to decisions.

221. In Bavaria, the legal framework for inter-municipal cooperation is regulated in the Law on Communal Cooperation – *KommZG*⁵². This provides for possible legal forms of municipal cooperation: Working communities, special-purpose agreements, special-purpose associations as well as joint municipal enterprises (Art. 2 par. 1 and 4 *KommZG*). In addition, there is the possibility of informal cooperation.

222. Population development, scarce financial resources, technological developments, growing competition between regions in the European and global context, as well as the increased expectations of citizens and businesses regarding the type and quality of municipal services pose ever greater challenges to municipalities. In some areas, declining population numbers are reducing economic strength, which can reduce the revenues of municipal budgets. Existing infrastructure facilities are no longer being used to capacity. The increasing aging of the population is changing the demands on municipal infrastructure and public services.

223. Inter-municipal cooperation is a forward-looking strategy with high potential. Together, numerous municipal tasks can be better solved. In order to secure their ability to perform and act, numerous municipalities perform their tasks jointly, thereby benefiting from the synergy effects without losing their independence. Since December 2012, the Free State of Bavaria has been promoting new exemplary inter-municipal cooperation projects. The aim is to strengthen municipal self-administration and maintain the municipal capacity to act through inter-municipal cooperation.

224. It is worth mentioning that a great deal of inter-municipal cooperation takes place through municipal companies, especially in the area of services of general interest (water, wastewater, waste, energy or telecommunications). The same applies to the development of joint commercial areas or transport projects.

225. In several cases, inter-municipal cooperation is developed (often on a contractual basis) in the wider area of an urban centre and the surrounding municipalities. The latter take advantage of the capacities of their urban neighbour, while in many cases, considerable economies of scale can be earned. The city of Freiburg, for instance, has a contract with the municipality of Merzhausen for the provision of a fire brigade. Merzhausen is thus one of four municipalities in Baden-Württemberg that does not have its own fire brigade. With most of the surrounding municipalities, Freiburg also has cooperation agreements on so-called supra-local assistance (*„Überörtliche Hilfe“*) for special vehicles or special extinguishing agents. Cooperation has also been developed in public transport, water, energy and sewage.

226. Nevertheless, according to the National Associations of local authorities, municipal cooperation must be facilitated and promoted in Germany, but it is, on the contrary, being hampered administratively and legally (especially by added value taxation, § 2 b UStG/EU VAT system directive). This results in taxation of the municipalities for the joint performance of statutory tasks, with the corresponding burden on the budget of citizens, the economy, and the municipalities themselves.

227. Concerning this aspect, representatives of the federal government have stressed that the new rules on value-added tax for legal persons governed by public law in Germany, in the form of section 2b of the VAT Act, constitute an unavoidable amendment of national law for reasons of Union law (Article 13 of Council Directive 2006/112/EC on the common system of value added tax). Under this amendment, the same tax

52 <https://www.gesetze-bayern.de/Content/Document/BayKommZG/true>

regulations will apply to cooperation among legal persons governed by public law at all levels of government (federal, state, and local) that apply to cooperation among and with private enterprises, if treating legal persons governed by public law as non-taxable persons would result in significant distortions of competition. In view of emerging difficulties, the German law provides for a long transitional period of some seven years (starting 1 January 2023) before section 2b of the VAT Act becomes obligatory. This allows all those involved to prepare for the new rules and to revise their processes and structures as needed.

228. In spite of aforementioned complaints, the impression of the rapporteurs is, according to the aforementioned, that inter-municipal cooperation is highly developed in Germany and the country complies with this paragraph of the Charter.

3.7.15 Article 10.2

229. The interests of local authorities in the federal state and at European level are represented by the three local government associations at the federal level: the German Association of Cities (*Deutscher Städtetag—DST*) as the leading representative of the county-free cities; the German County Association (*Deutscher Landkreistag—DLT*) as representative of the 294 counties; and the German Association of Towns and Municipalities (*Deutscher Städte- und Gemeindebund—DStGB*) as representative of all municipalities belonging to a county. There are also corresponding regional associations at state level. In addition to their respective headquarters, the three local government associations at federal level each maintains a European office in Brussels.

230. As already mentioned, the Basic Law does not provide for any participation or consultation rights of local government associations. But in several federal state constitutions there are provisions recognizing the role of associations representing the common interests of local authorities. In Bavaria, for instance, in line with the demand for strengthening the participation rights of the municipal associations, the state Constitution (BV) already provides for a hearing of the municipal umbrella organisations (Art. 83 para. 7 sentence 1 BV) and a consultation procedure between the state government and the municipal umbrella organisations (Art. 83 para. 7 sentence 2 BV).

231. Considering the above, the rapporteurs conclude that Germany complies with this provision.

3.7.16 Article 10.3

232. Direct cross-border and large-scale transnational cooperation between local and regional actors helps to compensate for the disadvantages which result from the fact that border regions are often found in peripheral areas (e.g. better access to hospitals, joint marketing measures, economic stimuli) or to learn about other countries' new ideas and approaches. That is why the Federal Government supports such cooperation. It has, for instance, for many years supported European territorial cooperation as part of the Interreg A and B structural funding programmes as well as other bilateral forms of cooperation with neighbouring countries, for example the Treaty of Aachen with the Committee for Cross-Border Cooperation under Article 14, or the German–Polish Neighbourhood Treaty with the German–Polish Government Commission and its various working groups, including on cross-border cooperation and regional planning.

233. In the case of the municipalities and the county of Bautzen in the Free State of Saxony, for instance, the proximity of the border to PoLand and the Czech Republic is becoming increasingly important due to the cooperation of the municipalities in the Euroregion Neisse-Nisa- Nysa, especially in dealing with common problems and similar opportunities. The major challenges are demographic change and the coal phase-out/energy transition.

234. Considering the above, the rapporteurs conclude that Germany complies with this provision.

3.7.17 Article 11 – Legal protection of local self-government

Article 11 – Legal protection of local self-government

Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.

235. Local self-government is sufficiently guaranteed also in practice. Notably, legal remedies are available to local communities (municipalities and counties/associations) claiming a violation of their right to local self-government: According to Article 93(1) no. 4b) of BL, the Federal Constitutional Court shall rule on constitutional complaints filed by local communities on the ground that their right to self-government under Article 28 of the basic Law has been infringed by a law (*Kommunalverfassungsbeschwerde*). Moreover, local

governments may challenge laws, regulation and administrative acts of the respective *Land* before the constitutional courts of the *Länder* and - if those are not competent - before administrative courts.

236. In Bavaria, for instance, the municipalities can use a popular complaint against inadmissible restrictions imposed by laws or ordinances (Art. 98 p. 4 BV). In addition, they have the possibility of lodging a constitutional complaint with the Bavarian Constitutional Court against the violation of the right to self-administration by an authority (cf. Art. 66, 120 BV). In addition, the municipalities may bring actions before the Bavarian administrative courts in administrative disputes between them and the state (Art. 83 (5) BV).

237. In practice some local communities file „pilot cases“ for themselves that enable courts to clarify a question in a principal way. According to interlocutors from the Federal Constitutional Court, since 2011, there have been four major cases decided by this court, which have strengthened the resilience of local communities with regard to state interferences:

- The case BVerfGE 137, 108 ff. -Optionskommunen (Urteil vom 07. Oktober 2014 - 2 BvR 1641/11): This case was about the exceptional creation of a kind of “mixed administration” (*Mischverwaltung*) for services supporting unemployed with the so-called *Optionskommunen* who would integrate tasks of local government and tasks of the Federal Labour Agency (*Bundesagentur für Arbeit*). The court examined the limits of federal law-making on municipal matters. Relevant legal provisions at the federal level were found to violate the Basic Law since they were imposing the premise of a 2/3 majority of municipal assemblies to decide on participation in such *Optionskommunen* and this was an unconstitutional intervention of the Federation on political decision making at the municipal level⁵³.
- BVerfGE 138, 1 ff. - Schulnetzplanung Sachsen (*Beschluß des Zweiten Senats vom 19. November 2014 2 BvL 2/13*): The Court ruled that the responsibility for elementary schools is a historically rooted domain of local communities and therefore the decision power about the opening or the closure of a school belongs to municipalities (with the participation of the state), while the planning of the elementary schools’ network at the level of the counties has to be decided together with the municipalities⁵⁴.
- BVerfGE 147, 185 ff. - KiföG Sachsen-Anhalt (*Urteil des Zweiten Senats vom 21. November 2017 - 2 BvR 2177/16*): Concerning childcare, the court ruled that the legislature may only withdraw local tasks from the municipalities for reasons of the common good. The mere aim of simplifying administration or concentrating responsibilities cannot justify the withdrawal of tasks. Reasons of economic efficiency and economy of public administration only justify an upscaling if leaving the task with the municipalities would lead to a disproportionate increase in costs⁵⁵.
- BVerfGE 155, 310 ff. *Durchgriffsverbot*: (*Beschluss* of 07.07.2020 - 2 BvR 696/12): a violation of the Basic Law exists if a federal law assigns to the municipalities for the first time a specific task or a functionally equivalent extension of a task already assigned by federal law. Therefore, a series of norms in the Social Code (*Sozialgesetzbuch*) were declared unconstitutional⁵⁶.

238. Considering the above, the rapporteurs conclude that Germany complies with this provision.

4. OTHER MATTERS RELATED TO THE FUNCTIONING OF LOCAL AND REGIONAL SELF-GOVERNMENT

239. A good decade after the entry into force of the major reform projects at national level, the administrative *Landscape* in some *Länder* has undergone fundamental changes. The bundling of responsibilities, the dismantling of double administrations, communalisation and territorial reforms are modernising and improving the performance of subnational public administration.

240. On the other hand, when shifting responsibilities, factors such as the ability of the municipalities to provide services that are seldom required but demand a high degree of specialisation, the efficiency with which tasks are performed and the uniformity of administrative execution should also be taken into account.

53 <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2014/bvg14-087.html>

54 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/11/ls20141119_2bvl000213.html

55 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/11/rs20171121_2bvr217716.html

56 This decision has already been mentioned above in 3.8.(about compliance with article 9.2. of the Charter)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/07/rs20200707_2bvr069612.html

The particularly pronounced tension between technical and political objectives at this level due to local proximity and the democratic legitimacy of the decision-maker is also an important factor.

241. How to combine the positive modernisation will of the state governments with functional and regional reforms and integrating the knowledge of the administration into the process is still an open question and also dependent on political framework conditions. An important lesson to learn from the various reforms in Germany is that they should not be justified mainly by the argument of increasing efficiency, but of improving local governments' capacities and performance instead. The latter effects are well documented in literature and supported by empirical findings, while greater efficiency and cost savings through mergers have not generally been recorded as they largely depend on specific context conditions and local implementation processes.⁵⁷

242. Since the outbreak of the pandemic, many achievements of the previous years were jeopardized. According to an expert opinion, prepared on behalf of the German Association of Cities (*Städtetag*)⁵⁸ during the summer of 2020, the pandemic and the associated economic downturn hit the German municipalities particularly hard. Business(Trade) tax (*Gewerbesteuer*) revenue, one of the municipalities' main sources of income, was expected to decrease by around 25% in 2020. Sectors of the economy that are located in the city centres such as gastronomy, entertainment and culture were also heavily affected, and a big number of company bankruptcies was expected. Social expenditures, and in particular the costs of accommodation were also expected to rise sharply.

243. The federal government and the *Länder* adopted Economic stimulus measures in the Summer 2020, taking into account the special situation of the municipalities. The compensation of trade tax revenue deficits (*Gewerbesteuer ausfälle*) and the increase in federal contributions to the costs of certain social benefits (housing and heating) should help to stabilise the financial situations of local authorities. To strengthen the health services and improve the protection against pandemics the 'Future-package' (*Zukunftspaket*) that was adopted supported regions (*Länder*) and local authorities by additionally providing 4 billion Euro for personnel, digital improvements and modernisation of health service infrastructure. In addition, the Federation increased its promotion of investment in climate-friendly technologies. However, according to some views,⁵⁹ this economic stimulus plan did not include sufficient, regionally tailored answers.

244. In September 2020 a special aid-package has been decided and the federal government increased its participation in the social Accommodation costs (*kommunale SGB II-Wohnkosten- KdU*). These transfers will provide to counties about 3-4 billion Euros annually. In addition, losses from business tax revenue will be compensated through a special grant of 12 billion per year, provided by the federal government and the *Länder*.⁶⁰

245. The extensive support measures for employees, companies and the self-employed provided by the Federation helped to limit the fiscal effect of the pandemic on the budgets of sub-national authorities. In its projection, the Federal Ministry of Finance forecasts the budget surplus of the *Länder* to be around 4 bn. Euro in 2021. By 2025, the budget surplus of the *Länder* is expected to be around 6 bn. Euro.

246. From 2021 onward, the projection expects budget surpluses of the local authorities. The budget surpluses increase to 5 bn. Euro by the end of the projection period in 2025. The budget surpluses materialize, since already in 2021 municipal tax revenues are expected to widely recover from the shrinkages of 2020 and to further increase in the years after.

247. By the Basic Law, the *Länder* are responsible for the financial endowment of their local authorities. Thus, it is in their discretion to provide additional financial help to improve the financial situation of their local authorities in 2021 and the following years. In particular, as to date, about 80 % of the fiscal costs of the pandemic accrue to the Federation's budget, assisting their local authorities would constitute a relevant fiscal contribution of the *Länder* to tackling the pandemic, within their responsibility set out in the Basic Law.

Table 8 – Financial measures of the Federation to assist sub-federal authorities during the pandemic

Article 1	A lump-sum compensation for the expected revenue losses of local authorities from the real trade tax (<i>Gewerbesteuer</i>),

⁵⁷ Ibid.

⁵⁸ https://difu.de/sites/default/files/media_files/2020-09/Kurzexpertise_St%C3%A4dtetag_final_200819.pdf

⁵⁹ Ibid.

⁶⁰ <https://Landkreistag.de/presseforum/pressemitteilungen/3037-bundestag-beschliesst-corona-hilfen-fuer-kommunen>
42/49

„Gesetz zur finanziellen Entlastung der Kommunen und der neuen <i>Länder</i> “	about 11.8 bn. Euro, granted to local authorities in 2020. The Federation and the <i>Länder</i> finance the compensation equally.
Article 2 und 3 „Gesetz zur finanziellen Entlastung der Kommunen und der neuen <i>Länder</i> “	A permanent 25-percentage point increase in the Federation's share in financing the costs of accommodation and heating for social security recipients (<i>Kosten für Unterkunft und Heizung</i>). The measure increases local authorities' revenues by approx. 4 bn. Euro p. a. starting from 2020. Economically less favoured local authorities with high social expenses particularly benefit from this measure.
Article 4 „Gesetz zur finanziellen Entlastung der Kommunen und der neuen <i>Länder</i> “	A permanent 10-percentage point increase in the Federation's share in financing the costs of the public pension system for those pensioners from the eastern German <i>Länder</i> who are under a special pension scheme (AAÜG). The measure decreases the expenditures for the eastern German <i>Länder</i> by approx. 340 million Euro p. a. in the short and medium term starting from 2021. In the long term, due to demographics, the volume decreases.
Additional funds: „Regionalisierungsgesetz“	Increases in the federal subsidies for public transport provision (<i>Regionalisierungsmittel</i>) by 2.5 bn. Euro in 2020 and 1 bn. Euro in 2021 (for 2021: draft law). The measure helps public transport providers, among them many local authorities, to stand the drop in fare income due to the mobility restrictions implemented to contain the spread of the coronavirus.
Additional funds: „DigitalPakt Schule“	A 1.5 bn. Euro increase in the Federation's subsidies to support digitization in the educational system. The additional funds were granted to finance the provision of students and teachers with the technical equipment for home schooling during the time of the pandemic. Given that financing the educational system is in the two-tier structure of the German state a responsibility of the <i>Länder</i> (including local authorities), the additional funds are a financial assistance of the Federation to sub-federal authorities.
Additional funds: „Kinderbetreuungsfinanzierung“	A 1 bn. Euro increase in the Federation's subsidies to support the build-up of 90.000 additional positions in day nursery for children in the pre-school age in 2020 and 2021. Given that financing the educational system is in the two-tier structure of the German state a responsibility of the <i>Länder</i> (including local authorities), the additional funds are financial assistance of the Federation to sub-federal authorities.
Pakt für den Öffentlichen Gesundheitsdienst	The Federation has reached an agreement with the <i>Länder</i> and the local authorities to strengthen the public health service, in particular regarding the personnel and digital equipment needed to meet future needs. For the financing of this purpose, in the years 2021 to 2026 the Federation grants 4 bn. Euro to the <i>Länder</i> . Given that financing the public health service is in the two-tier structure of the German structure a responsibility of the <i>Länder</i> (including local authorities), the additional funds are a financial assistance of the Federation to subfederal authorities.
Compensation for tax revenue losses due to child allowances and VAT rate decrease	As part of its stimulus package the Federation has decided to lower VAT rates in the second half of 2020 by 3 percentage points to stimulate private consumption. Further, to support families during the pandemic, the Federation has

	decided to provide an additional child allowance in both 2020 and 2021. The Federation fully compensates the <i>Länder</i> and local authorities for their associated losses in VAT and income tax revenues. The compensation for the <i>Länder</i> amounts to 12.190 million Euro, the compensation for the municipalities amounts to 1.390 million Euro.
Additional funds: "Verbesserung der regionalen Wirtschaftsstruktur"	A 500 Mio. Euro increase in the Federation's subsidies (250 Mio. Euro in both 2020 and 2021) to support investment activity in economically weaker regions. Local authorities in the areas of support benefit e.g. by support schemes for investment activities in local economic development.

248. In handling the crisis, local and regional autonomy has been a major factor. The day-to-day management of the crisis has been the responsibility of local authorities, i.e. mostly towns and counties, and subject to regional (*Länder*) legislation. Due to the federal levels' initial restraint in enforcing uniform COVID-19 rules, leaving the legislative work on the implementation of COVID-19 restrictions almost entirely to local and regional authorities, the diversity of COVID-19 regulations throughout the country has been considerable. After regular meetings of the Chancellor with the *Länder* Prime Ministers to coordinate the responses had proven insufficient, the Bundestag decided in April 2021 to modify the Infection Protection Act (*Infektionsschutzgesetz*) to enshrine a certain level of uniform minimum restrictions in case the number of new COVID-19 infections crossed a specific threshold (Federal Emergency Break). However, even after these changes the *Länder* retained the right to maintain or enact more restrictive measures.

5. CONCLUSIONS AND RECOMMENDATIONS

249. This report is the second general monitoring of the European Charter of Local Self-Government in Germany, which is a country with a very strong and far-reaching tradition of local self-government and also a *Land* that managed to consolidate well-functioning democratic institutions after the second world war. The balanced federal structure and the strength of local self-government institutions have certainly contributed to these positive developments in previous decades.

250. Germany is characterized by high standards of local democracy and a sophisticated legal framework covering all aspects of local autonomies. In addition, the level of judicial protection offered to local government and the rule of law can be labeled as paradigmatic. The rapporteurs would also like to praise the wide scope of responsibilities belonging to local authorities and the high levels of organisational and personnel autonomy, which offer to local authorities many possibilities to develop relevant policies and choose the appropriate measures for their implementation.

251. Germany is exposed to challenges faced by all European nations, such as the climate change and the environmental crisis, demographic change, and the emergence of new, much more complex and diverse societies displaying a plurality of values and ways of living. As a nation highly dependent on exports, Germany is obliged to pay particular attention to the competitiveness of its economy and focus on modernization and economic performance.

252. Concerning the challenge of the pandemic, Germany was one of the countries that performed considerably well, by comparison to other European nations of similar size and exposure to the risks of contagion. In handling the crisis, local and regional autonomy has been a major factor. The Federal government has successively adopted several measures to support local authorities which are presented in the report. In this way an economic collapse of the German communes has been prevented, given the fact that relevant yield from important sources of revenue (such as the trade tax) had drastically decreased due to the economic downturn caused by lockdowns and the pandemic.

253. Notwithstanding the foregoing findings of the overall very good picture of local and regional democracy in Germany, the rapporteurs examined the implementation of different points and suggestions of the previous recommendation 320/2012 and came to the conclusion that most of the issues raised in the previous monitoring report still persist.

254. The standard principle of a local authority's right to get revenue from local taxes and to have an influence on taxation, moreover, to have adequate financial means that would allow them discretion in how

to use these resources still needs to be sustained notwithstanding difficult economic conditions. In this regard, financial needs in the social sector pose a fiscal challenge especially to economically less favoured local authorities.

255. Particularly problematic is the financial status of the counties. The lack of taxation powers of the counties is a major reason why Germany upholds the explanations made in 1988 concerning the exclusion of the effect of article 9, para. 3 of the Charter. The rapporteurs found that paragraphs 1, 2 and 4 of article 9 are partially respected. Partial compliance with paragraphs 1 and 4 is mainly due to the fact that counties are not entitled to adequate resources of their own (county levies/Kreisumlage are formally 'own' revenues, but they constitute mandatory fiscal transfers from municipal budgets), their concomitant financing is not properly ensured, and counties' system of revenue needs further diversification and flexibility. The latter is also a problem faced by urban municipalities that provide services and infrastructures to a large number of citizens from neighbouring municipalities.

256. Besides, apart from the aforementioned economic obstacles to local initiative, which is common in many countries, in Germany there is particular legal shortcoming regarding counties in *Länder* which have not introduced the power of counties to exercise their initiative in matters that are not excluded from their competence, nor assigned to another authority (art. 4 par. 2).

257. As for article 9 para. 2, the previous Congress Recommendation 320/2012 suggested that standards and criteria should be adopted for the implementation of the commensurability principle, making financial calculations and the planning process more transparent, and providing practical guarantees by including municipal stakeholders in consultation. In some *Länder*, there is already an instrument of cost impact assessment and a corresponding legal framework, providing also for consultation and participation. Operational standards and criteria for the implementation of the commensurability principle, however, have yet to be adopted.

258. While some progress could be observed at the level of *Länder*, participatory and consultation rights of associations of local authorities, especially at the federal level, should be further strengthened and institutionalized.

259. Germany has not signed nor ratified the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207), due to the reservations of two federal states (Bavaria and Lower Saxony) expressing themselves against such a move because of their concerns about an obligation to enact freedom of information legislation.

260. In view of the aforementioned, the rapporteurs consider that the German authorities should be invited to:

- sustain the standard principle of a local authority's right to get revenue from local taxes and to have an influence on taxation, moreover, to have adequate financial means that allow them discretion in how to use these resources;
- consider introducing a general competence clause for the counties at the level of the federal constitution and all *Länder* legislations;
- revise the financial status of counties that is stemming from previous times (when counties were mainly supporting smaller municipalities) and drastically extend their taxation powers;
- in view of the revision of the fiscal status of counties, withdraw the declaration on article 9 para. 3 of the Charter and extend the relevant scope of the Charter to all entities having direct political legitimacy, ensuring at the same time that such taxes are not levied to the detriment of municipalities that are part of the counties; The latter could also be ensured through the reduction of the system of county levy (*Kreisumlage*) in combination with a new allocation of taxation powers and tax revenue shares.
- adopt concrete standards and criteria for the implementation of the commensurability principle in order to provide transparency in the whole financial calculation and planning process;
- diversify the system of revenue provided for counties and make it more flexible;
- grant more diversification and flexibility to the revenue system of urban municipalities that provide services and infrastructures to many citizens from neighbouring municipalities;
- further strengthen and institutionalise participatory and consultation rights of associations of local authorities, especially at the federal level;
- sign and ratify the Additional Protocol to the European Charter of Local Self-Government.

**MONITORING OF THE APPLICATION OF THE EUROPEAN CHARTER OF LOCAL
SELF-GOVERNMENT:
GERMANY**

**FINAL PROGRAMME OF REMOTE MEETINGS
26 – 28 May 2021**

Congress delegation:

Rapporteurs:

Mr Konstantinos KOUKAS

Rapporteur on local democracy
Chamber of Local Authorities, EPP/CCE⁶¹
Mayor of Mykonos, Greece

Mr Jani KOKKO

Rapporteur on regional democracy
Chamber of Regions, SOC/G/PD⁶²
Regional Councillor, Central Finland, Finland

Congress secretariat:

Ms Svitlana PEREVERTEN

Co-Secretary to the Monitoring Committee

Expert:

Mr Nikolaos-Komninos CHLEPAS

Member of the Group of Independent Experts on the European
Charter of Local Self-Government, Greece

Interpreters:

Mr Han Martin JOERIMANN

Ms Anja RUCHATZ

The working languages, for which interpretation is provided during the meetings, will be German and English.

⁶¹ EPP/CCE: European People's Party Group in the Congress

⁶² SOC/G/PD: Group of Socialists, Greens and Progressive Democrats

Wednesday, 26 May 2021

MEETING WITH MEMBERS OF THE NATIONAL DELEGATION OF GERMANY TO THE CONGRESS**Congress members:**

Mr Soeren SCHUMACHER, Head of delegation, Member of the *Hamburgische Bürgerschaft*
Ms Nicole BERKA, Mayor of Neunkirchen-Seelscheid
Mr Stefan FASSBINDER, Mayor of Greifswald
Ms Heike KASTER-MEURER, Mayor of Bad-Kreuznach
Mr Clemens LAMMERSKITTEN, Member of the County Assembly (Osnabrück)
Mr Ralph SPIEGLER, Mayor (*Verbandsgemeinde Nieder-Olm*)
Mr Tilo GUNDLACK, Member of the regional Parliament (*Mecklenburg-Vorpommern*)
Mr Heiner KLEMP, Member of the regional Parliament (Brandenburg)
Ms Doerte LIEBETRUTH, Member of the regional Parliament of Lower Saxony
Ms Christiane HORSCH, Mayor (*Verbandsgemeinde Schweich*)

Youth delegates:

Aline Wenger

Other participants:

Dr Martin Niedermeyer
 Elena Mönning
 Carmen Hohlfeld
 Thomas Starke
 Dr Violetta Frys
 Katharina Scheiber
 Laura Kamisli
 Friederike Lünzmann

JOINT MEETING WITH MEMBERS OF THE NATIONAL ASSOCIATIONS**GERMAN ASSOCIATION OF CEMR (RGRE)**

Dr Frank MENTRUP, President, Mayor of Karlsruhe

GERMAN ASSOCIATION OF CITIES (DS)

Mr Burkhard JUNG, President, Mayor of Leipzig

GERMAN ASSOCIATION OF TOWNS AND MUNICIPALITIES (DSTGB)

Mr Ralph SPIEGLER, President (member of the National delegation to the Congress)

GERMAN COUNTY ASSOCIATION (DLT)

Mr Reinhard SAGER, President

FEDERAL MINISTRY OF THE INTERIOR, BUILDING AND COMMUNITY

Dr Markus KERBER, State Secretary

Ms Bettina AUERBACH, Head of the directorate Equal living conditions

FEDERAL MINISTRY OF FINANCE

Dr Jürgen SCHNEIDER, Head of division Local authority financial matters
Mr Benedikt GRODAU, policy officer
Dr Simon SKIPKA, policy officer

Thursday, 27 May 2021

FEDERAL PARLIAMENT (*Bundestag and Bundesrat*)

Ms Mechthild HEIL, Chair of the Committee on Building, Housing, Urban Development and Local Government
Members of the Bundesrat's Internal Affairs Committee

FEDERAL CONSTITUTIONAL COURT

Prof. Dr Peter M. HUBER, Justice of the Second Senate

THE SAXON STATE PARLIAMENT (*Sächsischer Landtag*)

Dr Matthias RÖßLER, President
Mr Ronald POHLE, Chair of the Internal Affairs and Sport Committee

Mr Thomas STARKE, Policy Adviser for European Affairs

THE SAXON STATE GOVERNMENT (*Sächsische Staatsregierung*)

Prof. Dr Roland WÖLLER, State Minister of the Interior

THE SAXON STATE CONSTITUTIONAL COURT

Dr Matthias GRÜNBERG, President

THE SAXON STATE COURT OF AUDIT

Mr Peter TEICHMANN, Director

Friday, 28 May 2021

DISTRICT COUNCIL OF BAUTZEN (*Landkreis*)

Mr Michael HARIG, President of the District Council (*Landrat*)

PETITIONS COMMITTEE OF THE GERMAN BUNDESTAG

Mr Marian WENDT, Chair

**JOINT MEETING WITH THE BREMEN STATE SENATE (*Senat*)
AND BREMEN STATE PARLIAMENT (*Bremische Bürgerschaft*)**

Dr Maike SCHAEFER, Mayor, Senator for Climate Protection, Environment, Mobility, Urban Development and Housing

Ms Antje GROTHEER, Vice-President of the State Parliament (*Bremische Bürgerschaft*)

Mr Thomas VOM BRUCH, Member, State Parliament of Bremen

Mr Michael WEIß, Advisor

**JOINT MEETING WITH THE BAVARIAN STATE PARLIAMENT (*Bayerischer Landtag*)
AND THE BAVARIAN STATE GOVERNMENT (*Bayerische Staatsregierung*)**

Dr Martin HUBER, Member of the Bavarian State Parliament

Mr Gerhard ECK, State Secretary of the Bavarian State Ministry of the Interior, Sport and Integration

FREIBURG

Mr Martin HORN, Mayor

HARTMANNSDORF BEI KIRCHBERG

Mr Christfried NICOLAUS, Deputy Mayor