

# An update on developments regarding civic space in the EU and an overview of the possibilities for human rights defenders to enter EU territory

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# 1. Civic space developments in 2022

## 1.1. Criminalisation of climate activism

Area	Safe space & protection / Freedom of peaceful assembly
Topic	Criminalisation of humanitarian or human rights work / policing practices
Impact	Major

2022 saw controversial forms of protests by activists demanding government action in line with existing climate obligations, such as blockades of roads and airports<sup>1</sup> and the (temporary) defacing of artworks<sup>2</sup>.

Courts have sometimes qualified these actions as coercion (*Nötigung*) under section 240 of the German Criminal Code (*Strafgesetzbuch*), dangerous interference with road traffic (*gefährlicher Eingriff in den Straßenverkehr*) under section 315b and criminal damage (*Sachbeschädigung*) under section 303, often stating that civil disobedience can never act as justification.

A Munich local court (*Amtsgericht*) ordered preventive detention up to 30 days for activists who had planned further blockades of motorways under the Bavarian Police Act (*Polizeiaufgabengesetz*), confirming fears that provisions aimed at terrorist threats would be used against protestors. Elected officials compared activist groups to terrorist and criminal organisations, police conducted raids on activist homes, leading to pre-emptive self-denunciations. The conservative parliamentary opposition called for higher penalties and the creation of a new criminal provision for roadblocks capable of

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<sup>1</sup> See e.g. Reuters, 'Climate activists glue themselves to airport tarmac in Berlin and Munich', 8 December 2022, available at: [www.reuters.com/business/environment/climate-activists-glue-themselves-airport-tarmac-berlin-munich-2022-12-08/](https://www.reuters.com/business/environment/climate-activists-glue-themselves-airport-tarmac-berlin-munich-2022-12-08/) (all links accessed on 16 March 2023).

<sup>2</sup> S. Jones, The Guardian, 'Climate activists throw mashed potatoes at Monet work in Germany', 23 October 2022, available at: [www.theguardian.com/environment/2022/oct/23/climate-activists-mashed-potato-monet-potsdam-germany](https://www.theguardian.com/environment/2022/oct/23/climate-activists-mashed-potato-monet-potsdam-germany).

impeding emergency services. The Minister of Justice announced an examination of the protection of cultural goods under existing criminal law.

As a response, major environmental NGOs issued a declaration demanding discussion about climate concerns and effective forms of protest, instead of blanket criminalisation of civil disobedience<sup>3</sup>.

## 1.2. Charity Law: Incremental changes but no major reform in 2022

Area	Freedom of Association / Financing Framework
Topic	Political Campaigning / Charitable Status
Impact	Major

The reform of the charity law was not implemented in 2022 and uncertainty for civil society organisations relying primarily on political means persists.

The January 2022 amendments of the Fiscal Code Implementation Decree (*Anwendungserlass zur Abgabenordnung*)<sup>4</sup> by the Ministry of Finance reiterate that “political purposes” do not count as charitable activity, restating existing case law of the Federal Fiscal Court. The Implementation Decree attempts to provide more certainty on the scope of permissible political activity, confirming for example that organisations

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<sup>3</sup> Greenpeace, ‘Statement on the Criminalisation of Climate Protests’ (*Erklärung zur Debatte um die Kriminalisierung von Klimaprotesten*), 14 November 2022, available at: [www.greenpeace.de/ueber-uns/leitbild/erklaerung-debatte-kriminalisierung-klimaprotesten](http://www.greenpeace.de/ueber-uns/leitbild/erklaerung-debatte-kriminalisierung-klimaprotesten).

<sup>4</sup> Federal Ministry of Finance, Amendments to Fiscal Code Implementation Decree (*Änderung des Anwendungserlasses zur Abgabenordnung (AEAO)*), 11 January 2022, available at: [www.bundesfinanzministerium.de/Content/DE/Downloads/BMF\\_Schreiben/Weitere\\_Steu\\_erthemen/Abgabenordnung/AO-Anwendungserlass/2022-01-12-aenderung-des-anwendungserlasses-zur-abgabenordnung-AEAO.html](http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Weitere_Steu_erthemen/Abgabenordnung/AO-Anwendungserlass/2022-01-12-aenderung-des-anwendungserlasses-zur-abgabenordnung-AEAO.html).

have the ability to “occasionally comment on current political issues”, provided this serves the tax-exempt purpose and remains neutral in terms of party politics<sup>5</sup>.

However, changes to the administrative decree do not fulfil the stated goal of the coalition agreement to modernize the charity law or remove the uncertainty for political activity arising out of the Federal Fiscal Court’s jurisprudence<sup>6</sup>. A draft bill will likely be presented by the Federal Ministry of Finance in 2023, but its scope and ambition remain unclear at this stage<sup>7</sup>.

### 1.3. Update on Democracy Promotion Act

Area	Financing Framework
Topic	Funding Landscape
Impact	High

The government had pledged to tackle the issue of sustainable and long-term funding for civil society from federal sources by creating a legal mandate for the federal government in the area of democracy promotion, diversity shaping and extremism prevention. To this end, the Ministry of the Interior and the Ministry of Family Affairs presented a discussion paper in February 2022 and started a broad participation process

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<sup>5</sup> See Exner, M., ‘Current developments in charity law from the perspective of the financial administration’, (*Aktuelles zum Gemeinnützigkeitsrecht aus Sicht der Finanzverwaltung*), npoR 2022, 77, p. 84 f.

<sup>6</sup> ‘Daring more progress: Coalition agreement 2021-2025 between SPD, Coalition90/Greens and FDP’, (*Mehr Fortschritt wagen: Koalitionsvertrag 2021–2025 zwischen SPD, BÜNDNIS 90/DIE GRÜNEN und FDP*), 7 December 2021, p. 117, available at: [www.bundesregierung.de/resource/blob/974430/1990812/1f422c60505b6a88f8f3b3b5b8720bd4/2021-12-10-koav2021-data.pdf](http://www.bundesregierung.de/resource/blob/974430/1990812/1f422c60505b6a88f8f3b3b5b8720bd4/2021-12-10-koav2021-data.pdf).

<sup>7</sup> Diefenbach-Trommer, S., ‘Minister Paus announces comprehensive charity law reform in 2023’, (*Ministerin Paus kündigt umfassende Reform Gemeinnützigkeit 2023 an*), 29 September 2022, available at: [www.zivilgesellschaft-ist-gemeinnuetzig.de/paus-kuendigt-modernisierung-gemeinnuetzigkeit-2023-an/](http://www.zivilgesellschaft-ist-gemeinnuetzig.de/paus-kuendigt-modernisierung-gemeinnuetzigkeit-2023-an/).

to co-develop the planned Democracy Promotion Act<sup>8</sup>. On 4 May 2022, the participation process culminated in a joint conference, after 170 umbrella organisations, specialist organisations and academics had submitted their comments. Despite a broad consensus on the need to strengthen democratic initiatives, civil society actors called for more in-depth participation and criticised the continuation of fragmentation of their work due to a projectized funding approach<sup>9</sup>. The Draft Democracy Promotion Act was approved by the Federal Cabinet on 14 December 2022 and is set to enter into force in 2023. Whether the goal of long-term sustainable funding can be achieved will depend on the funding guidelines which will only be developed in 2023. CSOs have voiced concerns as support under the Act relies on privileged tax status<sup>10</sup>, and the planned reform of charity law has not yet been implemented.

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<sup>8</sup> Federal Ministry for Family Affairs/Ministry of the Interior, 'Discussion paper of BMFSFJ und BMI for a Democracy Promotion Act', (*Diskussionspapier von BMFSFJ und BMI für ein Demokratiefördergesetz*), February 2022, available at: [www.bmfsfj.de/resource/blob/193484/99d3b37fcb308ba06c5fab10aefd5405/diskussionspapier-demokratiefoerdersgesetz-data.pdf](http://www.bmfsfj.de/resource/blob/193484/99d3b37fcb308ba06c5fab10aefd5405/diskussionspapier-demokratiefoerdersgesetz-data.pdf).

<sup>9</sup> Institut für den Situationsansatz, 'Update on the planned Democracy Promotion Act', (*Aktuelles zum geplanten Demokratiefördergesetz*), June 2022, available at: <https://situationsansatz.de/kompetenznetzwerk-demokratiebildung-im-kindesalter-aktuelles-zum-geplanten-demokratiefoerdersgesetz/>.

<sup>10</sup> Diefenbach-Trommer, S., Allianz Rechtssicherheit für politische Willensbildung, 'Democracy Promotion Act enters the final round', (*Demokratiefördergesetz geht in die Endrunde*), 17 November 2022, available at: <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/demokratiefoerdersgesetz-geht-in-endrunde/>.

## 2. Promising practices in 2022

### 2.1. Development of a whistleblowing policy for civil society

An alliance of German NGOs focusing on transparency and accountability have developed a whistleblower policy for civil society<sup>11</sup>. The policy and accompanying FAQ provide guidance for participating NGOs on how to implement the treatment of whistleblowers reporting on misconduct. Empowering civil society to lead by example, the policy is explicitly designed to complement and inform applicable legislation, including the German Whistleblower Protection Act (*Hinweisgeberschutzgesetz*) implementing the EU Whistleblower Directive 2019/1937, which was passed by the Bundestag in December of 2022 with some delay and is expected to enter into force in 2023. According to the alliance, the policy includes covers both violations of the law and other forms of misconduct, such as abuses of power. Participating NGOs aim to create a common reporting office, and the commitments under the policy will apply as of 1 January 2023.

### 2.2. Support for BIPOC refugees fleeing Ukraine

A number of community-based organisations have founded initiatives to support Black People, Indigenous People and People of Color (BIPOC) fleeing Ukraine as a result of the Russian war of aggression. BIPOC refugees, many of whom were studying in Ukraine, have reported discrimination both on the way to and upon arrival in Germany, face differential treatment, and – when they are third-party nationals – may enjoy fewer protections than Ukrainian nationals under the Council Directive 2001/55/EC of 20 July

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<sup>11</sup> Gesellschaft für Freiheitsrechte, 'A whistle-blowing policy for civil society' (*Eine Whistleblowing Policy für die Zivilgesellschaft*), 30 November 2022, available at: <https://freiheitsrechte.org/themen/demokratie/whistleblowing-zivilcourage/whistleblowing-policy>.

2001<sup>12</sup>. Joint initiatives like “Communities Support for BIPOC Refugees from Ukraine (CUSBU)”<sup>13</sup> and projects like “Bienvenida” by “PeacebyPeace/PxP”<sup>14</sup> have provided crucial emergency support upon arrival, political advocacy, monitoring, as well as assistance with navigating administrative issues and exploring longer-term opportunities. These initiatives have successfully highlighted and attempted to fill gaps in both the official response and popular support for refugees fleeing war.

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<sup>12</sup> Zimmer, L., taz, ‘Like a substitute family’, (*Wie eine Ersatzfamilie*), 30 June 2022, available at: <https://taz.de/BiPoC-Gefluechtete-in-Berlin/!5863496/>.

<sup>13</sup> CUSBU, ‘About the project’, 9 January 2023, available at: [www.cusbu.de/home/about-the-project](http://www.cusbu.de/home/about-the-project).

<sup>14</sup> Schmidt, V., Amadeo-Antonio-Stiftung, ‘A welcome for everyone – Volunteers support BIPOC refugees from Ukraine’, (*Ein Willkommen, das für alle gilt – Freiwillige unterstützen BiPoC-Geflüchtete aus der Ukraine*), 4 May 2022, available at: [www.amadeu-antonio-stiftung.de/ein-willkommen-das-fuer-alle-gilt-freiwillige-unterstuetzen-gefluechtete-aus-der-ukraine-die-sonst-keine-hilfe-bekommen-84029/](http://www.amadeu-antonio-stiftung.de/ein-willkommen-das-fuer-alle-gilt-freiwillige-unterstuetzen-gefluechtete-aus-der-ukraine-die-sonst-keine-hilfe-bekommen-84029/).



## 3. Visa for human rights defenders

### 3.1. Entry and stay for human rights defenders (HRDs) at risk

Dedicated visa scheme for HRDs at risk available in your country	No
Other type of visa or alternative legal entitlement or derogation clause applied to HRDs	Yes

No dedicated visa category for human rights defenders (“HRDs”) currently exists. HRDs can apply for a residence permits for a temporary stay under the general rules of the Residence Act (*Aufenthaltsgesetz*), including for humanitarian reasons, and must go through the regular visa application process. HRDs may be able to apply for visa from a third country, when they face persecution in their country of origin<sup>15</sup>.

HRDs can apply for a residence permit under section 7 para. 1 sentence 3 of the Residence Act (*Aufenthaltsgesetz*) if the purpose of their stay (e.g. education) does not fall into one of the categories specified under the Act and there is a justified reason.

Residence permits can be issued by the diplomatic mission under section 22 sentence 1 of the Residence Act (*Aufenthaltsgesetz*) when there are urgent humanitarian reasons for the stay and there is a relevant connection with Germany<sup>16</sup>. It is assumed that minor children or spouses will apply for permits at the same time as the main applicant, family reunification at a later stage will only be possible under section 29 (3) when a humanitarian reason applies to the family member<sup>17</sup>.

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<sup>15</sup> See currently for Russian HRDs in Kasachstan, German Mission in Kasachstan, ‘Visa and entry’, (Visum und Einreise), available at: <https://kasachstan.diplo.de/kz-de/service/05-VisaEinreise>.

<sup>16</sup> Kluth, W./Bohley, M., *Beck Online Commentary Residence Act*, 35<sup>th</sup> Ed., 1 October 2022, s. 22, fn. 10.

<sup>17</sup> Federal Ministry of the Interior, ‘Resettlement and humanitarian admission’, (*Resettlement und humanitäre Aufnahmen*), available at: [www.bmi.bund.de/DE/themen/migration/asyl-](http://www.bmi.bund.de/DE/themen/migration/asyl-)

Under section 22 sentence 2 of the Residence Act (*Aufenthaltsgesetz*) the Ministry of the Interior can admit an individual (or narrowly defined group), which entitles them to an entry visa and a residence permit by the local authority upon arrival<sup>18</sup>. This category was activated in connection with the evacuation of local staff from Afghanistan in 2021. The Foreign Office also compiled a “human rights list” (*Menschenrechtsliste*) for Afghan HRDs who had cooperated with German organizations or were supported through German funds and made an “at risk” notification (*Gefährdungsanzeige*), to receive residence permits under section 22 sentence 2<sup>19</sup>.

In 2022 the Federal government created a federal reception program (*Bundesaufnahmeprogramm*) under sections 23 (2), (3) and 24 of the Residence Act (*Aufenthaltsgesetz*), to issue 1.000 permits per months to Afghans at risk, including HRDs, as well as their spouses and minor children. Candidates must be proposed by authorized organisations (*meldeberechtigte Stellen*), e.g. civil society organizations previously supported through German funds<sup>20</sup>.

Section 23 (1) of the Residence Act (*Aufenthaltsgesetz*) allows for the creation of state reception programs (*Landesaufnahmeprogramme*) to issue residence permits, and some Länder have included HRDs in recent programs related to Afghanistan<sup>21</sup>.

In 2020 Germany established a general support mechanism<sup>22</sup> for temporary stays of HRDs with a host organisation, the Elisabeth-Selbert-Initiative (“ESI”), which is

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[fluechtlingsschutz/humanitaere-aufnahmeprogramme/humanitaere-aufnahmeprogramme-node.html](https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/humanitaere-aufnahmeprogramme/humanitaere-aufnahmeprogramme-node.html).

<sup>18</sup> Kluth, W./Bohley, M., *Beck Online Commentary Residence Act*, 35<sup>th</sup> Ed., 1 October 2022, s. 22, fn. 16.

<sup>19</sup> Lehmann, J., Meier, C., Reception p. 2, ‘Admissions of Afghans at risk’, (*Aufnahme gefährdeter Afghan:innen*), 27 June 2022, available at: [https://gppi.net/media/Aufnahme\\_gefaehrdeter\\_Afghaninnen\\_2022.pdf](https://gppi.net/media/Aufnahme_gefaehrdeter_Afghaninnen_2022.pdf).

<sup>20</sup> Federal Ministry of the Interior, Ordinance of 19 December 2022 on the admission of Afghan nationals at risk in Afghanistan, available at: [www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/humanitaere-aufnahmeprogramme/aufnahmeanordnung-bap-afghanistan.pdf](https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/humanitaere-aufnahmeprogramme/aufnahmeanordnung-bap-afghanistan.pdf).

<sup>21</sup> See Berlin, Press Statement of 14 December 2021, available at: [www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2021/pressemitteilung.1157171.php](https://www.berlin.de/rbmskzl/aktuelles/pressemitteilungen/2021/pressemitteilung.1157171.php).

<sup>22</sup> For a specialized support mechanism see e.g. Alexander-Humboldt-Foundation, ‘A New Beginning: Philipp-Schwartz-Initiative for Researchers at Risk’, 15 February 2021, available at: [www.humboldt-foundation.de/fileadmin/Entdecken/Newsroom/Dossier\\_Philipp\\_Schwartz-Initiative/5-](https://www.humboldt-foundation.de/fileadmin/Entdecken/Newsroom/Dossier_Philipp_Schwartz-Initiative/5-)

administered by the Institute for Foreign Relations (*Institut für Auslandsbeziehungen*), and which provides HRDs with a scholarship, rent, travel expenses, health insurance, psychosocial support, and compensates the host organisation for support and assistance expenses<sup>23</sup>. Support is normally extended to the core family of the HRD. The definition of HRDs used by ESI is activity-based: “HRD[s] are persons defending or promoting peacefully human rights either as an individual or in a group.”<sup>24</sup> The initiative is currently divided into four programme lines (“PL”), but only PL 1 and PL 4 support HRD stays in Germany. PL 1 supports protective stays (*Schutzaufenthalte*) from four to six months to aid HRDs with recovery, networking efforts, and eventual return<sup>25</sup>. PL 4 supports stays of up to six months for Afghan HRDs, who had already been granted admission under section 22 sentence 2 of the Residence Act (*Aufenthaltsgesetz*). For PL 1 HRDs can either apply directly to ESI via the organisation that is willing to host them. ESI may approach organizations and ask them to host HRDs. An independent commission, which includes a member nominated by the GIHR, evaluates and decides the application. Host organisations may also create separate applications procedures before deciding to host HRDs.

Berlin, Frankfurt, and Hannover participate in the International Cities of Refuge Network (ICORN)<sup>26</sup>, an independent organisation of cities and regions offering protection to writers, artists, and journalists at risk. Participants have found refuge in Germany under various support frameworks, e.g. as guest authors of the city<sup>27</sup>, the Hannah-Ahrendt-

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[Jahre-Philipp-Schwartz-Initiative.pdf](#) or Martin-Roth-Initiative for persecuted artists, Martin-Roth-Initiative, ‘Support for Artists at risk between 2018 and 2021’, 20 January 2022, available at [www.martin-roth-initiative.de/sites/default/files/media/file/2022/mri-2018-21info-graphicwebpdf-439.pdf](http://www.martin-roth-initiative.de/sites/default/files/media/file/2022/mri-2018-21info-graphicwebpdf-439.pdf).

<sup>23</sup> Foreign Office/Institute for Foreign Relations, ‘Elisabeth Selbert Initiative: A Protection Programme for Human Rights Defenders’, 13 December 2021, available at: [https://www.ifa.de/fileadmin/Content/docs/foerderungen/ESI/2022\\_ifa-ESI\\_Infolyer\\_digital\\_EN.pdf](https://www.ifa.de/fileadmin/Content/docs/foerderungen/ESI/2022_ifa-ESI_Infolyer_digital_EN.pdf).

<sup>24</sup> Foreign Office/Institute for Foreign Relations, ‘Eligibility criteria for temporary relocation (up to 6 months)’, 9 March 2021, available at: [www.ifa.de/fileadmin/Content/docs/foerderungen/ESI/2021\\_ESI\\_EligibilityCriteria.pdf](http://www.ifa.de/fileadmin/Content/docs/foerderungen/ESI/2021_ESI_EligibilityCriteria.pdf).

<sup>25</sup> Institute for Foreign Relations, ‘Whom is the Programme designed for?’, available at: [www.ifa.de/en/funding/elisabeth-selbert-initiative/#section1](http://www.ifa.de/en/funding/elisabeth-selbert-initiative/#section1).

<sup>26</sup> ICORN, ‘ICORN Cities of Refuge’, 2023, available at: [www.icorn.org/icorn-cities-refuge](http://www.icorn.org/icorn-cities-refuge).

<sup>27</sup> ICORN, ‘Pegāh Ahmadi’, available at: [www.icorn.org/writer/pegah-ahmadi](http://www.icorn.org/writer/pegah-ahmadi).

Initiative<sup>28</sup>, or the Artist-in-Berlin Program<sup>29</sup>. As freelance or self-employed professionals they can apply for a freelance residence permit under s. 21 of the Residence Act, with Berlin (as a city-state) granting more favourable treatment to artist applicants under s. 21 (5) of the Residence Act<sup>30</sup>.

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<sup>28</sup> Hannah-Ahrendt-Initiative, 'Network for the Protection of Journalists and Media Worldwide', 2022, available at: <https://hannah-arendt-initiative.de/hannah-arendt-initiative-english>.

<sup>29</sup> Berliner Künstler Programm/DAAD, 'The Artists-in-Berlin Program', available at: [www.berliner-kuenstlerprogramm.de/en/mission-statement-2/](http://www.berliner-kuenstlerprogramm.de/en/mission-statement-2/).

<sup>30</sup> BBK Berlin, 'Residence title / Visa for artists', available at: [www.bbk-kulturwerk.de/en/office-for-artist-consulting/guide/artist-visa](http://www.bbk-kulturwerk.de/en/office-for-artist-consulting/guide/artist-visa).