

Case Study 4: Enforcement in Germany

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In Germany, the basic rules for the control of party finances are laid down in art. 21 of the federal constitution, the *Grundgesetz*. The basic principles that govern party finance audits are the provision for the publicity of parties' incomes, spending and assets as well as the principle of party freedom. In order to enable this audience to understand the German audit system, I first want to present you the constitutional basics of party funding auditing (A.) to be followed by the controlling system imposed by the German law on political parties (B.). With some final words I will try to evaluate the German system (C.)

A. The Constitutional Regulations Governing Party Funding Auditing

The framers of the German *Grundgesetz* understood that economic power should not be able to directly influence the political system. They also understood that social institutions such as political parties should mainly be funded by society, and that citizens have a right to further their party of choice financially, too. Finally, they realised that money is like water and will find its way to its destination regardless of barriers. With these considerations in mind, the framers made sure that private donations, though perfectly legal, should be made public to the electorate. This would allow the electorate to see where the party's money came from and decide whether they want to go along with that party and its financial sources. This also allowed the framers to provide fair competition between the parties. Under art. 21 sec. 1 cl. 4 of the *Grundgesetz*, German political parties are required to publicly file accounts of their incomes, their expenditure and their assets. Undoubtedly, such a provision is of no, or at least very limited, use without rules for its implementation and for monitoring compliance by the parties. Therefore, the German legislature under the provision of art. 21 cl. 3 of the *Grundgesetz* had to create norms to enable parties to publicly provide accounts under a uniform system. It also had to create the means of a system of control.

On the other hand, the framers were also concerned to create a system that protected the freedom of political parties. Under the principle of party freedom, the state normally does not intrude into the internal life of political parties and does not itself function as a controlling body for the parties. This is an important feature of the German system of control. Party freedom in Germany means that the parties should not be state parties, but rather institutions of society. Therefore, parties, generally speaking, have a right to certain arcana from the state. Given this principle of party freedom, the legislature was not free in its choice of a control system. By controlling the political parties, the state, and especially the executive branch, could gain an unwelcome influence over the parties. Also, other parties, especially the ones in control of the executive branch,

could gain insight into another party's system of raising funds and thereby gain an advantage in party competition.

With these considerations in mind, a system was designed that functions mostly apart from the state, heavily reliant on private auditing. The German law on political parties divided the party fund audit system into two prongs: private auditing on the one hand and verification of this audit by the state on the other. The latter verification mechanism is only set in motion when the regularity of a party's accounts is in doubt.

B. The Audit under the German Law on Political Parties

In order to ascertain whether the political parties fulfil their constitutional duty to hand in their accounts, public funding is made contingent upon the presentation of the party's reports. Therefore, it is in the parties' own interest to provide annual reports in line with art. 21 sec. 1 cl. 4 *Grundgesetz* and § 19 sec. 3 cl. 1 of the party law. This report must be audited by a certified auditor, according to § 23 sec. 2 cl. 1 of the party law. The auditor must testify that the annual report is in compliance with the provisions of the party law (§§ 23, 24 – 28 party law). If this testimony is missing, the party is not entitled to receive public funding. In order to make sure that auditors are provided with the correct information and the correct figures, § 31 sec. 1 of the party law makes it a misdemeanour to intentionally present false contents in the annual report, punishable with up to three years' imprisonment.

As noted above, the German law on political parties provides for a two-step audit system of party finances. First, I want to deal with the private part of auditing (I.) and then follow this up with the measures of state control (II.). In a further step, I want to talk about the legal risks to a party whose report is not in compliance with the law (III.), and finally, how possibilities of control by the state have grown through the criminalisation of intentional report fraud (IV.).

I. The Private Audit of Party Finances

The private audit of party finances can be sub-divided into two areas of auditing. First, of course, is the internal party audit. Though this part of the audit may be of scientific interest it is not an area of much interest here, as we are looking primarily at external forms of control. Still, I want to point out that because of the principle of party freedom, parties are free to choose how to organize this internal process. The parties' accountants usually carry out the initial internal audit. The accounts are then looked at by so-called 'revisers', who are elected by the parties themselves. This second step provides substance to the internal audit system.

As seen, § 23 sec. 3 cl. 1 of the party law makes it a requirement for accounts to be externally controlled by a chartered auditor. Sec. 2 provides for an exception for parties that did not win enough votes in the last elections to take part in public funding; their reports may be audited by a chartered accountant.

Auditors as well as chartered accountants have to fulfil certain conditions under § 31 of the party law. Holders of party offices are excluded as well as those who have held such office during the previous three years. Also barred are auditors who took part in the party's preparation of its accounts, and all of the auditors' employees. The latter provision was enacted after the recent CDU party financing scandal, which involved this exact problem. The same exclusions are valid for auditing firms and companies one of whose partners fulfils one of these qualifications. Although the parties pay for the audit themselves, the auditors and their associates are required to fulfil their auditing duties thoroughly and independently, according to § 31 sec. 3 of the party law. If an auditor intentionally provides an incorrect audit he or she is liable under the penal rule of § 31d sec. 2 of the party law and could face a sentence of up to three years' imprisonment. If he or she receives money for doing so or does so with harmful intent, the penalty can be up to five years' imprisonment. In addition, the auditor might be excluded from the auditor's bar for violating the rules of the profession.

II. Public Control of the Audited Reports

According to § 23a sec. 1 of the party law, the Speaker of the *Bundestag* has a duty to verify the reports both for procedural irregularity and for their content. This further check on the parties is not as thorough as the one done by the auditors, since the Speaker has to rely mostly on the auditors' testimonies. Still, according to sec. 2, the Speaker has the right to re-audit any report for up to ten years after the report was filed if there is strong suspicion that an error was made. The Speaker can ask the party in question to give a formal statement responding to his or her questions, and can demand that party's auditor sign this statement.

If the statement does not clear up the Speaker's questions, he or she can ask an auditor of his choice to investigate the party's documents (cl. 3). The party can reject the choice of auditor. Once an auditor is selected and approved, however, the party has to give the auditor access to its documents. The costs of this investigation are covered by the Speaker, i.e. the public purse.

After the investigation is completed, the Speaker must issue a formal statement outlining the alleged mistakes made in the report, including the misreported numbers (sec. 4). The party must file a new report if substantial mistakes have been found.

In order to ascertain whether the principle of party freedom has been violated, the Speaker has to destroy any documents that are not directly related to the party's bookkeeping after the investigation is complete (sec. 7).

III. Penalties for the Parties

The legal reporting requirements for parties would be useless if they did not carry any form of sanction if mistakes or even fraud is discovered. It is also important to note that sanctions that apply only to the parties are not a sufficient guard against such dealings. The same is true for sanctions that apply only to the individual party members who commit fraud. An individual may be willing to bear rather heavy sanctions if the party is not affected, or, conversely, might be willing to damage the party's prospects if he or she is not personally liable. Therefore, the latest revision of the German political party law added further sanctions against a party whose report does not comply with the law, as well as criminal sanctions for individuals committing such acts.

Under § 31a of the party law, the state can claim back public funds that have been paid out to the parties if the mistakes in the report led to a higher claim by the party than it could legally have demanded. While this is not a sanction in the strict sense of the term, the rule is still important as it may endanger party budgets.

More important, though, are §§ 31b and 31c of the party law. The first of these sections, § 31b, punishes each misrepresentation in a party's annual report with a fine. The fine is equal to twice the misrepresented amount. An exception exists for misrepresentations in the asset section of the annual report. Any misrepresentation here leads to a fine of 10 per cent of the misrepresented number.

In terms of donations, § 31c of the party law includes a special rule for illegal donations as defined in § 25 of the same law. Illegal donations must be transferred to the Speaker who ensures that these funds are given to charity. In addition, the party is fined twice the amount of the illegal donation. Donations above €10,000 that are either omitted from the report, or not listed with the name and address of the donor, also carry a fine of twice the amount of such donation.

Of course, the primary purpose of these fines is to deter parties from reporting mistakes or fraud. Nevertheless, they are also meant to encourage parties to report mistakes in older reports to the Speaker. Under § 23b of the party law, parties are themselves required to file mistakes in older reports with the Speaker. If they do so voluntarily they can avoid the fines outlined in §§ 31b and 31c of the party law – provided the mistakes have not been made public, are not known to the Speaker from other sources, or are not the subject of any public process. The party also has to show its willingness to cooperate with the Speaker.

IV. Criminalizing Provisions in the Party Law

Until 2002, the German party law did not include any personal sanctions against party actors and auditors who intentionally commit report fraud. Since 2003, § 31d of the party law makes such acts misdemeanours. As mentioned above, the existence of such personal sanctions is necessary in order to deter report fraud. It also means a further limitation of the principle of party freedom because it opens up the door for public prosecutors/state attorneys to step in and investigate party finances and reports. This intrusion into party freedom is acceptable because of the constitutional guarantee that information about party funds should be public. Of course, it carries the danger of political prosecution and espionage by party members holding high office. Since public prosecutors in Germany are considered to be highly independent from political pressure, the danger, although it exists, should not be taken as too heavy a constraint on party freedom.

C. Effectiveness of the German System

There is no such thing as a perfect legal system and undoubtedly the legislature could improve and clarify the German party law in certain areas. Nevertheless, the new concept of the law as practiced since 2002 is quite promising and has already helped to uncover the latest donation scandal involving Germany's liberal party. It also provided the sanctions that might serve to deter forthcoming scandals, especially since the liberals are struggling to raise money.

Case study 4: Germany (continued)

Statement by **Johannes Becher**, Head of the Department of the *Deutscher Bundestag* on party funding

Following Professor Martin Morlok's comments, which offered an accurate description of the legal situation under the German Law on Political Parties, I can keep the outline of my perspective as a practitioner brief, and refer you to the written information (including English and French translations) laid out on the book table for you yesterday:

- The transcript of a speech held by the Speaker of the German *Bundestag* at the most recent conference of presiding officers of national parliaments from the G8 states in Paris in September 2003, concerning general political funding in Germany ("Political Funding", Annex 1).
- A brief overview prepared by my division of the system of partial state funding of political parties and the calculation of the funds made available in 2003 ("State funding of political parties in Germany" and "Final assessment of state funding for 2003", Annex 2, see also www.bundestag.de/bic/finanz/index.html).

The only area where I would like to add to Professor Morlok's comments is with regard to the "control bodies" that exist in Germany: he rightly referred on the one hand to the primary examination of parties' statements of accounts by independent certified auditors or auditing companies – smaller parties which are not entitled to direct state funding because they did not receive sufficient support in the election must have their statements of accounts inspected by independent certified accountants or firms of certified accountants. Professor Morlok also referred on the other hand to the secondary examination of the statements of accounts, usually limited to a plausibility check, which the Speaker of the German *Bundestag* must conduct as part of the executive competences assigned to him by the Law on Political Parties. This is only expanded to a detailed, material examination of an individual case under Article 23a of the Law on Political Parties if firm evidence of inaccuracies exists – often provided by third parties (the media, members of the public who are interested in politics, rival parties). In addition, I would like to draw your attention to a third control body: in line with Article 21 para. 2 of the Law on Political Parties, the Federal Audit Court examines "whether the Speaker of the German *Bundestag* as the agency administering the funds has determined and disbursed them in accordance with the provisions of this Section and whether the procedure under Article 23a of the Law on Political Parties has been properly followed". This level of scrutiny by the Federal Audit Court of the Speaker of the German *Bundestag* in his capacity as a control agency is important not only because of the additional check on accounts, but also because it protects the President (and the administration that works for him and executes the Law on Political Parties on his behalf) from unlawful

attempts by parties close to him to pressure him to deviate from strict and formal application of the Law on Political Parties.

As a practitioner, I would now like to examine the question of whether the Speaker of the German *Bundestag* in his capacity as a control body is independent and adequately resourced.

With regard to independence:

The Speaker of the German *Bundestag* is legally independent. This is a result of the fact that he is elected by parliament to serve for an entire electoral term, and cannot be voted out of office during this period. The extent to which independence is preserved therefore depends on each Speaker's personality.

The Speaker of the *Bundestag*'s main function is as the highest representative of the legislature, where he holds the rank of *primus inter pares* and regularly acts as a mediator, seeking to achieve as much consensus as possible in decisions taken as part of the political debate between the various parliamentary groups. The parties that comprise these parliamentary groups and overlap with them in terms of personnel might thus be tempted to expect the Speaker of the *Bundestag* to also act merely as a mediator when carrying out his atypical executive tasks, setting aside his clearly defined legal responsibilities. No one has yet successfully attempted to induce the Speaker to pursue unlawful administrative actions, not least because his more important legislative office would also be damaged if he were to take administrative actions that deviate from the Law on Political Parties. It is possible to say that political parties respect the Speaker of the *Bundestag* as the authority administering the funds, and most importantly do not accuse him of taking biased decisions that violate the strict requirement of equal treatment. In fact, one could almost say the opposite is true: the parties represented in the *Bundestag* all feel equally discriminated against by the authority administering the funds. As far as the issue of independence is concerned, this situation is satisfactory.

With regard to resources:

The question of whether the authority administering the funds is adequately resourced is one I would prefer not to answer, as I am not impartial. To enable you to form your own conclusions, allow me to quote from the description of the tasks of my division, the Party Financing and Land Parliaments Division of the Administration of the German *Bundestag*, and add a few observations:

Party financing:

- Preparation and execution of the work of the Speaker of the German *Bundestag* pursuant to the Law on Political Parties, the Federal Electoral Law and the Law on Elections to the European Parliament, inter alia:
 - Calculation of the entire annual state funds for the purpose of financing parties at the level of the Federation and the federal states (currently €133 million), instructions to the federal states on their share of party finances (currently about €15 million), as well as the approval and disbursement of funds at federal level (currently about €118 million),
 - Calculation and reimbursement of the election campaign costs incurred by independent candidates in *Bundestag* elections,
 - Examination and publication of the parties' annual statements of accounts with the auditors' certificates (These statements are published as *Bundestag* printed papers and are also available online <http://dip.bundestag.de/parfors/parfors.htm>. An index of the relevant printed papers is attached as Appendix 1 to the brief overview of party funding I mentioned at the start [Annex 2]. I have brought with me a copy of the statements of accounts for 2001 for you to examine, Part 1: *Bundestag* parties, *Bundestag* printed paper 15/700; Part 2: Other parties, printed paper 15/2750. The same applies for the correction of the statements of accounts of the Free Democratic Party (FDP) from 1996 to 2001, printed paper 15/ 2799),
 - The President of the German *Bundestag's* report on the parties' statements of accounts and the development of party finances (This report is also published as a *Bundestag* printed paper. I have brought the report on the statements from 1996 to 1998 for you to examine: *Bundestag* printed paper 14/4747),
 - Examination and ascertainment of violations by parties of the Law on Political Parties and the fixing and imposition of corresponding sanctions (Following the amendment of the Law on Political Parties in 2002, any inaccuracy in the statement of accounts can lead to the party being forced to pay twice the incorrectly stated amount to the Administration of the German *Bundestag*. This has led to a major increase in the number of cases to be examined and has stretched the Division's resources accordingly),
 - Technical advice in legal proceedings concerning the Law on Political Parties before the Federal Constitutional Court and administrative courts,
 - Management of the budget funds for party financing at federal level (2003: €115 million).

Land parliaments:

- Coordination of communications between the Land parliaments and the German *Bundestag*,
- Preparation of and assistance with the conferences of the Presidents (once a year) and of the Secretaries-General (twice a year) of the German Land parliaments, to which the President and Secretary-General of the German *Bundestag* are always invited because of their experience in running the administration of the federal parliament.

In addition to the Head of Division, the division comprises two subject specialists, who are also civil servants in the higher service and fully trained lawyers (one of these positions is temporary and due to be abolished at the end of 2006), as well as one assistant desk officer, two clerical officers and, in addition to the secretariat, a part-time typist.

Given the information provided yesterday about the resources of the French National Campaign Accounts and Political Financing Commission, which comprises 33 people, or 180 people for the examination of campaign accounts, and has an annual administrative budget of €4 million, I cannot deny that I envy my French colleagues, even if they do have to examine parties' statements of accounts by themselves, a task carried out by independent auditors under German law.

With regard to the method and intensity of the examination of potential violations of the Law on Political Parties (Professor Keith Ewing's question), the practice, as set out in Article 23a of the Law on Political Parties is as follows:

If there is firm evidence of inaccuracies in the statements of accounts that have already been submitted, or evidence of the unlawful acceptance of inadmissible donations, the party is required to examine the matter and to have an independent auditor certify that their examination is correct. This procedure generally suffices in order to investigate the issue reliably and to impose any sanctions which might result.

In cases where it is suspected that donations have been accepted that were "clearly made to the party in the expectation of or in return for a specific economic or political advantage" and whose acceptance is inadmissible and unlawful under Article 25, para. 2, number 7 of the Law on Political Parties, criminal corruption is usually also suspected and must be officially investigated by the public prosecutions office. As the public prosecutions office has far greater possibilities than the *Bundestag's* Party Financing and Land Parliaments Division to investigate the matter thoroughly, the Division usually awaits the results of the public prosecution office's investigation and draws on the results when coming to a judgement on the case pursuant to the Law on Political Parties.