



Office for Democratic Institutions and Human Rights

FEDERAL REPUBLIC OF GERMANY

ELECTIONS TO THE FEDERAL PARLIAMENT (BUNDESTAG) 22 September 2013

OSCE/ODIHR Election Expert Team
Final Report



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I. EXECUTIVE SUMMARY

Following an invitation from the Permanent Mission of the Federal Republic of Germany to the OSCE to observe the 22 September 2013 elections to the Federal Parliament (*Bundestag*) and based on the recommendation of a Needs Assessment Mission conducted in Berlin from 21 to 23 May 2013, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) deployed an Election Expert Team (EET). The OSCE/ODIHR EET consisted of two experts and was tasked to examine and report on aspects of the elections related to the amended legal framework, as well as the regulation and practice concerning political party and campaign finance.

Overall, the legal framework provided a solid basis to conduct genuine elections. The *Bundestag* introduced a number of amendments to the electoral legislation ahead of the 2013 federal elections, some of which addressed previous OSCE/ODIHR recommendations. The most significant of changes, adopted in May 2013, concerned the seat allocation method. These were introduced to address previous Federal Constitutional Court (FCC) rulings on the unconstitutionality of the electoral system stemming from the so-called ‘negative voting weight’ and the effect of ‘overhang mandates’. These amendments enjoyed a high degree of cross-party consensus and sought to ensure that party representation in the *Bundestag* will correspond closely to the percentage of votes received for the party list.

The legal framework for party financing allows political parties to compete with each other on the basis of equal treatment before the law and by the authorities. Political parties and state authorities met with by the OSCE/ODIHR EET expressed a general satisfaction with the regulatory framework for party financing and campaign spending.

All political parties are potentially eligible to receive public funds and are required to publicly account for their assets, sources of funding, and its use. Parties are obliged to submit annual financial statements, although in practice many smaller parties do not comply with this requirement. While there is generally a reasonable level of transparency on party income there are no specific campaign finance regulations and few requirements to account for party campaign expenditures.

The amount spent by parties on their election campaigns is included in the annual financial statements, which are published over a year after an election, detracting from transparency. Some OSCE/ODIHR EET interlocutors expressed concern that the legislation does not sufficiently regulate campaign expenditure reporting as some funds used for campaigning may not be declared by individual candidates and parliamentary groups.

Prior to election day, it is only possible to file complaints and appeals related to voter registration, issuing polling cards, and candidate and party nominations. This could limit the

¹ The English version of this report is the only official document. An unofficial translation is available in German.

opportunity for citizens to secure an effective and timely remedy against other incorrect administrative decisions and actions. In 2012, amendments were introduced that partially addressed an OSCE/ODIHR recommendation related to submitting complaints prior to election day, thus allowing parties or associations to submit complaints against a decision to deny its eligibility to contest the elections before the elections.

After an election, anyone eligible to vote and specific government officials may file complaints on issues directly affecting electoral procedures to the *Bundestag* within two months. The *Bundestag* estimated that it would take two years to hear and decide all complaints filed. Individuals can appeal *Bundestag* decisions at the FCC.

II. INTRODUCTION AND ACKNOWLEDGEMENTS

Following an invitation from the Permanent Mission of the Federal Republic of Germany to the OSCE to observe the 22 September 2013 elections to the Federal Parliament (*Bundestag*) and based on the recommendation of a Needs Assessment Mission conducted in Berlin from 21 to 23 May 2013, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) deployed an Election Expert Team (EET).

The OSCE/ODIHR EET consisted of two experts drawn from two OSCE participating States. The EET examined aspects of the elections related to the amended legal framework, as well as the regulation and practice concerning political party and campaign finance. Therefore, this report is limited in scope and does not offer an overall assessment of the electoral process. The specific areas under review were assessed for their compliance with OSCE commitments and other international standards for democratic elections, as well as with domestic legislation. The OSCE/ODIHR EET did not include long-term or short-term observers and did not undertake a comprehensive and systematic observation of election day proceedings.

The OSCE/ODIHR wishes to thank the Federal Foreign Office, the Federal Ministry of the Interior, the *Bundestag*, representatives of the election administration, political parties, mass media, and other interlocutors for their co-operation and assistance extended to the OSCE/ODIHR EET.

III. BACKGROUND

Germany is a federal republic composed of 16 states (*Länder*).² Legislative power is shared between the *Bundestag* and the *Landtage* (State parliaments). *Länder* participate in the legislation at the federal level through the Federal Council (*Bundesrat*).³ The Basic Law (constitution) provides that members of the *Bundestag* are elected in general, direct, free, equal and secret elections for four-year terms.

Following the federal elections of 27 September 2009, six political parties were represented in the *Bundestag*: the Christian Democratic Union (*Christlich Demokratische Union Deutschlands*; CDU), the Social Democratic Party (*Sozialdemokratische Partei Deutschlands*; SPD), the Free

² The term “states” is the closest English language translation of the German word “*Länder*” (singular *Land*).

³ The *Bundesrat* is composed of representatives of the governments of the *Länder* and has authority to review and grant consent on some legislative proposals.

Democratic Party (*Freie Demokratische Partei*; FDP), the Left (*Die Linke*), Alliance '90/The Greens (*Bündnis 90/Die Grünen*), and the Christian Social Union of Bavaria (*Christlich-Soziale Union in Bayern*; CSU).⁴ The CDU/CSU alliance together with the FDP formed the government, led by Chancellor Angela Merkel of the CDU.

All of these parties contested the 2013 federal elections.⁵ In addition, among the other parties that competed were three with members in *Landtage*: the Pirate Party (*Piratenpartei*, PP), the National Democratic Party (*Nationaldemokratische Partei Deutschlands*, NPD), and the Free Voters (*Freie Wähler*, FW). The Alternative for Germany (*Alternative für Deutschland*, AfD), which was founded in early 2013, also competed in these elections. In total, 30 parties took part in the elections.

The OSCE/ODIHR previously deployed an Election Assessment Mission (EAM) for the 2009 federal parliamentary elections. The EAM's final report concluded that "the federal parliamentary elections confirmed a solid experience in conducting democratic elections in Germany. They demonstrated an open, pluralistic and competitive process, founded on the respect for fundamental freedoms, equitable conditions for all contestants, the efficiency and professionalism of the election administration as well as a high level of public confidence in the overall integrity of the electoral process."⁶

IV. ELECTORAL SYSTEM AND LEGAL FRAMEWORK

Elections to the *Bundestag* are primarily regulated by the Basic Law, Federal Electoral Act (*Bundeswahlgesetz*, FEA), Federal Electoral Regulations (*Bundeswahlordnung*; FER), Law on the Scrutiny of Elections (*Wahlprüfungsgesetz*), as well as guided by relevant Federal Constitutional Court (*Bundesverfassungsgericht*; FCC) rulings.⁷ Overall, the legal framework is comprehensive and provides a solid basis to conduct genuine elections.

The federal election system is set out in the FEA. It is designed to ensure representation in the *Bundestag* in accordance with the principles of proportional representation combined with the single member system, whilst respecting the country's federal structure.⁸ The *Bundestag* consists of 598 members, subject to variations resulting from the implementation of the electoral system. Of these, 299 members are elected in single-seat electoral districts (SSEDs) under a first-past-the-post system. The other members are elected on the basis of closed party lists at the *Land* level (hereafter 'land lists'). Each of the 16 *Länder* constitutes one multi-seat electoral constituency (MSEC).

The system allows voters to cast two votes on the same ballot paper. The first vote is cast for a candidate in the respective SSED. The second vote is cast for a party list in the respective MSEC. The system seeks to ensure the proportional representation of parties in the *Bundestag* based on their share of second votes cast. Parties must obtain at least five per cent of the valid

⁴ While the CDU and CSU are separate political entities, they co-operate at the federal level and together represented the largest political bloc in the *Bundestag*.

⁵ A total of 4,451 candidates, including 1,149 women, were registered for the elections.

⁶ All OSCE/ODIHR reports on Germany are available at: www.osce.org/odihr/elections/germany.

⁷ Additional legislation includes the Political Parties Act (*Parteiengesetz*), Law on Election Statistics (*Wahlstatistikgesetz*), and relevant sections of the Civil and Criminal Codes.

⁸ In Germany, the system is called 'personalized proportional system', but is also known as the 'mixed-member proportional system'.

second votes cast at the national level to be eligible to participate in the allocation of proportional seats.⁹

Following the seat allocation by party at the national level, and subsequently in each *Land*, the number of SSEDs won by a party in each *Land* is deducted from the overall number of seats allocated to the party on the basis of results in the proportional contest in that *Land*. The remaining mandates are distributed according to the order of candidates on the landlists. It can happen that a party wins more SSED seats in a *Land* than its proportional entitlement determined by its share of the second vote. These ‘excess’ seats are known as overhang mandates (*Überhangmandate*) and are retained by the party, resulting in an increase in the total number of seats in the *Bundestag*. The overhang mandates, coupled with the specific system for allocating MSEC mandates, in the past could lead to situations where a party received a higher share of seats than its share of eligible second votes.

Ahead of the 2013 federal elections, the *Bundestag* introduced a number of amendments to the electoral legislation. The most significant of these concerned the seat allocation method, which were introduced to address a 2008 FCC ruling on the unconstitutionality of the electoral system stemming from disproportionality caused by overhang mandates and the so-called ‘negative voting weight’ (additional votes for a party list that could lead to the loss of a seat).¹⁰ Legislation attempting to address the FCC’s ruling was initially passed on 25 November 2011. However, on 25 July 2012, following a challenge by several political parties and a group of some 3,000 citizens, the FCC declared certain provisions of the revised electoral framework unconstitutional, with the provisions related to ‘negative vote weight’ violating the principles of equality and directness of elections.¹¹ Additionally, while the FCC did not void provisions related to overhang mandates, it found them to challenge the principle of the equality of the vote and limited their number to fifteen. Subsequently, the *Bundestag* revised the relevant articles in May 2013.¹²

The revised legislation includes an additional stage of seat distribution to maintain the overall proportionality of the *Bundestag* taking into account any overhang mandates gained by parties. Political parties may receive additional seats referred to as ‘balance seats’ (*Ausgleichsmandate*) to ensure that seat distribution reflects the parties’ national share of second votes.

These amendments enjoyed a high degree of support from most parties in the *Bundestag*;¹³ however, they were adopted less than a year before the elections, which is contrary to good electoral practice.¹⁴ While the mandate allocation system remains complex, the change lessens the scope for tactical voting by ensuring that the second vote is the crucial factor in deciding on party’s representation in the *Bundestag*.

⁹ If a party does not win at least five per cent of the vote it is still entitled to participate in the distribution of the proportional seats if it wins seats in at least three SSEDs.

¹⁰ See the OSCE/ODIHR EAM 2009 Final Report for a more comprehensive overview of the issue of ‘negative voting weight’.

¹¹ See FCC Judgment of 25 July 2012, 2 BvF 3/11.

¹² See FEA Section 6.

¹³ *Die Linke* informed the OSCE/ODIHR EET that it did not support the amendments, as it did not agree to the retention of the five per cent threshold and because of uncertainty over the size of the potential increase in the number of members in the *Bundestag*.

¹⁴ See paragraph 65 of the Council of Europe’s Commission for Democracy through Law (Venice Commission) Code of Good Practice in Electoral Matters:
<http://www.venice.coe.int/webforms/documents/CDL-AD%282002%29023rev-e.aspx>.

The OSCE/ODIHR EET noted some concern by various stakeholders that the revisions to the system could cause the number of *Bundestag* members to rise significantly (when a high number of additional balance seats are needed to achieve proportionality). The 2013 federal elections resulted in the allocation of 33 additional seats, yielding a *Bundestag* of 631 members (402 men and 229 women).¹⁵ While the German electoral process emphasizes the principle of proportional representation, the percentage of all votes cast in the 2013 elections for parties falling below the five percent threshold totaled some 16 per cent.

Other amendments to the legal framework related to voter registration, the composition of the Federal Election Committee (*Bundeswahlausschuss*; FEC), the possibility to appeal against a decision of the Federal Returning Officer (FRO), which denies a party's eligibility to contest the elections, and removing the requirement to file 100 supporting signatures for appeals to the FCC against a decision of the *Bundestag* on post-election complaints. While some of the recent changes addressed previous OSCE/ODIHR recommendations, a few recommendations remain unaddressed, including those regarding legal provisions allowing significant difference in the number of registered voters in each electoral district and the absence of explicit legal provisions on election observation.¹⁶

Section 12 of the FEA regulates the rights of citizens living abroad to register to vote, which was revised in July 2012 in order to comply with an FCC decision concerning voter eligibility of citizens residing abroad.¹⁷ The new provisions state that citizens residing abroad are eligible to vote if they have a domicile or three-months of continual residence in Germany (not longer than 25 years ago) after reaching fourteen years of age. Alternatively, Germans residing abroad are eligible to vote if they can demonstrate that they are familiar with and directly affected by the political situation in Germany. Members of an association of German expatriates noted to the OSCE/ODIHR EET that the amended provisions created an unjustified administrative obstacle to the right to vote for citizens residing abroad for over 25 years by requiring them to prove their links with Germany, which constitutes differential treatment between citizens. The association also found the 25-year period arbitrary.

V. POLITICAL PARTY FINANCE

German law establishes that political parties are integral to a democracy, and parties are required to play a continuous public function in forming the people's political will. The legal framework for party financing allows parties to compete with each other on a basis of equal treatment

¹⁵ The 631 seats in the current *Bundestag* are broken-down as follows: 598 SSED/MSEC seats, four overhang seats, and 29 balance seats. While this constitutes a relatively modest increase in the size of the *Bundestag* (nine seats), it is not necessarily indicative of the size of future parliaments as it derives from the specific variables including the number of overhang seats, parties' share of the second vote, as well as the number of parties surpassing the five per cent threshold.

¹⁶ The number of SSEDs in each *Land* should correspond to the respective proportion of citizens countrywide. By law, the population of any one SSED should not deviate from the countrywide average SSED population by more than 15 per cent and where the deviation is greater than 25 per cent, the boundaries should be redrawn. Where possible, the borders of SSEDs should respect administrative borders of lower-level units such as municipalities. In practice, deviations of between 15 and 25 per cent are permitted. While this issue is of a technical nature and was not raised by the OSCE/ODIHR EET interlocutors, such large deviations go against international good practice. See paragraph 2.2.iv of the Code of Good Practice in Electoral Matters.

¹⁷ See FCC Judgment of 4 July 2012, 2 BvC 1/11, 2 BvC 2/11.

before the law and by the authorities, although the transparency of party financing and campaign spending could be enhanced.¹⁸

The Political Parties Act (PPA) regulates the financing and activities of parties and sets criteria aimed to ensure equitable treatment by public authorities.¹⁹ During election campaigns, parties receive ‘in-kind’ public support, including free media airtime. However, the PPA also provides for ‘gradual equality’ with the extent to which public facilities and services are provided to contestants is determined by the parties’ performance in previous parliamentary elections.

The PPA also provides for the public funding of political parties. The specific allocations are determined by the proportion of votes the party won in the most recent elections in combination with the amounts of membership dues, contributions from holders of elected public office, and donations received.²⁰ The allocation of public funds cannot exceed the total amount raised privately by the party.²¹ The main private revenue sources of parties include: membership fees; contributions by elected office holders; donations from private citizens; revenue from events, publications and income generating activities; donations from legal entities (e.g. companies); and income from assets and business activity.²²

Transparency is a founding principle of the party financing system. The Basic Law requires political parties to publicly account for their assets, and the sources and use of funds. The PPA obliges political parties to submit an annual statement of accounts for the preceding year to the *Bundestag* President by 30 September.²³ These statements, which have been previously certified by auditors chosen by the parties, are subject to official scrutiny by administrators in the *Bundestag*. The statements are published as official papers of the *Bundestag*, thereby allowing for public scrutiny. Parties’ funding arrangements are discussed periodically in the *Bundestag* committees and the *Bundestag* President is required to issue a report every two years on trends in parties’ financial situation and on the statements of accounts submitted by the parties.²⁴ In addition, the Federal President may appoint a committee of independent experts on matters of political party funding.

Parties’ financial statements set out the origin and use of funds as well as the party’s assets and liabilities. Failure to submit financial statements in due time has consequences for the party’s entitlement to receive public funds.²⁵ However, despite requirements for parties to account for the sources and use of their funds, the PPA does not contain specific penalties for non-

¹⁸ The transparency of party funding in Germany has been assessed by the Council of Europe Group of States against Corruption (GRECO). See the GRECO Compliance Report on Germany on the Transparency of Party Funding, 11 December 2011:

[http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3\(2011\)9_Germany_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoRC3(2011)9_Germany_EN.pdf)

¹⁹ For example, Section 5 of the PPA requires that “where a public authority provides facilities or other public services for use by one party, equal treatment must be accorded to all parties”.

²⁰ To qualify for public funding, parties must secure at least 0.5 per cent of the vote in federal and/or European Union (EU) elections and/or one per cent of the valid list votes in *Landtag* elections. Parties that nominate candidates in SSEDs, but not a land list, are eligible for state funding if they win at least 10 per cent of valid votes in the district.

²¹ For the 2012 allocations, this cap affected the size of allocations to five parties or voter associations (*Wählervereinigungen*): Pirate Party, Family Party (*Die Familie*), Animal Welfare Party (*Die Tierschutzpartei*), Pro-NRW (*Bürgerbewegung pro NRW*) and Free Voters Thuringia.

²² Examples of business activities include involvement or ownership in companies related to printing party material. See Annex I for a full breakdown on contributions by funding sources per parliamentary party.

²³ This deadline may be extended by up to three months.

²⁴ The last report (17/8200) was issued in December 2011, <http://dip21.bundestag.de/dip21/btd/17/082/1708200.pdf>.

²⁵ See Section 19a(3) of the PPA.

submission. This diminishes the effectiveness of the party financing and campaign expenditure disclosure arrangements. The 2011 report of the *Bundestag* President indicated that, routinely, the majority of parties do not file financial statements, and two non-parliamentary parties that were eligible for public funds did not submit financial statements for 2011 by 31 December 2012.

Authorities could consider adopting measures to ensure that all political parties submit annual financial statements, including sanctions for non-compliance such as the loss of all or part of public funds as well as administrative fines.

The PPA requires that single donations in excess of EUR 50,000 must be immediately reported to the *Bundestag* President. These are announced via the *Bundestag* website usually within two days and in parliamentary printed papers (including the identity of the donor), within one month. Parties must declare in their annual statements all donations received and contributions by elected representatives/officials paid to it or its regional/local branches, which exceed EUR 10,000, and include details on the identity of donors.²⁶ Parties are not required to declare individual donations of less than EUR 10,000, but must give separate figures in their annual statements for (i) the sum of contributions made by natural persons up to EUR 3,300 per person and (ii) the sum of contributions by natural persons, which exceed EUR 3,300. The PPA prohibits certain types of donations including those made by public corporations, parliamentary groups, political foundations, and not-for-profit organizations; and those given by an anonymous donor (if over EUR 500),²⁷ in cash (if over EUR 1,000), and with the expectation of a financial or political return.

Following the statement verification by the parliamentary administration, the *Bundestag* President may commission a certified auditor to check the compliance of the statement with legal requirements. If an amount in a party's annual report is misstated, a fine of double the misstated amount can be imposed.²⁸ Failure to declare details of donations above EUR 10,000 may also result in the imposition of a similar fine. In case a party retains an illegally obtained or undeclared donation, an amount equal to three times the size of the donation must be paid to the federal budget. The OSCE/ODIHR EET was informed by the *Bundestag* administration that penalties are applied relatively frequently, but rarely for significant amounts.

The most debated and scrutinized component of party financing concerns donations, especially those made by for-profit enterprises and, to a lesser extent, large donations by private citizens. Borne of a concern that large donations might not be given without any interest attached, some civic groups advocate reducing the amount for which immediate disclosure of donations is required and capping the maximum size of donations and sponsorship of party events.²⁹ The OSCE/ODIHR EET met with one parliamentary party that advocated introducing a prohibition

²⁶ Multiple donations or contributions given by a natural person or legal entity within a financial year are aggregated to calculate the total contribution, which if it exceeds EUR 10,000, must be declared.

²⁷ Paragraph 174 of the Joint Venice Commission and OSCE/ODIHR Guidelines on Political Party Regulation also recommends including a limit on the aggregate allowable amount of all anonymous contributions (<http://www.osce.org/odihr/77812>).

²⁸ Under certain conditions parties may rectify errors in their accounts without penalty. In general, a large part of parties' financial statements constitute corrections to small errors made in previous statements.

²⁹ In 2010, four civic groups petitioned to limit donations by an individual natural person or legal entity to EUR 50,000 and to similarly limit sponsorship of/at party events. The Internal Affairs Committee of the *Bundestag* discussed the issue and differing views were expressed (see Parliamentary Paper 17/8200). In addition, the civil society organizations advocated for scrutiny of parties' accounts to be placed under the jurisdiction of an independent body, which operates outside the parliament or government.

on all donations to parties made by legal entities.³⁰ Conversely, some OSCE/ODIHR EET interlocutors questioned the need or desirability for a prohibition or a cap, and whether such action would be consistent with rights established under the Basic Law.

VI. CAMPAIGN FINANCE

The legislation does not contain specific provisions regulating campaign finance and there are no limits on campaign expenditure. Outside of annual financial reporting cycles, there is no requirement for parties or candidates to publish information on campaign expenditure. The PPA only requires parties to report the total spending figures for their election campaigns and separate figures for campaign expenditure by their federal-level and *Land* branches. They are not required to provide any further details on what items the funds were spent.

The practice of disclosing campaign spending as part of parties' regular annual statements means that campaign-spending information is not publicly available shortly after an election, detracting from transparency.³¹ Parliamentary parties met with by the OSCE/ODIHR EET explained the absence of separate campaign finance disclosure rules by the difficulty to disaggregate expenditures on a specific campaign from general party expenditures, particularly when statements incorporate accounts from thousands of local branches and where many elections take place at local, municipal, *Land*, federal and EU levels.

While there appears to be a general satisfaction with the regulatory framework for disclosing campaign expenditure among the parties and state authorities, there may nevertheless be scope and benefits in enhancing the transparency of campaign expenditure to continue to ensure that the democratic process is not distorted by the disproportionate expenditure on behalf of any candidate or party.³² This is of particular importance given that almost 30 per cent of party budgets are financed through public funds.

To enhance transparency, the government authorities could consider adopting measures to require parties competing in federal elections to provide more detailed information on campaign expenditure, and accelerate the timeframe for disclosing campaign expenditure information.

Some OSCE/ODIHR EET interlocutors expressed concern that some funds being spent on campaigning were outside the scope of the PPA (e.g. public funds received by parties' parliamentary groups and donations made directly to a candidate).³³ While the Act on the Members of the Bundestag (AMB) specifies that it is not permitted to use funds of parliamentary groups for "political-party purposes", and parliamentary groups may not donate to parties, the AMB also stipulates that "parliamentary groups and their members may inform the

³⁰ This was previously discussed and rejected by the *Bundestag* Committee on Internal Affairs.

³¹ See Paragraph 200 of the Guidelines on Political Party Regulation; The figures for the September 2009 federal elections became publicly available in February 2011. Campaign spending figures for 2009, the year in which *Bundestag* elections, EU elections and six state elections took place, can be found in Annex II.

³² See Paragraph 19 of General Comment No. 25 to Article 25 of the International Covenant on Civil and Political Rights (ICCPR) by the UN Human Rights Committee and Paragraph 206 of the Guidelines on Political Party Regulation.

³³ Parliamentary groups are formed under Part 11 of the Act on the Members of the *Bundestag*. Section 50 of this Act provides monetary benefits to the parliamentary groups. These funds are separate from the public allocations to party organizations.

public of their activities”.³⁴ Some OSCE/ODIHR EET interlocutors expressed concern that this provision had previously given the possibility for parliamentary groups to use their funds to engage in activities normally regarded as campaigning (e.g. conducting direct mailings).

Authorities could consider a review of the current rules to see if they suffice to ensure that parliamentary groups do not use their financial allocations to engage in parties’ political activities, in particular in election campaigning.

While the PPA does not establish clear rules regarding donations made directly to members of the *Bundestag*, the issue is adequately covered by the *Bundestag’s* Rules of Procedures.³⁵ The situation regarding donations to a party’s individual election candidates (who are not necessarily elected members), and spending by an individual party candidate on their election campaigns from their own personal funds, is less clear. Officials from the Federal Ministry of Interior assured the OSCE/ODIHR EET that such donations fall within the scope of the PPA and must be declared in parties’ statements of account. The PPA states that “party members who receive donations on behalf of their party shall immediately pass them on to an Executive Committee member who, under the party statutes, is responsible for the party’s financial matters”. However, it appears that the phrase “on behalf of their party” (as opposed to a donation on behalf of an individual candidate) could be misunderstood.

Consideration could be given to clarifying in the PPA, whether all donations, including to a party, party official, candidate, or member of the parliament, are considered as donations to the party and thus should be declared as such in the annual statement of accounts.

The provisions of the PPA only apply to parties.³⁶ There is no requirement in the FEA or the PPA for non-party (independent) candidates in SSEDs to disclose sources of income and campaign expenditure. While the participation and election of independent candidates is relatively infrequent, the issue raises a question as to whether the regulatory framework provides a strictly equal framework for all contestants.³⁷

To guarantee that all election contestants (party and non-party) compete with each other on the basis of equal treatment by the law, amendments could be considered to ensure that all contestants are required to account for campaign expenditure under similar legal arrangements.

VII. COMPLAINTS AND APPEALS

While the legal framework for filing complaints on the electoral process has been improved, the lack of opportunity to file an appeal to a court prior to election day on most procedural issues

³⁴ The Federal Audit Office (*Bundesrechnungshof*) has jurisdiction over issues pertaining to the accounts of parliamentary groups and sections 51-53 of the AMB set out the accounting procedures.

³⁵ Rule 4, Annex 1 of the Rules of Procedure requires record keeping financial for donations (including in-kind donations), notification to the *Bundestag* President of all donations exceeding EUR 5,000, and immediate publication if over EUR 10,000. It also states that section 25 (2 and 4) applies *mutatis mutandis* to donations to *Bundestag* members. The accounts of parliamentary groups are examined by an auditor selected in consultation with the Federal Audit Office.

³⁶ The Federal Ministry of Interior confirmed that it also applies to voter associations, which contest *Land* elections.

³⁷ As set out in paragraphs 7.5 and 7.6 of the 1990 OSCE Copenhagen Document.

still limits the ability of citizens to secure an effective and timely remedy against incorrect administrative decisions and actions.

Prior to election day, complaints or appeals on only a limited number of issues can be filed; mostly with the bodies of the electoral administration.³⁸ Most other types of complaints can only be lodged after election day through the election scrutiny procedure. The FEA stipulates that “any decisions and measures directly affecting the electoral procedure may only be contested by means of the legal remedies provided by this Law and the Federal Electoral Regulations and by way of the electoral scrutiny procedure.” According to the Basic Law, the *Bundestag* is responsible for ‘scrutinising elections’.

Parties are permitted to submit candidate lists for federal elections with the *Land* Election Committees only after their eligibility has been confirmed by the FEC.³⁹ Previously, a party whose application to contest federal elections was rejected by the FEC, or a party whose list of candidates was not registered by a LEC or the FEC could not file an appeal to a judicial body prior to election day. In July 2012, the *Bundestag* improved access to legal remedy by allowing a party or association to submit a complaint against a decision to deny its eligibility to contest the elections before the election.⁴⁰ While the amendment is a positive development and partially addressed an OSCE/ODIHR recommendation related to submitting pre-election day complaints, it appears that a decision of the FEC not to register a candidate or a landlist still cannot be appealed to a court. In addition, amendments expanded the membership of the FEC through the incorporation of two judges of the Federal Administrative Court (*Bundesverwaltungsgericht*).⁴¹

The scrutiny of the election is regulated by the Law on Scrutiny of Elections, which was last amended in July 2012. The law provides that the *Bundestag* decides on the violation of rights in preparing and conducting the elections and the validity of the *Bundestag* elections. The Basic Law provides that appeals against decisions of the *Bundestag* on complaints received by it under the scrutiny procedure may be lodged with the FCC. Other than these appeals, the judiciary has little involvement in electoral matters.

The Law on the Scrutiny of Elections provides for the establishment of an Election Scrutiny Board (ESB), which has the exclusive right to consider post-election complaints and appeals and prepares decisions for the *Bundestag* on the complaints submitted. The ESB is elected by the incoming *Bundestag* for four years and members cannot be replaced during the term of the legislature. Election complaints may be filed by anyone eligible to vote, by any group of persons eligible to vote and, in their official capacities, by any *Land* Returning Officer, the FRO and the *Bundestag* President within two months of polling day.⁴² Complaints can be submitted only after election day. The OSCE/ODIHR EET was informed that the rationale behind this provision is that if complaints were to be considered prior to election day, then the entire electoral process

³⁸ Decisions of local authorities related to voter registration and the issuance of polling cards can be appealed to District Election Committees (*Kreiswahlausschüsse; DEC*s), decisions of DEC's regarding candidate nominations and of *Land* Election Committees (*Landeswahlausschüsse; LEC*), regarding landlist nominations can be appealed to the respective higher-level committees. Decisions of the FEC on the eligibility of a party to submit nominations can be appealed to the FCC.

³⁹ See Sections 18, 27, and 28 of the FEA.

⁴⁰ The FEA states that: “A party or association may file a complaint with the FCC against a confirmation, which prevents it from submitting nominations within four days after the announcement. In such case the party or association must be treated by the electoral bodies like a party entitled to submit nominations until a decision has been taken by the FCC.”

⁴¹ Each LEC now also includes two judges of the *Land*'s Higher Administrative Court.

⁴² Appeals after this deadline may be filed by the *Bundestag* President under certain conditions.

would have to be suspended until the outcome was decided; a situation that authorities would consider neither reasonable nor proportionate.⁴³

The ESB conducts a preliminary hearing to determine if a complaint has been properly filed. The ESB is required to conduct investigations on all complaints filed, not only those where a violation could have affected the distribution of seats.⁴⁴ It conducts its work transparently through public hearings and allowing all persons involved in an appeal access to all the documents. The Board issues written decisions on the complaints, which are proposed to the *Bundestag* for adoption by simple majority. The *Bundestag* also decides on the validity of a contested election and on the consequences of declaring it invalid.

If the *Bundestag* does not agree with an ESB decision, it is to be remitted to the ESB where it may be required to verify certain factual or legal circumstances. The *Bundestag* normally decides to adopt ESB decisions and in the recent past, the *Bundestag* has not upheld a single complaint, in most cases because it could not find any effect on the final results. The ESB's objective is to process all complaints within two years.⁴⁵ The OSCE/ODIHR EET was informed that 'quality' of complaints varied significantly and that approximately half were not substantiated.

Appeals against the *Bundestag's* decisions can be filed with the FCC, whose decisions are final. Appeals can be submitted only by 'eligible persons', which in practice means individual citizens. A previous provision stating that an appeal to the FCC had to be supported by 100 supporting signatures was removed. Some OSCE/ODIHR EET interlocutors felt that following the relaxation of the requirement to submit supporting signatures the proportion of complaints that are appealed may rise. FCC rulings on previous appeals have upheld the original decisions of the *Bundestag* (i.e. the FCC has never issued a decision on an appeal which affects the distribution of mandates). However, on occasion it has advised the *Bundestag* to revise specific legal provisions associated with electoral rights.

VIII. RECOMMENDATIONS

These recommendations as contained throughout the text are offered with a view to enhance the conduct of elections in Germany and bring them fully in line with OSCE commitments and other international standards for democratic elections. These recommendations should be read in conjunction with past OSCE/ODIHR recommendations that remain to be addressed; in particular those contained within the OSCE/ODIHR EAM Final Report for the 27 September 2009 federal parliamentary elections. The OSCE/ODIHR stands ready to assist the authorities of Germany to further improve the electoral process.

⁴³ Eight complaints related to the 2013 federal elections were filed to the ESB and were disregarded as the ESB had no jurisdiction to investigate them before the elections.

⁴⁴ Amendments to the Law on the Scrutiny of Elections expanded the ESB's scope of review to include assessing whether the rights of a person or group of people have been violated in preparing or conducting the elections and whether such a violation impacts the distribution of mandates.

⁴⁵ In total, 163 complaints were filed with the *Bundestag* in connection with the 2009 elections, which were all resolved within two years.

A. PRIORITY RECOMMENDATIONS

1. Authorities could consider adopting measures to ensure that all political parties submit annual financial statements, including sanctions for non-compliance such as the loss of all or part of public funds as well as administrative fines.
2. Consideration could be given to clarifying in the PPA, whether all donations, including to a party, party official, candidate, or member of the parliament, are considered as donations to the party and thus should be declared as such in the annual statement of accounts.
3. To enhance transparency, the government authorities could consider adopting measures to require parties competing in federal elections to provide more detailed information on campaign expenditure, and accelerate the timeframe for disclosing campaign expenditure information.

B. OTHER RECOMMENDATIONS

4. Authorities could consider a review of the current rules to see if they suffice to ensure that parliamentary groups do not use their financial allocations to engage in parties' political activities, in particular in election campaigning.
5. To guarantee that all election contestants (party and non-party) compete with each other on the basis of equal treatment by the law, amendments could be considered to ensure that all contestants are required to account for campaign expenditure under similar legal arrangements.

ANNEX I: CONTRIBUTION BY FUNDING SOURCE PER PARTY (AVERAGE 2008-2011)⁴⁶

	CDU	SPD	FDP	Bündnis 90/ Greens	Die Linke	CSU
Member Contributions	27.8	28.9	21.2	20.9	36.4	23.4
Elected posts and similar regular contributions	12.2	13.9	8.1	20.6	11.9	7.5
Donations from natural persons	11.2	6.6	18.2	12.2	8.1	14.0
Donations from legal entities	6.1	1.7	8.3	2.2	0.3	8.9
Income from business activity and investments	0.2	6.0	1.0	0.0	0.0	0.1
Income from other assets	3.0	6.0	1.2	0.9	1.1	1.4
Receipt from events, publication and other income raising activity	9.4	9.1	6.9	2.9	0.7	18.0
State funds	29.3	25.6	34.6	37.0	39.6	26.2
Other income	0.8	2.2	0.5	3.3	1.9	0.5
Total (per cent)	100	100	100	100	100	100

ANNEX II: PARTY EXPENDITURE IN 2009 (EUR MILLIONS)⁴⁷

	Election Campaigns	General Activity	Routine Operations	Staff	Other expenses	Total
CDU	88.0	30.9	30.7	44.6	6.0	200.2
SPD	84.9	34.7	27.8	51.3	9.5	208.2
FDP	25.6	9.5	9.8	5.2	1.4	51.5
Bündnis 90 / Greens	15.6	5.8	5.2	9.9	0.5	37
Die Linke	14.1	5.8	4.3	9.5	0.1	33.8
CSU	14.4	13.0	7.2	9.8	0.5	44.9
Total	242.6	99.7	85	130.3	18	575.6

⁴⁶ Figures compiled by aggregating parties income figures contained in financial statements for 2008-2011 (parliamentary papers: 17/630, 17/4800, 17/8550 and 17/12340): <http://www.bundestag.de/bundestag/parteienfinanzierung/rechenschaftsberichte/index.html>

⁴⁷ Extracted from data contained in parliamentary paper 17/4800.

ANNEX III: FINAL ELECTION RESULTS

	First Votes		Second Votes		Total Seats
	Number	%	Number	%	
Persons entitled to vote	61,946,900	-	61,946,900	-	
Voters	44,309,925	71.5	44,309,925	71.5	
Invalid votes	684,883	1.5	583,069	1.3	
Valid votes	43,625,042	98.5	43,726,856	98.7	
CDU	16,233,642	37.2	14,921,877	34.1	255
SPD	12,843,458	29.4	11,252,215	25.7	193
FDP	1,028,645	2.4	2,083,533	4.8	
DIE LINKE	3,585,178	8.2	3,755,699	8.6	64
GRÜNE	3,180,299	7.3	3,694,057	8.4	63
CSU	3,544,079	8.1	3,243,569	7.4	56
PIRATEN	963,623	2.2	959,177	2.2	
NPD	635,135	1.5	560,828	1.3	
Tierschutzpartei	4,437	0.0	140,366	0.3	
REP	27,299	0.1	91,193	0.2	
ÖDP	128,209	0.3	127,088	0.3	
FAMILIE	4,478	0.0	7,449	0.0	
Bündnis 21/RRP	5,324	0.0	8,578	0.0	
RENTNER	920	0.0	25,134	0.1	
BP	28,430	0.1	57,395	0.1	
PBC	2,081	0.0	18,542	0.0	
BüSo	17,988	0.0	12,814	0.0	
DIE VIOLETTEN	2,516	0.0	8,211	0.0	
MLPD	12,904	0.0	24,219	0.1	
Volksabstimmung	1,748	0.0	28,654	0.1	
PSG	-	-	4,564	0.0	
AfD	810,915	1.9	2,056,985	4.7	
BIG	2,680	0.0	17,743	0.0	
pro Deutschland	4,815	0.0	73,854	0.2	
DIE RECHTE	-	-	2,245	0.0	
DIE FRAUEN	-	-	12,148	0.0	
FREIE WÄHLER	431,640	1.0	423,977	1.0	
Nichtwähler	-	-	11,349	0.0	
PARTEI DER VERNUNFT	3,861	0.0	24,719	0.1	
Die PARTEI	39,388	0.1	78,674	0.2	
Total Seats					631

Source: Federal Returning Officer;

www.bundeswahlleiter.de/en/bundestagswahlen/BTW_BUND_13/ergebnisse/bundesergebnisse

ABOUT THE OSCE/ODIHR

The Office for Democratic Institutions and Human Rights (OSCE/ODIHR) is the OSCE's principal institution to assist participating States "to ensure full respect for human rights and fundamental freedoms, to abide by the rule of law, to promote principles of democracy and (...) to build, strengthen and protect democratic institutions, as well as promote tolerance throughout society" (1992 Helsinki Summit Document). This is referred to as the OSCE human dimension.

The OSCE/ODIHR, based in Warsaw (Poland) was created as the Office for Free Elections at the 1990 Paris Summit and started operating in May 1991. One year later, the name of the Office was changed to reflect an expanded mandate to include human rights and democratization. Today it employs over 130 staff.

The OSCE/ODIHR is the lead agency in Europe in the field of **election observation**. Every year, it coordinates and organizes the deployment of thousands of observers to assess whether elections in the OSCE region are conducted in line with OSCE Commitments, other international standards for democratic elections and national legislation. Its unique methodology provides an in-depth insight into the electoral process in its entirety. Through assistance projects, the OSCE/ODIHR helps participating States to improve their electoral framework.

The Office's **democratization** activities include: rule of law, legislative support, democratic governance, migration and freedom of movement, and gender equality. The OSCE/ODIHR implements a number of targeted assistance programs annually, seeking to develop democratic structures.

The OSCE/ODIHR also assists participating States' in fulfilling their obligations to promote and protect human rights and fundamental freedoms consistent with OSCE human dimension commitments. This is achieved by working with a variety of partners to foster collaboration, build capacity and provide expertise in thematic areas including human rights in the fight against terrorism, enhancing the human rights protection of trafficked persons, human rights education and training, human rights monitoring and reporting, and women's human rights and security.

Within the field of **tolerance** and **non-discrimination**, the OSCE/ODIHR provides support to the participating States in strengthening their response to hate crimes and incidents of racism, xenophobia, anti-Semitism and other forms of intolerance. The OSCE/ODIHR's activities related to tolerance and non-discrimination are focused on the following areas: legislation; law enforcement training; monitoring, reporting on, and following up on responses to hate-motivated crimes and incidents; as well as educational activities to promote tolerance, respect, and mutual understanding.

The OSCE/ODIHR provides advice to participating States on their policies on **Roma and Sinti**. It promotes capacity-building and networking among Roma and Sinti communities, and encourages the participation of Roma and Sinti representatives in policy-making bodies.

All ODIHR activities are carried out in close co-ordination and co-operation with OSCE participating States, OSCE institutions and field operations, as well as with other international organizations.

More information is available on the ODIHR website (www.osce.org/odihhr).