



Office for Democratic Institutions and Human Rights

FEDERAL REPUBLIC OF GERMANY

ELECTIONS TO THE FEDERAL PARLIAMENT (BUNDESTAG)

27 September 2009

OSCE/ODIHR Election Assessment Mission Report



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I. EXECUTIVE SUMMARY

On 9 January 2009, the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) was invited by the Permanent Mission of the Federal Republic of Germany to the OSCE to observe the 27 September 2009 elections to the Federal Parliament (*Bundestag*). The OSCE/ODIHR undertook a Needs Assessment Mission (NAM) in Germany from 15 to 17 July 2009, and based on findings and recommendations of the NAM,¹ deployed an Election Assessment Mission (EAM) from 13 September to 1 October 2009.

The 2009 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.

The legal framework is comprehensive and provides an overall sound basis for the conduct of democratic elections. Some aspects of the legislation, however, could benefit from revision. It is of concern that the legislation does not provide for a judicial review of decisions made by the election administration before election day, thus diminishing access of citizens to timely and effective remedy as prescribed by OSCE commitments and other international legal instruments.

A broad range of political parties and candidates contested the election, ensuring a wide and genuine choice of political alternatives for the electorate. However, of particular importance is the need to adopt precise, objective and measurable criteria on the eligibility of parties, party lists and candidates to contest elections in order to avoid the perceived risk of subjectivity in the registration process.

The four-tier election administration performed its duties impartially and transparently, and ensured the process was efficient and in compliance with the legislation. Some 62.2 million voters were included in the voter lists, which appeared to be reliable and enjoyed public confidence. Some 21 per cent of registered voters cast their ballots by mail. Although not devoid of minor technical incidents, postal voting appears to enjoy the trust of the electorate thanks to safeguards in place to protect the integrity of the votes.

Formally, the campaign began after the finalization of party and candidate registration. In practice, parties are free to seek popular support for their political programmes on a continual basis. Campaign-related entitlements of political parties, including coverage in media and access to campaign venues, are determined in line with the principle of ‘gradual equality’, which *inter alia* takes into account parties’ past electoral performance.

¹ The OSCE/ODIHR NAM report is available at www.osce.org/documents/odihr/2009/08/39164_en.pdf.

The media environment in Germany is diverse and free, with public and private media being largely self-regulated. The internet is an increasingly important medium for sharing and forming opinions. Paid political advertising in the broadcast media is not permitted, but parties receive free airtime on main public networks. The media covered the campaign extensively in political debates, news, discussions and analytical programmes. Nevertheless, some parties contested the decision not to hold a joint debate between representatives of all parliamentary parties. Some non-parliamentary parties claimed that the media largely overlooked their campaigns. The amount and pluralistic nature of the information available allowed the voters to make an informed choice.

There are no specific legal provisions regulating campaign finance and there are no limits on campaign expenditures. Election contestants are also not bound by campaign finance disclosure requirements. However, campaign financing forms part of general party financing, and detailed reports must be audited, certified and submitted by all political parties on an annual basis.

Women are reasonably well-represented in the new *Bundestag* and the government. Some parties have adopted special measures to ensure that broadly equal numbers of men and women were fielded as candidates. Parties that seek to represent Germany's formally recognized national minorities are exempted from some of the registration and representation requirements applicable to other parties. None, however, sought election to the *Bundestag*.

International and domestic non-partisan election observation is not specifically provided for in the legislation. Nevertheless, the law emphasizes the public nature of elections, a principle that was also underscored by a recent judgement of the Federal Constitutional Court. In practice, all interested individuals are able to follow the election process, and the OSCE/ODIHR EAM was granted full access before, during and after election day. In order to remove any uncertainty and to comply fully with OSCE commitments, it is desirable that the legislation explicitly provides access for international and domestic non-partisan observers to all stages of the electoral process.

According to standard practice for Election Assessment Missions, the OSCE/ODIHR did not conduct a comprehensive and systematic election-day observation. Mission members, however, visited polling stations in six cities. In these polling stations, voting procedures were overall correctly implemented and the secrecy of the vote was uniformly respected. The counting of votes was conducted efficiently and transparently. Provisional results were publicly available shortly after the close of polls. Final results were announced within the legal deadline.

II. INTRODUCTION AND ACKNOWLEDGEMENTS

On 9 January 2009, the OSCE/ODIHR was invited by the Permanent Mission of the Federal Republic of Germany to the OSCE to observe the 27 September 2009 elections to the *Bundestag*. The OSCE/ODIHR undertook a Needs Assessment Mission (NAM) in Germany from 15 to 17 July 2009. Based on its recommendation, the OSCE/ODIHR deployed an Election Assessment Mission (EAM) from 13 September to 1 October 2009. This was the first ever OSCE/ODIHR mission deployed in Germany for national elections.

The OSCE/ODIHR EAM was led by Ambassador Gérard Stoudmann and consisted of 15 election experts from 13 OSCE participating States. OSCE/ODIHR EAM experts visited all 16 federal states (*Länder*).² The OSCE/ODIHR EAM did not assess elections to the Brandenburg and Schleswig-Holstein *Land* parliaments (*Landtage*),³ which were also held on 27 September 2009.

The OSCE/ODIHR wishes to thank the Federal Foreign Office, the Ministry of the Interior, representatives of election administration, federal and local government authorities, political parties, media, and other interlocutors for the co-operation and assistance extended to the OSCE/ODIHR EAM.

III. BACKGROUND

According to the Basic Law (*Grundgesetz*), the Federal Republic of Germany is a republic consisting of 16 *Länder*, which are vested with significant powers.

The *Bundestag* is the main body responsible for the legislative process and scrutiny of the government and its work. The Basic Law provides that members of the *Bundestag* are elected in general, direct, free, equal and secret elections for four-year terms. The Federal Council (*Bundesrat*) is the body through which the *Länder* participate in the legislation at the federal level. The *Bundesrat* is composed of representatives of the governments of the *Länder* and has authority to review and grant consent on some legislative proposals.

Executive power is vested in the Federal Cabinet led by the Federal Chancellor, who is elected by the *Bundestag* on the proposal of the Federal President for the duration of the legislative term.⁴ In the context of elections, the Federal Constitutional Court (*Bundesverfassungsgericht*; FCC) is the highest court dealing with constitutional matters, including protection of citizens' suffrage rights. The FCC has in the past issued a number of decisions and interpretative rulings concerning electoral matters.

Following the last federal parliamentary elections, held on 18 September 2005, six political parties were represented in the *Bundestag*. The centre-right Christian Democratic Union (*Christlich Demokratische Union*; CDU) and the Christian Social Union (*Christlich-Soziale Union*; CSU)⁵ were the largest political formation and jointly held 226 seats. The centre-left Social Democratic Party of Germany (*Sozialdemokratische Partei Deutschlands*; SPD) held 222 seats. The rest of the seats were held by the Free Democratic Party (*Freie Demokratische Partei*; FDP) with 61 seats, the Left Party (*Die Linke*), 54 seats, and Alliance '90/The Greens (*Bündnis 90/Die Grünen*), 51 seats. After the 2005 elections, the CDU/CSU and the SPD

² The term "states" is the closest literal English language translation of the German word "*Länder*" (in plural form), which is used in the Basic Law (the German Constitution) to refer to the territorial administrative divisions of Germany. The singular form is "*Land*". The 16 *Länder* are Baden-Württemberg, Bayern, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Niedersachsen, Nordrhein-Westfalen, Rheinland-Pfalz, Saarland, Sachsen, Sachsen-Anhalt, Schleswig-Holstein and Thüringen.

³ In German language, the singular form of "*Landtage*" is "*Landtag*".

⁴ The Federal President is elected by the Federal Convention, which consists of members of the *Bundestag*, as well as representatives elected by the *Landtage*.

⁵ The CSU is the CDU's sister party. It is active only in the state of Bayern. While remaining separate political structures, the CDU and CSU co-operate closely at the federal level.

formed a ‘grand coalition’ government, with Angela Merkel (CDU) elected as the Federal Chancellor and an equal division of ministerial positions.

IV. LEGAL FRAMEWORK

A. OVERVIEW

The legislation provides an overall sound basis for the conduct of democratic elections. The Basic Law, adopted in 1949, guarantees suffrage rights and other civil and political rights, including the freedom of expression and opinion, freedom of assembly, and the freedom of political association.

Under the federal system, the legislative power is shared between the federal and *Land* parliaments. Article 31 of the Basic Law provides that federal law takes precedence over *Land* law, while Article 30 provides that unless the Basic Law states otherwise, the exercise of state powers and the discharge of state functions is a matter for the *Länder*. The Basic Law sets out the areas in which the federal and Land parliaments have exclusive and in which ones they have joint jurisdiction (Articles 70 to 91b).

The conduct of elections to the *Bundestag* is primarily regulated by federal legislation, notably the Federal Electoral Act (*Bundeswahlgesetz*; FEA) and the Federal Electoral Regulations (*Bundeswahlordnung*; FER). The rulings of the FCC may also be significant, while the Law on the Scrutiny of Elections (*Wahlprüfungsgesetz*; LSE) is applicable to the review of election complaints. Other legal acts may also be relevant, including Civil and Criminal Codes, and the Law on Election Statistics, as well as legislation adopted by the *Länder* and local government ordinances.

Several amendments were introduced to the FEA after the 2005 elections, including the change in seat allocation method, the broadening of the right of Germans living abroad to vote, the elimination of a requirement for voters to state a valid reason to be able to vote by mail, as well as the introduction of a prohibition for a party to nominate a member of another party as one of its candidates.

The Political Parties Act (*Parteiengesetz*; PPA) regulates the activities of parties, including financing, and sets some general criteria for the treatment of political parties during an electoral period. Section 5 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”. The PPA also provides for a ‘gradual equality’ approach, whereby the amount of services and facilities to be provided is determined on the basis of results obtained by parties in last election to the Bundestag. The FCC has in several rulings found the principle of ‘gradual equality’ to be constitutional.

B. SUFFRAGE

The Basic Law establishes that the right to vote and to stand in elections to the *Bundestag* is granted to every German citizen of at least 18 years of age. The FEA requires that citizens must have had a domicile or have otherwise been permanently resident in Germany for at least three uninterrupted months since the adoption of the Basic Law in 1949. Citizens may

seek election as a party-nominated or an ‘individual’ candidate (*Direktkandidat*) without party affiliation.

Citizens may be deprived of suffrage rights on the basis of a judicial decision, if a custodian has been appointed to attend to their affairs, or if committed to a psychiatric hospital pursuant to the Criminal Code. A court may deprive those convicted to a prison term of at least one year for felony of their right to hold office or to seek election for a period of up to five years. Subject to certain preconditions, those convicted for politically motivated crime may lose the right to vote and to seek election for two to five years.

C. ELECTRONIC VOTING

Section 35 of the FEA foresees the use of electronic voting machines. This issue is further regulated by the Federal Voting Machine Ordinance (*Bundeswahlgeräteverordnung*). The use of electronic voting machines during the 2005 elections to the *Bundestag* resulted in numerous complaints and eventually an appeal to the FCC.

On 3 March 2008, the Court ruled that the specific type of voting machines used during the 2005 elections, which did not provide a verifiable audit paper trail, was unconstitutional.⁶ The Court found that in cases where an election result is determined through computer-controlled processing of votes stored in an electronic memory, the production of a summarizing printout or an electronic display of data were not sufficient to meet public scrutiny requirements. The ruling specified that the use of machines would only comply with the Basic Law if the essential steps of the voting, counting and results tabulation phases could be examined without any specialist or technical knowledge. At the same time, the Court stated that there was no evidence that the machines had not functioned properly, hence did not invalidate any results, nor did it rule out the use of voting machines in future as long as they meet the terms of the ruling.

During the OSCE/ODIHR EAM, some municipal and district level election officials expressed reservations about the use of electronic voting machines. To date, no new legislation regarding their use has been adopted. Electronic voting machines were not used during the 2009 elections to the *Bundestag*.

V. FEDERAL ELECTORAL SYSTEM

A. OVERVIEW

The federal election system is set out in the FEA.⁷ The intention of the system is to grant parties representation in the *Bundestag* “in accordance with the principles of proportional representation combined with uninominal voting,” subject to threshold requirements.⁸ The FEA provides that the *Bundestag*, in principle, shall consist of 598 members, subject to variation resulting from the implementation of the system. Of these, 299 members are elected

⁶ See FCC Judgment of 3 March 2009, 2BvC 3/07, 2BvC 4/07 and FCC Press Release of 3 March 2009, 19/2009.

⁷ Sections 1-7 and 20(3) of the FEA (last amended, 17 March 2008).

⁸ FEA, Section 1(1). In Germany, the system is called ‘personalised proportional system’. It is also known elsewhere as “mixed-member proportional system”.

from single-seat electoral districts (SSEDs) through a first-past-the-post system. The remaining members are elected by proportional representation on the basis of closed lists registered at *Land* level (hereafter 'landlists'). Each of the 16 *Länder* constitutes a multi-seat electoral constituency (MSEC).

Each voter is entitled to cast two votes, marked separately 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. Only parties that have received at least five per cent of valid 'second' votes at the federal level or have won at least three SSED seats are eligible to participate in the allocation of proportional seats. An SSED candidate is considered elected if s/he receives the most votes cast in the district.

Adopted in 1949,⁹ the system is well-established notwithstanding its complexity, and appears to be reasonably well-understood by the citizens. The system, in general, seems to function in accordance with its underlying intention. However, in specific circumstances it may allow for situations in which additional votes for a party result in it receiving fewer seats (see sections D and E, respectively on Splitting of Votes, and Deferred Elections, "Overhang" Seats and "Votes with Negative Weight"). In the run up to the 2009 elections, the election system became the subject of a public debate, mostly as a result of the FCC ruling on 'negative vote weight.'

B. ELECTORAL DISTRICTS

Each *Land* is divided into a variable number of SSEDs determined in proportion to the number of German citizens resident in the *Land*. One SSED is established for approximately 250,000 citizens. The 299 proportional seats are allocated to the 16 *Länder*, with each *Land* allocated the same number of MSEC seats as it has SSED seats.

SSEDs should respect *Land* administrative borders, represent contiguous geographical areas and, where possible, respect the borders of lower level administrative units. Large urban municipalities are divided into several SSEDs. According to FEA Section 3(1)3, deviations in SSED population size should not differ from the federal average by more than ± 15 per cent. If a deviation exceeds 25 per cent, the SSED borders shall be re-drawn. The law does not specify what action is to be taken if deviations are in the range between 15 and 25 per cent.

*Consideration could be given to narrowing the deviation limits in line with good electoral practice.*¹⁰

An Electoral Districting Commission (*Wahlkreiskommission*; EDC) is appointed by the Federal President to review the delimitation of election district boundaries on the basis of periodic population changes.¹¹ Following the 2005 elections, the EDC conducted a review of

⁹ Since then it has been modified on a few occasions, including a change to a 'two vote' model and periodic changes to the number of elected Members of Parliament.

¹⁰ The European Commission for Democracy through Law of the Council of Europe (the Venice Commission) recommends that deviations in population numbers in constituencies, generally, should not exceed 10 per cent "and should certainly not exceed 15 per cent except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity)", Chapter 2, Paragraph 2.2.iv, available at [www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.asp).

¹¹ The Commission may propose changes for reasons other than population changes. See FEA section 3(2)-3(5).

election districts and prepared proposals for amending some boundaries.¹² As a result of the review, Niedersachsen and Baden-Württemberg each gained one SSED seat and Sachsen-Anhalt and Sachsen each lost one seat. In addition, the boundaries of 31 SSEDs were redrawn prior to the 2009 federal elections.¹³ However, the finalized districting plan includes some 53 SSEDs, which deviate from the federal average by more than ± 15 per cent, of which some 18 deviate by more than ± 20 per cent. Some of the respective *Land* authorities did not address some of the amendments proposed in the EDC's report.

Consideration could be given to further enhancing compliance of the districting plan with requirements of the FEA, equality of suffrage principles contained in Article 38(1) of the Basic Law, as well as with the OSCE commitments.

C. SEAT ALLOCATION

At the first stage of the allocation, the objective is to determine the overall number of seats to which each eligible party is entitled. To achieve this, the election administration establishes: (a) the winners in the 299 SSEDs and (b) the total numbers of votes cast for party lists in MSECs aggregated at the federal level. The number of successful 'individual' candidates is subtracted from the total number of 598 seats available for allocation (see details in *Splitting of Votes* subsection). The remaining seats are then distributed proportionally between eligible political parties based on their share of valid 'second' votes at the federal level.

The second stage of the allocation determines which landlist candidates will receive seats. To achieve this, the seats to which each party is entitled at the federal level are allocated to the 16 MSECs in proportion to the 'second' valid votes cast for their landlists in each of the MSECs. This gives a provisional entitlement for all eligible parties in each *Land*. The number of SSEDs won by each party in each *Land* is then subtracted from the total number of proportional seats to which the party is provisionally entitled in each *Land*. This yields the number of landlist seats to which the party is entitled in each MSEC.

Situations may arise in which a party wins more SSED seats than it would have been entitled to based on its proportion of 'second' votes. These 'excess seats', referred to as 'overhang' mandates (*Überhangmandate*), are retained by the party, resulting in an increase of the total number of seats in the *Bundestag*.

D. SPLITTING OF VOTES

Having two electoral choices, voters may split their 'first' and 'second' votes between a SSED candidate of one party and the landlist of another party. This can serve to enhance the number of mandates won by both parties. However, according to the FEA (Section 6(1)), if a voter casts the 'first' vote for a winning candidate registered as an 'individual' or a candidate of a party that did not or was unable to register a landlist in the respective MSEC, the voters' 'second' votes are disregarded. This provision, *inter alia*, lessens the scope for distortions

¹² "Eighteenth Law to Amend the Federal Electoral Act", Federal Law Gazette volume 2008 part I No. 9, Bonn, 18 March 2008.

¹³ Brigitte Gisart, "Basic facts and data about the elections to the 17th German Bundestag on 27 September 2009", Federal Statistical Bureau, Economy and Statistics 8/2009, p. 743-763.

that could occur if parties register their candidates ‘tactically’.¹⁴ At the same time, both of the votes split between a candidate of a registered party and a landlist of another party are counted. Thus, it appears that while in principle all voters have two electoral choices, some split votes are permitted to have ‘double impact’ on the composition of the *Bundestag*, others are restricted to a ‘single impact.’

In 1998, the FCC confirmed the constitutionality of Section 6(1) and found that it “prevents the doubling of the weight of votes cast by voters who elected a successful [‘individual’] candidate and thus serves the realization of the principle of equality of elections.”¹⁵

E. DEFERRED ELECTIONS, ‘OVERHANG’ MANDATES AND ‘VOTES WITH NEGATIVE WEIGHT’

If a person registered as an SSED candidate dies before election day, a deferred election in the respective district is appointed, both for the election of SSED candidates and of MSEC party lists.¹⁶ If the deferred election takes place after the federal election day, partial provisional results are already known. It is thus possible to make forecasts regarding the effect of the results of the deferred election on the overall election results and to campaign for supporters to vote tactically.¹⁷ Specifically, situations may occur in which a party that has won ‘overhang’ mandates during the federal elections may end up losing seat(s) if during the deferred election it receives a somewhat, but not significantly,¹⁸ increased number of ‘second’ votes in the particular MSEC.¹⁹ In other words, additional ‘second’ votes received by the party in question may result in the loss of seat(s) in the same or another *Land* and hence, in effect, these votes have ‘negative weight.’

Consideration could be given that in circumstances requiring the conduct of a deferred election, that only the voting for the new SSED candidate is deferred while the voting for the respective landlist is held on the federal election day.

The conduct of a deferred election after other results are already known can also have other consequences. For example, the votes cast during the deferred election could be decisive in determining a party’s eligibility for the allocation of proportional seats at the federal level if the five per cent threshold is surpassed or three SSEDs are won.

Following a legal challenge, in July 2008, the FCC ruled that the provisions of the FEA that allow for the ‘negative vote weight’ effect are unconstitutional and violate the principles of

¹⁴ For example, it addresses a situation where a party would register landlists, but its SSED candidates would not be registered in the name of the party, but as ‘individual’ candidates.

¹⁵ FCC decision on the constitutionality of Section 6(1), C.II.2, sentence 2, 23 November 1988.

¹⁶ According to official information, since the introduction of the current electoral system, six deferred elections have been conducted, of which four were conducted after the federal election day.

¹⁷ As occurred in SSED #160 (Dresden) in the 2005 federal elections.

¹⁸ So that the number of seats allocated to a party at the federal level remains unchanged.

¹⁹ For example, assume that a party has won six SSEDs in a given *Land*, but it is entitled only to five seats based on its proportion of ‘second’ votes in this *Land*. In this scenario, the party in question receives one ‘overhang’ mandate and the total number of seats in the *Bundestag* will increase by one. Due to the deferred election, this party receives additional ‘second’ votes and its entitlement for proportional seats increases from five to six. Then, the difference between its new entitlement and the number of SSED seats won becomes zero. Thus, there is no longer an ‘overhang’ mandate and, as a result, there is no additional seat in the *Bundestag*.

equality and directness of elections.²⁰ The Court ruled that the *Bundestag* has until 30 June 2011 to make necessary amendments to the FEA. Some parties indicated to the OSCE/ODIHR EAM that they would have preferred adjustments to the election system to have been adopted prior to the 2009 elections to the *Bundestag*. However, there was no consensus on this issue.

VI. ELECTION ADMINISTRATION

A. ELECTION ADMINISTRATION BODIES

The electoral process is administered by a four-tier structure, comprising the Federal Election Committee (*Bundeswahlausschuss*; FEC), 16 *Land* Election Committees (*Landeswahlausschüsse*; LECs), 278 District Election Committees (*Kreiswahlausschüsse*; DEC)s²¹ and some 80,000 Election Boards (EBs).²² The committees are chaired by the respective Returning Officers, while EBs are headed by Election Officers. By law, election officials are required to perform their duties in an impartial manner, and in practice, electoral committees function independently from the federal and state bodies that appointed them.

The Federal Returning Officer (FRO) and *Land* Returning Officers (LROs) are permanent appointees of the Federal Ministry of Interior and of the *Länder* executive authorities or their designated agency, respectively.²³ The District Returning Officers and Election Officers are appointed ahead of each election by the *Länder* executive authorities or their designated agency. Members of election committees and boards are appointed by the respective Returning and Election Officers from among the electorate. Election commissions adopt decisions by the majority of members present. In case of a tie, the Returning Officer or the Election Officer has the determining vote. Some 630,000 people were appointed as polling officials for the 2009 elections to the *Bundestag*.

Participation of political parties in the work of the election administration is provided for in Section 4(2) of the FER. It states that “in the selection of members of election commissions, due consideration should generally be given to the political parties in the order of the number of second votes they obtained in the [respective] area in the last *Bundestag* election.” Details of parties’ specific entitlements are not further elaborated and there seemed to have been varied understanding of this provision in different *Länder*. In practice, the FEC is composed of members nominated by all parties represented in the *Bundestag*.²⁴ The OSCE/ODIHR EAM was informed that two parties, Alliance 90/The Greens and the Left Party, did not have nominees on some LECs because they did not have seats in the respective *Landtage*. The lack of details in the Law did not raise concerns from political parties.

²⁰ See FCC Judgment 2 BvC 1/07, 2BvC 7/07 (3 July 2008) and FCC press release no. 68/2008.

²¹ Some DEC)s are responsible for more than one election district; hence this figure does not correspond to the number of SSEDs (299).

²² In addition, at least one additional EB per electoral district is formed to process postal votes.

²³ The acting FRO is also the Director of the Federal Statistics Institute and a member of the Chair of the Electoral Districting Commission. The LRO is frequently the *Land* Director of Statistics or the Head of the Legal Department of the *Land* Ministry of Interior.

²⁴ The current FEC is composed of two members nominated by the SPD and CDU, and one member nominated by the FDP, the Greens, CSU and the Left Party.

There is a high degree of public confidence in the work of the electoral administration at all levels. This confidence was shared by most political parties met by the OSCE/ODIHR EAM. Election commissions at all levels carried out their duties in a well-organized, transparent and efficient manner.²⁵ Committees held meetings to discuss a number of important issues including approval or rejection of candidate nominations, approval of election results, and review of complaints or appeals. Day-to-day decisions on the organization of elections were generally taken by the respective Returning Officers without holding committees' meetings.

In addition to election commissions, municipal authorities also have an important role in the electoral process. They are responsible, *inter alia*, for the maintenance and update of the civil registry, compilation of voter lists, maintenance of rosters of experienced election commission members and recruitment of new members, verification of the authenticity of data in candidate support documentation, allocation of public space for placement of campaign posters, as well as training of election officials.

Ballot Papers

Ballots are printed on ordinary paper, without obvious security features, according to a sample adopted by the FRO. The ballot paper contained two columns listing SSED candidates (on the left) and landlists (on the right). The order of parties varied from *Land* to *Land* and was determined according to the proportion of 'second' votes the party received in the most recent *Bundestag* elections in the respective *Land*. Newly registered parties were listed in alphabetical order after the parties that have previously contested elections. The order of SSED candidates follows the order of landlists. 'Individual' SSED candidates always appear after parties' SSED candidates.

B. VOTER REGISTRATION

Some 62.2 million German citizens were entitled to vote in the 2009 elections.²⁶ All eligible voters whose residence is registered in the municipal civil registry are automatically included in the voter register managed by the municipal authorities.²⁷ In Germany, registration of residence is obligatory. Citizens must register with local authorities when changing residence and local authorities are responsible for ensuring de-registration of the citizen at his/her previous address. The OSCE/ODIHR EAM interlocutors were of the opinion that this system functions well and expressed confidence in the reliability of voter registration data. It was, however, acknowledged that while a centralized countrywide voter register does not exist, there is no routine practice of cross checking voter registers with a view to identifying and purging possible multiple records across municipal administrative borders.

Citizens are entitled to inspect their voter registration records in person during a five-day scrutiny period by addressing relevant local authorities. Enquiries about third persons' records are permitted only if the respective person is in possession of facts indicating an error. Objections with regard to voter registration data may be filed with the municipal

²⁵ The FRO maintains a website that contains comprehensive information including legal acts, statistics, information on the parties for citizens, for parties on registration issues, and a wide range of press releases (including on ballot paper design, the party registration process, voting by people with disabilities, voting abroad, by mail voting, voting procedures, and warnings on the penalties for voting more than once).

²⁶ See: www.bundestag.de/htdocs_e/elections/statistik/index.html.

²⁷ Maintenance of residents' records is regulated by the Federal Framework Act on Registration.

authority within the inspection period. Municipal authorities are obliged to deliver a decision on any objection not later than ten days before the election, with a copy of a decision provided to the person concerned. Appeals against the decisions of municipal authorities may be lodged within two days to the District Returning Officer. These appeals must be decided upon not later than four days before election day. During the inspection and appeals periods, changes to the voter register may only be made *ex officio* or on the basis of an objection or appeal which was upheld. Voter registers are ‘closed’ not earlier than three days and not later than one day before the election day. Voter lists are deemed to contain sensitive personal data and hence are subject to data protection law. Voter lists are not published and not displayed at polling stations.

Consideration could be given to extending the five-day scrutiny period in order to provide more opportunities for voters to verify their records.

Prior to election day, every registered voter should receive a notification slip detailing *inter alia* the location of the polling station, polling hours, and the number under which s/he is listed in the register. The notification also contains an application form for postal voting. Unlike previous elections, voters are no longer required to provide a justification for the request, which can be made several weeks before election day. Voters who express the wish to vote by mail receive ballots, special voting envelopes, as well as a ‘polling card’ (*Wahlschein*). The ‘polling card’ confirms the identity of the voter, as well as his/her registration data, and allows the citizen to vote both by mail, or at another polling station within his/her election district. The entries of citizens that had applied for a ‘polling card’ were marked in the voter lists with a ‘W’ (for ‘*Wahlschein*’). To be included in the vote count, postal votes needed to be received by the respective postal vote EBs by 18.00 hrs on election day.

German citizens permanently residing abroad are eligible to vote provided that they meet the three-month uninterrupted residency requirement. To exercise their right to vote, citizens abroad must apply no later than 21 days before the election to be registered on the voter list at the place of their last residence in Germany by submitting a special registration form. Voters abroad cast their ballots by mail. Other citizens without a domicile, for instance homeless people, are not included in the civil registry, but are eligible to vote. Unlike citizens who are automatically included in a voter register, these individuals must apply to the respective municipal authorities to be registered to vote.

C. PARTY, PARTY LIST AND CANDIDATE REGISTRATION

The legislation provides for the formation of both ‘associations’ and ‘political parties’. Article 9 of the Basic Law provides that “all Germans shall have the right to form [...] associations.” Article 21(1) provides that “Political parties shall participate in the formation of the political will of the people. They may be freely established.”

While associations need to be registered and fall under regulations of the Civil Code (Sections 21-79), according to the FRO, “German political parties are generally organized as unregistered associations, i.e. associations without legal personality.”²⁸ The legislation generally does not contain any formal requirements for the establishment of political parties.

²⁸ See www.bundeswahlleiter.de/en/parteien/rechtsgrundlagen.html. Some political parties, however, are entered into the Register of Associations and thus have legal capacity.

They must however comply with the provisions of the PPA and FEA respectively when contesting elections or applying for State funding.

1. Registration of Parties as Eligible to Contest Elections

Political parties that have held continuously at least five seats in the *Bundestag* or a *Landtag* since the last elections are allowed to submit their nominations of candidates and landlists without any initial approval and without the need to submit supporting signatures. All other parties and political associations are required to formally notify the FRO of their intention to compete in elections not later than 90 days before election day. The preliminary review of notifications for compliance with the ‘formal’ criteria set out in Section 18.2 of the FEA²⁹ is carried out by the FRO at the moment of submission of documents. The FRO is obliged to inform parties of any mistakes identified at that point. Mistakes and omissions can be addressed only until the termination of the period for the submission of nominations.

Thereafter, decisions on the eligibility of parties are taken during a meeting of the FEC, based on the report of the FRO on the results of the preliminary review. Applicant political parties are invited to the meeting and are “given an opportunity to speak.”³⁰ On 17 July 2009, the FEC held a session to decide which of 52 non-parliamentary political associations and parties who submitted nomination documents were eligible to contest the elections. During the session, the FRO presented the assessment criteria, which apart from the ‘formal’ criteria contained in the FEA, also included ‘substantive’ requirements towards political parties under the PPA.³¹ The criteria included: the number of German citizens who are members; the long-term nature of association’s/party’s ambition to be involved in decision-making at federal and *Land* levels; the size and stability of organization; the number of representations in the *Länder*; the number of public appearances and assemblies; and the party’s participation in previous elections.

While these criteria and legal criteria provide some framework for decision-making, they are formulated in overly general and descriptive terms, and do not set specific and measurable requirements. In this connection, some political parties considered that the decision-making process on parties’ eligibility to compete in elections risks a degree of subjectivity.

Consideration should be given to elaborating in law a set of precise, objective and measurable criteria to determine which parties and associations are eligible to participate in elections.

²⁹ Section 18.2 of the FEA stipulates that notifications need to indicate the name of the party under which it intends to contest elections, be signed by at least three members of the national executive committee of the party, and that party’s written statutes, programme and proof that the executive committee was duly appointed be enclosed.

³⁰ Section 33(2) of the FER.

³¹ Section 2 of the PPA defines political parties as “associations of citizens which exert influence permanently or for longer periods of time on the formation of the political will at federal or *Land* levels and participate in the representation of the people in the German *Bundestag* or *Landtag* provided that they offer sufficient guarantee of the sincerity of their aims in the general character of their circumstances and attendant conditions, particularly with regard to the size and strength of their organization, their memberships and their conduct in public.”

In addition, as the FEC is composed largely of party nominees, this process is essentially a 'peer review', in which members of established parties decide on their competitors. Hence, this arrangement is not immune from conflicts of interest.

Following the review by the FEC, applications of 21 associations and parties were approved. The remainder were denied registration for failing to meet the eligibility criteria.³² The FEC confirmed that a further eight parties were eligible to contest the elections by virtue of the representation in the *Bundestag* and *Landtage*.³³ Thus, in total 29 parties were accepted to compete in the 2009 *Bundestag* elections.

The practice whereby the FEC decides on a large number of applications at a single sitting necessarily means that the FEC has a limited amount of time to thoroughly discuss each case. It is especially problematic that FEC decisions on rejecting applications to contest elections are not subject to appeal to a judicial body prior to election day, particularly because the registration process touches upon the exercise of the fundamental right to stand for office (see section IX *Complaints and Appeals*).

2. Registering Candidates and Candidate Lists

No later than 72 days prior to election day, the FEC notifies all subordinate electoral committees which parties are eligible to nominate candidates and landlists. Candidates nominated by a party must be elected at the party's assembly or by delegates. For this purpose, parties are obliged to hold internal party elections allowing for the nomination of candidates and a secret ballot. Documents evidencing the candidate selection process must be submitted together with actual candidate nominations and landlists.

With the exception of parliamentary parties, nominations of SSED candidates and landlists need to be accompanied by support signatures. Landlists need to be supported by signatures of at least 0.1 per cent of registered voters in the *Land* or 2,000 signatures. SSED candidacies require support signatures from at least 200 registered voters in the election district.

According to the FER, prior to the submission of candidate and landlist nominations for registration, parties need to ensure that the validity of signatures and signatories' personal data is verified by the municipal authorities of the area of their residence, through the comparison with data held in the civil registers.³⁴ The municipal authorities provide parties with proof that this check has been conducted. The OSCE/ODIHR EAM found that the verification of signatures and signatories' data conducted by the municipalities was thorough. However, a number of smaller parties commented to the OSCE/ODIHR EAM that the signature verification requirements and procedures were too onerous, since data needs to be delivered to and verified by numerous different municipal authorities. In this connection, some parties suggested that serious consideration should be given to relaxing the requirements.

³² Decisions to refuse an application to compete in elections require two-thirds of FEC members.

³³ The six parties represented in the *Bundestag*: the CDU, SPD, FDP, Greens/Alliance 90, and the CSU, as well as the Deutsche Volkunion with six seats in the Brandenburg *Landtag*, and the NPD with eight members in the Sachsen *Landtag* and six members in the Mecklenburg-Vorpommern *Landtag*.

³⁴ For constituency nominations see FEA 20(2) and FER 34(4) paragraphs 1-5. For landlist nominations see FEA 27(1) and FER 39(3 – 5).

Nominations of SSED candidates and party lists are submitted to and decided upon by the DEC's and LEC's, respectively. Of the 29 parties that were accepted as eligible by the FEC, 27 successfully registered a landlist in at least one *Land*.³⁵ Six parties registered lists in all 16 *Länder* (CDU/CSU,³⁶ SPD, FDP, Alliance 90/Greens, the Left Party, NPD, and the Marxist Leninist Party (*Marxistisch-Leninistische Partei Deutschlands*; MLDP). A few other parties registered landlists in the majority of *Länder*, while most others only registered candidates in some *Länder*.³⁷ The landlists of seven parties and a number of SSED candidates were refused registration by individual LEC's and DEC's, respectively, mostly due to insufficient numbers of support signatures or shortcomings in registration documents.

Following the confirmation of eligibility by the FEC, the Free Union (*Freie Union*)³⁸ attempted to register landlists in several *Länder*. The party failed in all cases and acknowledged it did not submit the required number of signatures in some instances. In Bayern, where the party gathered a sufficient number of signatures, the respective LEC voted unanimously to reject the FU's landlist on the grounds that its leader, Gabriele Pauli, had not signed a document confirming that the selection of candidates had taken place according to the legal requirements. The FU did not deny that the document lacked the signature, but argued that this document did not require the signature of the party leader. Quoting Section 25 of the FEA, the party also stated that it should have been given an opportunity to address the issue before the decision was taken.³⁹ The LEC, and subsequently the FEC, took the view that the missing signature constituted a 'material error', and as such was not covered by Section 25.

Decisions of DEC's and LEC's not to register candidates and landlists, respectively, may be appealed to the higher election committee within 3 days. On 6 August, the FEC held a public session to hear four appeals it received. By a 4:4 vote, in which the FRO had a determining vote, the FEC decided to reject an appeal by the FU against the decision of Bayern LEC. In a meeting with the OSCE/ODIHR EAM, the party claimed that the LEC and FEC decisions were politically rather than technically motivated. The FEC rejected the appeals of three other parties, all of which challenged the FEC's initial denial to recognize them as eligible to compete in elections. These included the appeals by 'the Party' (*Partei für Arbeit, Rechtsstaat, Tierschutz, Elitenförderung und Basisdemokratische Initiative (Die Partei)*),⁴⁰ the 'Greys' (*Die Grauen – Generationspartei*), and the Citizens' Party for All (*Die Bürgerpartei für "Alle"* (BPA)).

³⁵ The Democratic People's Party (Demokratische Volkspartei Deutschland – DVD) did not submit candidate lists in any *Land*. The Free Union (*Freie Union*; FU) attempted to submit lists in several *Länder*, but failed in all.

³⁶ The CDU registered 15 landlists, while CSU registered a landlist only in Bayern.

³⁷ In total, 3,556 candidates were registered, of which 851 stood as candidates only in SSEDs, 1,344 registered as an SSED and a landlist candidate, and 1,361 were registered only on landlists.

³⁸ The FU was founded in June 2009, i.e. relatively close to the deadline for submitting landlists and candidates. The party did manage to register five SSED candidates in Bayern and one in Brandenburg.

³⁹ Section 25 of the FEA allows for the correction of mistakes in documents if done before the deadline for the submission of documents. It also stipulates that after the expiration of the submission period, "faults may only be rectified in nominations which are otherwise valid." It is, however, unclear what "otherwise valid" means and what kind of mistakes and/or omissions can be addressed after the deadline and at the time the final decision is taken. The FU submitted documents to the Bayern LEC only minutes before the deadline, and said it had no time to append the signature. However, it appears that in all other aspects the landlist met the legal requirements.

⁴⁰ The FRO issued a press release on 14 August, outlining the reasons for the FEC's decision not to register 'the Party' for the 2009 elections, see: www.bundeswahlleiter.de/en/bundestagswahlen/BTW_BUND_09/presse/50_Info_DIE-PARTEI.html.

Subsequently, the FU and *Die Partei* filed cases with the FCC challenging the FEC decisions. The Court ruled that the challenges were inadmissible, as the FCC does not have jurisdiction to hear election complaints prior to election day. The FCC did not rule on the merits of the case.

The current arrangement for complaints and appeals does not provide for political parties to appeal their non-registration to a court of law before election day (see section IX *Complaints and Appeals*).

VII. THE ELECTION CAMPAIGN

A. LEGAL FRAMEWORK FOR CAMPAIGNING

Article 8 of the Basic Law provides for freedom of peaceful assembly without prior notification, with the exception of outdoor assemblies. The Law on Assemblies and Parades (LAP) requires organizers of outdoor assemblies to notify the responsible authorities 48 hours prior to the public announcement of the event.⁴¹ The *Länder* have jurisdiction to further regulate assemblies, provided that legislation respects the Basic Law and the LAP. The campaign is largely unregulated by the federal legislation,⁴² while the municipalities adopt local campaign-related ordinances regarding, for example, the display of campaign posters.

Hate speech is an offense under Section 130 of the Federal Criminal Code; however, the jurisdiction for prosecution rests with the *Länder*. Thus, if a party's campaign material that is displayed countrywide violates the Federal Criminal Code, 16 legal actions in different *Länder* may be required to remove the material.

B. THE 2009 ELECTION CAMPAIGN

Most of the large parties used traditional forms of campaigning including rallies, distribution of flyers, door-to-door campaigning and displaying of posters. The internet, in particular social networking sites, was regarded as an increasingly significant campaign medium. For some German citizens, elections to the *Bundestag* were the fourth electoral event of 2009, and some interlocutors felt that 'election fatigue' had resulted in a rather subdued election campaign. The campaign period was calm and largely uneventful.

Parties were able to campaign and to present their platforms to electors freely. Some local authorities adopted ordinances regarding the placement of posters. Rules varied from place to place. Some ordinances restricted the number of posters parties could display or where they could be displayed. For instance, authorities in Riesa (Sachsen) applied the principle of

⁴¹ Under Section 5.4 of the Federal Law on Assemblies and Parades (LAP), individual assemblies may be prohibited "[i]f facts are known that lead to the conclusion that the host or assembly members have views or allow remarks that are offensive or criminal and which are subject to prosecution by authorities."

⁴² An exception is the Federal Press Act (*Pressegesetz*), which requires all campaign posters to contain an imprint with information on which party and branch is responsible for the content.

‘gradual equality’ to the display of campaign posters,⁴³ whereas authorities in Hamburg allowed posters to be placed almost everywhere. One party informed the OSCE/ODIHR EAM that it had to seek permission from 498 different local authorities to place its posters in one *Land*.

Most parties met by the OSCE/ODIHR EAM did not experience particular difficulties in accessing campaign venues. However, some were denied use of public buildings because local authorities decided not to make any publicly owned buildings available to parties for campaign purposes. A number of parties were not satisfied with the approach taken by local authorities in this regard and in a number of cases filed objections with municipal authorities. Some interlocutors felt there should be less variation in the rules for displaying posters and accessing public buildings, and that the issue could be regulated at *Land* or federal level.

In the course of the campaign, the NPD claimed its posters were being systematically illegally removed or damaged. In a number of cases, the party’s posters were in fact removed by order of the police or a court. For instance, in Fulda (Hessen) posters bearing the anti-immigration slogan “go home, do not come in” were removed by a court order, and in Mecklenburg-Vorpommern and Sachsen, NPD posters bearing the slogan “invasion of the Poles” were taken down by the police.⁴⁴

The NPD was involved in other controversial actions during the campaign period. In August, its website carried an article racially abusing Zeca Schall, an Angolan-born member of the CDU’s campaign team in Thuringia.⁴⁵ In September, the party sent out offensive letters regarding the ‘repatriation of all foreigners’ to the private addresses of a number of candidates from minority communities.⁴⁶

C. PARTY FINANCING

The legislation does not contain any specific provisions regulating campaign finance and there are no limits on campaign expenditure. Parties’ income and campaign-related expenses are reported under the general regulations on party financing set out in the PPA. Parties explained the absence of specific campaign finance regulations by the difficulty to disaggregate expenditures on a specific campaign from general party expenditures, particularly when many elections take place at local, municipal, *Land*, federal and EU levels, sometimes at short intervals.

The OSCE/ODIHR EAM was informed that election campaigns do not constitute a considerable part of parties’ expenditures, whereas the bulk of funds are spent on maintaining parties’ structures at various levels. While the OSCE/ODIHR EAM was informed that some

⁴³ Riesa, with a population of some 35,000 citizens, decided that a total of 700 campaign posters could be displayed in the town. The largest parties were allowed to place no more than four times the number of posters as the smallest parties, subject to a minimum of 35 spaces. Parties and associations that did not previously participate in the elections received 15 spaces.

⁴⁴ In Mecklenburg-Vorpommern, the NPD filed a successful legal challenge against the police action. This was subsequently overturned following an appeal, where a higher court found the content of the posters constituted ‘hate speech’.

⁴⁵ The party urged its supporters to march on his house, causing Mr. Schall to be placed under police protection. The CDU condemned the NPD’s statement and the state prosecutor launched an investigation to determine if the NPD’s action constituted incitement to racial hatred.

⁴⁶ The issue was promptly investigated by the Prosecutor of Berlin.

parties do disclose their campaign budgets, actual amounts spent by parties during a campaign are largely unknown. While some parties commented negatively on the amounts spent by other parties, there appeared to be a broadly shared satisfaction with the current arrangements.

In line with the PPA, political parties finance their activities essentially through state funding, membership fees and donations. To qualify for state funding, parties must secure at least 0.5 per cent of the vote in federal and/or EU elections and/or one per cent of votes in *Landtag* elections.⁴⁷ Parties that only nominated candidates in SSEDs are eligible for state funding if they win 10 per cent of valid votes in the district. The amount of state funding for each political party is determined on the basis of the number of valid votes won by the party in the recent election, as well as on the basis of donations the party received.⁴⁸

In line with Article 21.1 of the Basic Law and Article 23 of the PPA, political parties are required to submit their annual financial reports by 30 September of each year for the preceding year to the President of the *Bundestag*. The reports must include detailed accounts of income, expenditure and assets. All donations must be reported, indentifying the donors whose total contributions during the year exceeded Euro 10,000. In the event that an amount in a party's annual report is misstated, a fine of double the misstated amount is imposed. A failure to declare details of donations above Euro 10,000 may also result in the imposition of a similar fine. In case a party retains an illegal donation, for example an anonymous donation, an amount equal to three times the size of the donation must be paid to the federal budget.

The financial reports must be verified by a certified auditor prior to submission. In addition, if following the verification of a statement of accounts the President of the *Bundestag* deems it necessary, he/she may commission a certified auditor of his/her choice to check the compliance of the report with legal requirements.

OSCE/ODIHR EAM interlocutors underlined that transparency was a founding principles of the German party financing system. However, in practice it is somewhat limited. While parties must immediately report donations exceeding Euro 50,000 to the President of the *Bundestag*, information on these donations is only made publicly available once per month. In addition, some interlocutors felt that the amount of donations requiring immediate disclosure was too high.

Parties' annual reports are posted on the *Bundestag's* website approximately 18 months after the end of the reporting year. This delay is partly due to scrutiny procedures required by law. Thus, accounts for the 2009 election year might not be made public before June 2011. Moreover, a considerable effort is required if a member of the public wishes to analyse the financial reports as the information is not presented in an easily 'searchable' format.

To further enhance transparency of party financing, including of electoral campaigns, consideration could be given to requiring immediate publication of information on large donations, as well as to speeding up the publication of annual reports.

⁴⁷ These parties receive Euro 0.85 per vote up to 4 million votes. Thereafter they receive Euro 0.70 per vote.

⁴⁸ For individual donations up to Euro 3,300, political parties receive Euro 0.38 per Euro donated and these donations are tax deductible. Donations from legal entities and private donations in excess of Euro 3,300 do not qualify for matching funds and are not tax deductible. The maximum total amount of public funds paid annually to political parties shall not exceed Euro 133 million.

VIII. THE MEDIA

Germany has a diverse and pluralistic media environment. In the broadcasting sector, a wide range of public and private television and radio channels operate across the country, with a strong role played by local and regional broadcasters. At the federal level, there are two main public broadcasters - ZDF (*Zweites Deutsches Fernsehen*) and ARD (*Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands*); the latter is composed of various regional TV channels. The public networks are viewed by a significant number of citizens. The private broadcasting sector is dominated by TV channels belonging to the two largest media groups, *ProSiebenSat.1 Media AG* and *RTL Group*. The print media market is dominated by five leading daily newspapers, including *Frankfurter Allgemeine Zeitung*, *Süddeutsche Zeitung*, *Die Welt*, *Frankfurter Rundschau* and the tabloid *Bild*, as well as a number of weeklies, in particular *Der Spiegel*. The internet is increasingly an important medium during electoral campaigns.

A. LEGAL FRAMEWORK FOR ELECTION CAMPAIGNING IN THE MEDIA

The Basic Law guarantees the freedom of expression, press and broadcasting and prohibits censorship.⁴⁹ Several past FCC rulings detail the constitutional principles governing broadcasting and press, and provide guiding principles for media outlets.

The activities of the broadcast media are primarily regulated by the laws of the *Länder* and there are no media-related regulations at the federal level *per se*.⁵⁰ However, the Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag*, hereafter: 'Interstate Treaty') creates a general framework for public and private broadcast media operating countrywide. Section 25 requires the editorial content of private broadcasters to "express a plurality of opinion. Important political, ideological and social forces and groups shall be given appropriate opportunity to express themselves [...]; minority views shall be taken into account" and adds that "a single [private] channel must not influence public opinion in an exceedingly imbalanced way". Section 42(2) provides that parties which have registered at least one landlist are granted an 'appropriate amount' of broadcasting time.⁵¹ The principle of 'gradual equality' is applied to this airtime whereby the larger parliamentary parties receive up to double the amount of airtime allocated to smaller parliamentary parties, which in turn receive no more than double the amount of airtime given to non-parliamentary parties.

Broadcasting time for campaign spots in the public media networks is provided free of charge.⁵² In the private media, a charge of 35 per cent of the price for commercial advertising is levied to cover broadcasting costs.⁵³ The Interstate Treaty prohibits the purchasing of paid advertising 'of a political, ideological or religious nature' on public and private broadcasters.

⁴⁹ These rights are subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young people and the citizen's right to personal respect.

⁵⁰ The only exception is the federal Law on *Deutsche Welle*.

⁵¹ The Interstate Treaty does not stipulate whether this requirement applies to free campaign spots and/or general broadcasting, including news, debates and analytical programs.

⁵² Parties must pay their own production costs and are fully responsible for the content. Broadcasters may refuse footage that obviously violates criminal provisions (see FCC decision in 1978 (BVerfG, decision of Feb. 14, 1978, 47 BVerfGE 198).

⁵³ Legal guidance of the directors conference of media institutes of the *Länder* about election advertising slots for political parties, (2005) 11 November 2008.

However, parties are allowed to buy advertising space in print media, although the print media are free to decide whether to accept the advertisements or not.⁵⁴ In practice, some newspapers refuse all political advertisements and many parties cannot afford to place advertisements in national newspapers.

While there is no centralized federal body regulating the conduct of the media, the public broadcasting corporations are governed by independent broadcasting councils. These councils evaluate the content of broadcasts, but have no right to intervene in editorial policies. The press is largely self-regulated. The German Press Council (*Deutscher Presserat*) was established to protect the freedom of press, as well as to receive complaints against print media and to deliver opinions on them. The Council's Press Code states that "accurate informing of the public during election campaigns includes press reporting on opinions that it does not share". The Council's powers are limited, but its rulings carry 'moral weight'.⁵⁵ In practice, it receives relatively few campaign-related complaints.⁵⁶ Complaints are reviewed only every three to four months, so any election-related complaints would only be considered well after the election, thus depriving complainants of effective remedies.

B. MEDIA COVERAGE OF THE 2009 BUNDESTAG ELECTIONS⁵⁷

The larger parties welcome free airtime, but do not consider it a central pillar of their election campaigns as they participate in political discussion programmes throughout the year – not just during election periods. However, for the smaller, non-parliamentary parties, free airtime is seen as an essential campaign tool, since in general they have less exposure in the media and often have limited financial resources.

While ARD, ZDF and *Deutschlandradio* adopted a joint public document setting out some general principles for the allocation of free airtime, it did not stipulate the methods used for determining specific parties' entitlements. The OSCE/ODIHR EAM was informed by ARD that the criteria for establishing the entitlements were indicated in an internal regulation, which was not publicly available. Based on the information received by the OSCE/ODIHR EAM from political parties, for the entire duration of the electoral campaign, SPD was allocated 12 minutes (eight spots), the CDU was allocated ten and a half minutes (seven spots), the FDP, Greens, the Left Party and the CSU were all allocated six minutes (four spots), while non-parliamentary parties were each allocated three minutes (two spots). Private media operating countrywide traditionally attempt to match the schemes for the allocation of airtime of ARD and ZDF, according to the OSCE/ODIHR interlocutors.

The main public broadcast networks could consider publishing the criteria used to calculate parties' entitlements to free airtime in an attempt to increase transparency and predictability.

In addition to the broadcasting of campaign spots, ARD organized a 'Chancellor's Debate' between Angela Merkel and Frank-Walter Steinmeier, the leaders of the CDU and SPD. Three other parliamentary parties took part in a separate debate, while non-parliamentary

⁵⁴ This principle was established by the FCC in 1976 in decision BVerfG in NJW 1976, S.1627.

⁵⁵ It may issue an 'advice notice' to an editor, a 'notice of censure', a 'non-public reprimand' (in the interest of victims' protection) or a 'public reprimand'.

⁵⁶ For example, in 2009, the Council had received just 20 such complaints shortly before election day.

⁵⁷ The OSCE/ODIHR EAM did not conduct a comprehensive media monitoring.

parties debated only among themselves. ARD and ZDF had to cancel plans to hold debates among leaders of the five largest parliamentary parties due to the unavailability of the leaders of CDU and SPD. Representatives of FDP, the Greens and the Left Party all criticized this decision.

In other respects, the parliamentary parties were satisfied with their coverage by the public broadcast media, including in news and discussion programmes. Some of the non-parliamentary parties expressed dissatisfaction with the media's tendency to focus coverage on the six largest parties, and stated that they were rarely invited to participate in political discussion programmes or to give interviews.

IX. COMPLAINTS AND APPEALS

The judiciary enjoys a high degree of public confidence, with the FCC being held in particularly high respect. Parties and citizens are active in using available administrative and legal remedies. However, in the electoral context, only a limited number of issues can be the subject of complaints during the campaign.⁵⁸ The electoral and judicial authorities repeatedly stressed to the OSCE/ODIHR EAM that due to short timeframes prior to the elections it would not have been practically or legally possible to review all complaints and appeals sufficiently expeditiously to avoid negative effects for the administration of the electoral process.

Other types of complaints can only be lodged after the election day.⁵⁹ In particular, Article 41 of the Basic Law stipulates that the *Bundestag* is responsible for 'scrutinising elections,' and the scrutiny procedure is set out in the Law on the Scrutiny of Elections. This Law provides for the establishment of an Election Scrutiny Board (ESB), elected by the *Bundestag*,⁶⁰ with jurisdiction to receive and rule on complaints regarding actions or inactions of electoral bodies. Complaints to the ESB are only admissible after the election has taken place, and may be filed within two months after the election day by any person or group of people eligible to vote, *ex officio* by the LROs and the FRO, and by the President of the *Bundestag*.⁶¹

Since the ESB is formed by the incoming *Bundestag*, newly-elected deputies appoint the body, which would take decisions on cases involving their own elections. This raises an issue of potential conflict of interests, which could have an impact on the impartiality of and confidence in the body and its decisions. Decisions of the ESB are appealable to the FCC; however, a petitioner is obliged to submit 100 signatures of eligible voters in support of the appeal.

Consideration should be given to reviewing the provisions related to appeals of ESB decisions to the FCC with a view to eliminating the requirement for the support

⁵⁸ Decisions of local authorities related to voter registration and the issuance of polling cards can be appealed to DEC. Decisions of DEC regarding SSED candidate nominations and of LEC regarding landlist nominations can be appealed to higher-level committees.

⁵⁹ Section 49 of the FEA provides that "any decisions and measures directly affecting the electoral procedure may only be contested by means of legal remedies provided by [the FEA and FER] and by way of the electoral scrutiny procedure".

⁶⁰ The ESB consists of nine ordinary members, nine deputies and permanent 'advisory' members nominated by any parliamentary party not represented by an ordinary member.

⁶¹ Law on Scrutiny of Elections, Section 2(2).

signatures in order to ensure that access to justice of an individual is not conditioned on the support of others.

Those filing complaints with the ESB and any subsequent appeals to the FCC are not only required to prove that their rights had been violated, but also that the violation affected the outcome of the elections (for instance, the winning candidate or the allocation of mandates). This is a formidable requirement.⁶²

Importantly, while the legislation allows for a final decision on election complaints to be made by a court, in this case the FCC, the impossibility of filing an appeal to a court prior to election day considerably diminishes the availability of an effective redress against incorrect administrative decisions and actions. It is recognized that the resolution of post-election complaints by the ESB and FCC in most cases requires considerable time.⁶³ In case of a successful challenge, it appears that the only course of action available to rectify the identified mistake would be to invalidate the results of the election(s) in question and to repeat the polling.

To ensure the protection of suffrage rights, consideration should be given to revising the appeals arrangements so that at least certain types of complaints, in particular those related to the eligibility of parties and registration of candidates, landlists and voters, could be heard by a judicial body before the election, thereby providing a timely resolution of election-related disputes that is integral to the broader principle of effective means of redress.⁶⁴

In the course of the campaign, relatively few complaints were filed with district and *Land* electoral authorities. The OSCE/ODIHR EAM found that, in general, these authorities addressed complaints in a timely manner and with respect of legal requirements. A number of appeals related to candidate and landlist registrations were filed with LECs and the FEC, respectively (see section on *Party List and Candidate Registration*).

X. ELECTION OBSERVATION

The election legislation does not contain explicit provisions for the presence of election observers. At the same time, the OSCE/ODIHR EAM was informed that a number of legal provisions emphasize the public nature of the electoral process. In particular, Section 31 of

⁶² Following the 2005 elections, the ESB dismissed all 195 complaints it received.

⁶³ The OSCE/ODIHR EAM was informed that it had taken two to four years for the ESB and FCC to take decisions on all complaints and appeals filed in some previous elections.

⁶⁴ Paragraph 5.10 of the 1990 Copenhagen Document provides that “everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity”. The 1989 Concluding Document of the Vienna Meeting (CSCE), paragraph 13.9, iterates “the right to a fair and public hearing within a reasonable time before and independent and impartial tribunal.” The 1991 Moscow Document stipulates that “participating States will endeavour to provide for judicial review of [administrative] regulations and decisions.” The UNHRC General Comment No. 31, paragraph 15, requires that states “ensure that individuals also have accessible and effective remedies to vindicate...rights” and emphasizes an “obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.” The Venice Commission’s Code of Good Practice in Electoral Matters, paragraph 95, emphasizes the importance of having appeals about pre-election matters resolved in a timely manner before election day.

the FEA states that “polling shall be public”, and Section 54 of the FER elaborates that “during the poll, as well as during the establishment and declaration of the election results, the public shall have access to the polling station if this is possible without disruption of the electoral process.” The ‘public nature’ of the electoral process was further emphasized by the FCC ruling on electronic voting machines, and the Federal Ministry of Interior considers it applies to international election observation.

However, the FEA and the FER do not contain definitions of the term ‘public’. In addition, Section 10 of the FEA requires election officials “to exercise discretion regarding information to which they gain access as a result of their official duties.” This provision combined with the lack of a definition for what constitutes the ‘public’ could create confusion as to what information about the electoral process can be released. Furthermore, the legislation appears to limit the ‘public nature’ of the process to polling while observers should have access to all phases of the elections, including before polling.

While there is no formal accreditation mechanism for observers, the Ministry provided the OSCE/ODIHR EAM with authorization letters, which were presented to interlocutors at their request during the course of the mission, including on election day to Election Boards (*Wahlvorstände*; EBs).

*In order to create the legal basis for the effective implementation of Paragraph 8 of the 1990 Copenhagen Document and to ensure full access to all stages of the election process to observers, consideration should be given to introducing an explicit provision for election observation, in particular setting out rights and responsibilities of observers as well as accreditation arrangements.*⁶⁵

XI. PARTICIPATION OF WOMEN

Women participated in the electoral process rather actively. Women candidates constituted 31.2 per cent of all landlists and 23.8 per cent of candidates in SSEDs. Some of the larger parties had formal policies to ensure appropriate representation of women as candidates. The SPD resolved that at least 40 per cent of candidates were to be men and at least 40 per cent to be women. The Green Party and the Left Party required that women occupied every other position on their landlists.

In election administration, women were relatively well-represented as LROs (5 of 16), but were much less frequently appointed as DROs (44 of 278). Women constitute 32.8 per cent of the *Bundestag* elected on 27 September 2009.⁶⁶ The new government is led by a woman, Angela Merkel, and includes five other women cabinet ministers.

⁶⁵ Paragraph 8 of the 1990 Copenhagen Document reads: “The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law.”

⁶⁶ Alliance 90/the Greens have the highest share of women MPs (54.4 per cent), followed by the Left Party (52.6 per cent), the SPD (38.3 per cent), the FDP (24.7 per cent), the CDU (21.6 per cent) and the CSU (13.3 per cent).

XII. PARTICIPATION OF MINORITIES

In Germany, the status of ‘a national minority’ is applied to Danish, Sorbian, Frisian and Roma/Sinti German citizens who have traditionally resided in specific areas.⁶⁷ These minorities enjoy the rights secured by the Council of Europe’s Framework Convention for the Protection of National Minorities.⁶⁸ Other groups are not recognized as national minorities.

Germany implements special arrangements in federal elections to promote the participation and representation of national minorities in political life. Candidates and landlists of parties seeking to represent national minorities are exempted from collecting support signatures, the need to surpass the threshold in order to receive seats, and the need to secure the minimum level of votes to receive state funding.

A number of associations seek to represent the interests of national minority voters. However, none of these parties participated in the 2009 *Bundestag* elections.

Some 15 million people with an immigrant background are resident in Germany,⁶⁹ of which some 6.7 million do not possess German citizenship.⁷⁰ Of those eligible to vote, it is estimated that some 800,000 are naturalized ethnic-Turkish German citizens. In general, ‘ethnically-based’ parties have not been formed in Germany. Instead, mainstream parties have sought to represent all citizens.

XIII. VOTING AND COUNTING

A. VOTING

In accordance with standard practice, the OSCE/ODIHR EAM did not observe election day proceedings in a systematic or comprehensive manner. However, mission members visited a few polling stations in Berlin, Munich, Rostock, Dresden, Saarbrücken and Trier.

The OSCE/ODIHR EAM was granted access to all polling stations visited, and in general was able to receive all information requested. In these polling stations, polling was organized professionally and transparently and took place in a calm environment. The OSCE/ODIHR EAM was informed that due to the high level of trust in the election administration by most parties and the public, there is generally little interest in observing the process.

⁶⁷ The Danish minority is concentrated in Schleswig-Holstein. The Sorbian minority is concentrated in Brandenburg and Saxony. Frisians reside at the western coast of Schleswig-Holstein and the north-western part of Lower Saxony. Roma/Sinti are spread all across Germany, many living in larger cities.

⁶⁸ See the Second Opinion on Germany by the Advisory Committee on the Framework Convention for the Protection of National Minorities, published on 7 January 2007, available at www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Germany_en.pdf. The minority languages are promoted under the terms of the European Charter for Regional or Minority Languages, which Germany ratified in 1998.

⁶⁹ See www.bundesregierung.de/nn_245708/Content/EN/Artikel/2007/12/2007-12-19-migrationsbericht-lagebericht_en.html.

⁷⁰ See www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/press/pr/2009/03/PE09_110_12521.psm.

Most Election Boards were composed of civil servants or public employees, and worked in a collegial, impartial and inclusive manner. Voters were processed quickly and efficiently, and no queues, delays or overcrowding were witnessed. All EBs visited had sufficient election material. The legislation does not appear to require the EBs to account for ballot papers received, used, spoilt and unused. EBs were frequently unaware of exactly how many ballots had been received.

To further enhance transparency, consideration could be given to including in polling station protocols separate lines for the numbers of ballots received, used and unused.

Voting procedures were overall implemented correctly and the secrecy of the vote was uniformly respected. In most cases, upon entering the polling station, voters were asked for their official identification documents and notification slips. However, certain instances of voters being allowed to vote without presenting identification documents were observed and reported to the OSCE/ODIHR EAM. The EBs checked voters' names against the voters' list, and then issued a ballot. Once a voter marked the ballot, the EB checked the voter's entry on the voter list with an 'X' and the voter deposited the folded ballot into the ballot box. The OSCE/ODIHR EAM noted some minor procedural variations. The methods for securing ballot boxes varied, and in some locations voting booths were equipped with pencils instead of pens.

Visually impaired or blind voters could request a Braille template enabling the ballot to be marked in person. People not in a position to mark their ballot unaided could receive assistance from another person of their choice, including an EB member. The person providing assistance is required to keep in confidence his or her knowledge of the voter's choice. The location of some polling stations did not provide easy access for voters with walking disabilities.⁷¹

B. POSTAL VOTING

Postal voting is increasingly popular in Germany and appears to enjoy the confidence of the electorate. Some 21.4 per cent of voters cast their ballots by mail. There are some procedures to protect the integrity of the vote (see also Section VI. B on Voter registration), such as for instance the fact that all voters casting their ballots by mail must sign a statement, included on the polling card, that they have marked their ballots in person.⁷² However, voting in uncontrolled environments is more open to abuse, particularly in situations where it may involve vulnerable groups such as citizens who are dependant on others to cast their ballot.

The OSCE/ODIHR EAM was informed of isolated cases of electoral malpractice related to postal voting in the recent local council elections in Bad Ems (Rhineland-Pfalz). The EAM was informed that 120 postal ballots applied for by residents of a retirement house through proxies had been filled in by one individual. In this case, the results were declared invalid. These elections were repeated on 27 September 2009. It is understood that a similar case occurred during local elections in Saarland.

⁷¹ Voters could apply to vote at another polling station in the district, which provided barrier-free access.

⁷² In cases of assisted voting, the statement is signed by the person providing assistance together with a statement that the choice corresponds to the voters' will.

Some minor incidents related to postal voting were brought to the attention of the OSCE/ODIHR EAM. A mix-up by a private contractor with postal ballots in Köln resulted in wrong ballots being sent to 8,620 voters.⁷³ The problem was identified before election day and voters were sent new ballots.⁷⁴ However, some 290 voters still submitted wrong ballots and hence their 'first' votes had to be disregarded. The error did not affect the overall election result in the district. On 14 October 2009, the FRO reported four other mix-ups involving postal ballots in other cities, which all involved far fewer voters.⁷⁵

Although the legal and administrative procedures regarding postal voting appear to have been developed to prioritize enfranchisement and voter participation, consideration should be given to reviewing the adequacy of existing safeguards against potential abuse of the postal voting system.

C. COUNTING, TABULATION AND ANNOUNCEMENT OF RESULTS

In polling stations visited, the counting of votes was conducted transparently, efficiently, and according to the established procedures. Some procedural variations were noted.⁷⁶ In counts followed, the EBs did not experience any difficulties with completion of result protocols. Ballots sorted in stacks as required by electoral procedures were sealed in envelopes and placed in the ballot boxes, which were also sealed. EBs reported the results over the telephone and immediately after delivered election materials to the DEC or in some cases to designated collection points. In general, the process of gathering the results by telephone and the delivery of polling materials to the next level was highly efficient and conducted transparently.

District election offices entered the polling data into computerized vote aggregation systems, which fed into the *Land* and federal vote aggregation systems. The OSCE/ODIHR EAM was informed that the software used includes plausibility checks and automatically screens out anomalous data. Aggregated results were made publicly available on the internet as soon as they were received, and provisional results were updated regularly. The overall provisional results were available on the FRO's website by early morning of 28 September.

On 14 October, the FEC held a session to announce the final results. The FRO declared that some additional 13,650 voters were established to have cast ballots as compared to the provisional results, and that vote recounts had been conducted in 18 districts. This mostly involved one or two polling stations per district, although results of large numbers of polling stations were recounted in Hamburg Altona (37 stations), Bremen (37), Bremerhaven (42), Berlin Pankow (21) and Berlin Steglitz (58).

⁷³ On 7 September, some 8,400 postal ballots meant for District 96 were mistakenly sent to voters in District 94, and, on 16 September, to some 220 voters in District 95.

⁷⁴ The new ballot envelopes were marked with a capital 'A' to distinguish it from the original ballot envelope. Wrong ballots were otherwise elicited during counting.

⁷⁵ Bremen, Berlin Spandau, Dresden, and Hildesheim.

⁷⁶ For example, in some stations the number of electors that have voted was established before the ballot box was opened. In other locations the EB counted the number of ballots in the box before determining this number. The regulations do not necessarily require the number to be determined before the ballot box is opened, although it is considered as good practice.

ANNEX 1 – FINAL RESULTS

Final Results of Parliamentary Elections 2009					
	First Votes		Second votes		Total Seats
	Number	%	Number	%	
Registered voters	62.168.489	-	62.168.489	-	
Voters who voted	44.005.575	70,8	44.005.575	70,8	
Invalid votes	757.575	1,7	634.385	1,4	
Valid votes	43.248.000	98,3	43.371.190	98,6	
SPD	12.079.758	27,9	9.990.488	23	146
CDU	13.856.674	32	11.828.277	27,3	194
FDP	4.076.496	9,4	6.316.080	14,6	93
DIE LINKE	4.791.124	11,1	5.155.933	11,9	76
GRÜNE	3.977.125	9,2	4.643.272	10,7	68
CSU	3.191.000	7,4	2.830.238	6,5	45
NPD	768.442	1,8	635.525	1,5	
REP	30.061	0,1	193.396	0,4	
FAMILIE	17.848	0	120.718	0,3	
Die Tierschutzpartei	16.887	0	230.872	0,5	
PBC	12.052	0	40.370	0,1	
MLPD	17.512	0	29.261	0,1	
BüSo	34.894	0,1	38.706	0,1	
BP	32.324	0,1	48.311	0,1	
PSG	-	-	2.957	0	
Volksabstimmung	2.550	0	23.015	0,1	
ZENTRUM	369	0	6.087	0	
ADM	396	0	2.889	0	
CM	-	-	6.826	0	
DKP	929	0	1.894	0	
DVU	-	-	45.752	0,1	
DIE VIOLETTEN	5.794	0	31.957	0,1	
FWD	-	-	11.243	0	
ödp	105.653	0,2	132.249	0,3	
PIRATEN	46.770	0,1	847.870	2	
RRP	37.946	0,1	100.605	0,2	
RENTNER	-	-	56.399	0,1	
Freie Union	6.121	0	-	-	
Others	139.275	0,3	-	-	
Total number of seats					622

Source: Website of the Federal Returning Officer,
www.bundeswahlleiter.de/en/bundestagswahlen/BTW_BUND_09/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 co-ordinates 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/odihr).