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No. 2/2005 POLITICAL FINANCE REGULATIONS: BRIDGING THE ENFORCEMENT GAP

Political finance regulations have been introduced in a majority of democracies to promote fair political competition and to 'clean up' politics, specifically to limit the influence of business over the political sphere. But all too often political party and campaign finance laws are breached with impunity, in the face of enforcement agencies that are constrained by cumbersome legislation, a lack of independence, insufficient resources or a lack of will. This situation needs remedying because people's trust in democracy is eroded when democratically elected leaders fail to comply with laws they themselves design.

The stakes are high, both in terms of impact on the democratic system and of the abundant spoils of political power that are traded in corrupt transactions. Yet even when there appears to be political will to sanction infractions of political finance laws, these laws are difficult to enforce. In the well-documented Elf case, for example, committed prosecutors were unable to produce evidence of the allegation that French political parties had received millions of dollars from oil company Elf in the late 1980s; misuse of private property by company executives was easier to demonstrate.

Transparency International has been pushing for political finance regulations across the globe to be enacted and enforced. The main political finance regulations aim to:

- Reduce demand for funding and limit the comparative advantage of wealthy parties by providing public funds to political parties;
- Curb the influence of corrosive money through caps on individual donations or donations from corporate, foreign or trade union sources;
- Make political parties more accountable to the electorate by increasing transparency of political funding (see **Policy Position #01/2005, 'Standards on Political Funding and Favours'**).

By monitoring campaign expenditure, TI's National Chapters have provided evidence of the undue influence moneyed interests have over the political process, and the unfair advantage that the abuse of access to state resources has

provided incumbent powers. Monitoring efforts have shown that the formal checks on political finance are not working adequately. Formal checks are flouted by parties and candidates who present balance sheets that are blatantly false or doctored using accounting tricks such as channelling donations through satellite branches of the party or splitting donations into amounts just below the threshold requirement for disclosing them.

Despite the importance of enforcement, it is not adequately dealt with in international conventions and standards. In the interest of furthering the debate, and given the gap in international norms, TI advocates adherence to the following **ten principles to ensure the enforcement of political funding regulations**.

KEY RECOMMENDATIONS

- Political finance rules must be clear, realistic and regularly updated
- Regulatory bodies must be given independence, resources and investigatory powers and must be backed up by functioning and independent courts
- Sanctions should apply to individuals as well as the party

1. Effective enforcement depends on respect for the rule of law

The political culture within any particular society or country has an enormous bearing on whether laws governing political finance will be enforced. If it is not the practice for the law to be followed and enforced in a country, then the specific area of political finance law is unlikely to prove the exception.

Also relevant is whether a strong rights culture operates within a country since there might be a clash between the aspirations of election law and the fundamental rights that are protected in a particular society. For instance the US Supreme Court has battled with attempts to

limit third-party spending on the grounds that it violates freedom of expression: the freedom to donate money has been equated with free speech. Principles may prove malleable in the face of financial pressure, however. In France, for example, the argument that parties should be considered civil society organisations, immune from any kind of state regulation, was sidelined when business funds dried up and public funds were needed.

2. Effective enforcement depends upon clear, realistic and accessible rules, regularly updated

It is impossible to enforce vague legislation properly. Similarly, if loopholes are introduced into the law, its impact will be minimised. And if the law is too detailed, parties and candidates might feel that it threatens their freedom.

There needs to be a political consensus that the regulation in question is fair among the parties. It must not be perceived as a means of giving one party an advantage over another. It is important, therefore, that all parties, NGOs, monitoring bodies, lawyers, the press and academics are involved in the law-making processes.

Finally, the legislation needs to be relevant to the circumstances of the country and must give political parties and candidates a fair opportunity to conduct their relevant activities. If spending limits are unrealistically low, for example, all candidates for elected office may be permanently in breach of them.

3. There is a need for effective and independent internal auditing by the parties

In order to enforce bans or limits on political donations, the sources and amounts of money entering and leaving the campaign chests of political parties and candidates must be known. Any monitoring effort must therefore start with the financial statements produced by the political parties and candidates themselves. These must be produced annually as well as after each election and must include receipts and expenses. In addition, reports on donations should be presented before each election. Statements must be independently audited and presented to the authorised monitoring agency.

Authority for producing accurate and timely reports must rest with a committee or an individual, usually the party treasurer or special agent who is personally responsible for all political income and expenses.

Standard reporting formats help, and monitoring is easier if transactions have to be routed through bank accounts.

4. Regulation must not be disproportionate in the sense that it discourages ordinary party activities; a balance should be struck between the need to regulate and the need for effective supervision

Regulations need to consider a wide array of funding channels or else they will be easily circumvented. But if they are too cumbersome public authorities will find it impossible to implement them and parties and candidates will find it difficult to comply with them. (It is important not to overstate this argument, however: accounting rules governing parties are rarely as detailed as those that apply to companies).

Some countries have introduced different requirements for smaller parties, for whom reporting requirements are more onerous than for better-resourced parties. In Germany, for example, smaller parties that fail to win enough votes to qualify for public funding can have statements inspected by certified accountants and not the more expensive chartered auditors.

A difficult area to regulate is **third-party funding**, which refers to local party branches and satellite organisations that channel money to the party or carry out services that could be conceived as in-kind donations to the party but that remain off of the balance sheet. The United Kingdom has had varied success in attempting to regulate third-party foundations by requiring parties to define them as 'accounting units' in their organisational structure. All accounting units spending over a certain threshold must submit independent statements; smaller units must be included in the global party accounts.

A second grey area for regulators is the enforcement of laws governing the **use of public funds**, by individuals seeking re-election or a new elected office. A few phone calls from a government phone line in support of an election campaign would probably not result in penalties for the candidate. But should it trigger an investigation given that the small number of calls identified might be just the tip of the iceberg? Incentives for greater transparency can help, for instance jurisprudence generated by the French Conseil d'état indicates that if the offender pays the public entity the money back, the case will be dropped. This good faith principle should not be granted too readily, however, or it risks being abused by parties that regularly infringe the law.

5. The violation of party finance regulations must be effectively sanctioned

When it comes to sanctioning, two questions must be asked. Firstly, is the sanction appropriate? If the sanction is too harsh, the judicial authorities will err on the side of caution because the cost of a wrongful ruling is high. On the other hand, if it is too weak, then it will not act as a deterrent. Sanctions can be financial, administrative, criminal and electoral disqualification and should consider the culpability of both donors and recipients.

Secondly, to whom should the sanction apply? Attaching liability not just to the organisation, but also to an individual officer within the organisation with responsibility for financing, tends to be more efficient than relying on sanctions on the party, since fear of criminal proceedings acts as a more effective restraint on party officials than penalties for the party.

The timing of court rulings also has a bearing on the efficacy of sanctions. In France, for example, the declaration of the results of the presidential elections occurs before the accounts are scrutinised and cannot be challenged. Therefore the sanctions provided for in law in the case of a breach of regulations by the winning candidate are unlikely to ever be applied.

6. Regulatory agencies must be independent in terms of appointments, security of tenure and funding, and should themselves be independently supervised

There is no simple answer to the question of which type of body is likely to be the most suited to enforcing political finance laws. Different countries have opted for different types of body, such as electoral commissions, government ministries or anti-corruption agencies. Regardless of the type of body chosen, success in enforcing laws depends on the body's independence.

There are three conditions for independence:

- that appointments be made independently of the government
- that those appointed to the regulatory body be given security of tenure
- that the body has secure funding

In terms of resources, scrutinising party accounts for irregularities is time consuming and labour intensive. Control bodies have extremely varying capacities. The French campaign accounts and political funding committee hires 170 temporary rapporteurs during the election period – in addition to a permanent staff of 33 – to scan newspapers for evidence of campaign

spending that is not included in the accounts. In Germany, by contrast, the same task falls to a team of six, though they do not audit accounts.

In practice, opposition parties tend to be the most interested observers of party funding and many investigations begin with their complaints. The existence of a free press and a dynamic civil society is important, since it is often the cases uncovered these groups that trigger investigation. Voters should also be able to file complaints.

Enforcement is more effective when a single agency is in charge: dividing up political finance regulations between two or more bodies tends to leave parts of the puzzle to fall between their jurisdictions. In Italy, for example, different bodies monitor candidate accounts and party accounts, with little coordination between them.

7. The regulatory authority must have adequate powers to supervise and investigate accounts and to refer irregularities to the criminal justice authorities

Very often control is limited to investigating the procedural irregularities in the accounts provided by candidates and parties, without probing behind the figures that the candidates and parties declare.

Constitutional safeguards sometimes protect parties from scrutiny of their reports, but even some of the oldest democracies have revised these protections in recent years. In 2000, Britain opted to examine party accounts, which for decades had been protected on the basis of respect for privacy. German parties, on the other hand, continue to be sheltered from direct scrutiny by the state. Instead it is independent auditors that verify accounts, which are then presented to parliament.

Public subsidies are an important source of public control since receipt of public funds can be made conditional on reporting. Where there are no public subsidies, enforcement bodies have to find another way to control finances. In the United Kingdom, for example, political parties cannot have their names on ballot papers until they register with the Electoral Commission and therefore come within its scope of enforcement.

Enforcement bodies need to be backed up by functioning courts staffed with independent judges who have the means to conduct in depth investigations.

Care needs to be taken to delineate the scope of judicial action in the sphere of political financing, however. Minor errors in reporting are

not necessarily an act of corruption.

8. The regulatory body must respect human rights, particularly the rights to due process and rights to be found in international and regional humans rights conventions

The goal of curbing corruption in the financing of electoral politics should not run counter to the goal of respect for human rights and personal freedoms. Many regulatory bodies have been created in the aftermath of scandal, and there is a tendency towards symbolism – either creating bodies that are in practice weak and ineffective, or giving them overarching powers that contravene due process rights.

The UK Electoral Commission has the power to require a relevant person from any organisation that falls under its supervision (political party or third-party organisation) to produce documents, books or other records related to the income or expenditure of the organisation. It can also require that the individual provide an explanation of the information in question, and it is a criminal offence to fail to provide this information, even if it is self-incriminating. Furthermore, it can enter the organisation's premises, inspect books and take copies of any documents found there, without any prior judicial authorisation or warrant. The powers have never been used, however, and are unlikely to be except in the most egregious of cases.

A less independent enforcement body based in a country with weaker democratic traditions

could abuse such powers. Indeed in a number of post-communist countries, selective partisan enforcement of political finance regulation has served to reduce electoral competition by intimidating supporters to opposition parties.

9. The regulatory body itself should be subject to legal accountability, either through administrative law or by other means

An important safeguard against ineffective or selective use of the enforcement machinery is to make sure that the regulatory body is itself scrutinised.

In Germany, for example, the speaker of the Bundestag is responsible for enforcing political finance laws, but is himself overseen by the federal audit court. This court makes sure that laws governing the distribution of public funds are not breached, and that the speaker does not favour the parties with which he is aligned.

10. The regulatory body should provide accessible information, produced in a timely manner and published on the Internet

Timely disclosure of the sources of political donations empowers the electorate to make an informed choice on election day. But in some countries, a year or two may pass between the time a contribution is made and the time it is disclosed.

Enforcement bodies need to post reports online before the election, and make sure that the reports are presented in a way that is easy to use and understand.

References:

- The principles were developed at an expert meeting convened by TI and Transparency International/France in May 2004. For a full report and a list of conferences papers and case studies on France, Germany, Italy, Portugal and the United Kingdom, see http://www.transparency.org/global_priorities/corruption_politics
- The Council of Europe has developed one of the most detailed sets of guidelines on political financing, but they lack detail on enforcement. See 'Guidelines and Report on the Financing of Political Parties', adopted by the Venice Commission in March 2001, [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)008-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)008-e.asp)
- Transparency International, Position Position #01/2005, 'Standards on Political Funding and Favours', http://www.transparency.org/global_priorities/corruption_politics
- For information on the Elf case (p.1, above) see TI's *Global Corruption Report* 2004, pp 59–71; for information on US campaign finance laws and relevant US Supreme Court rulings (p.1, above) see www.brookings.edu/gs/cf/courts.htm.

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