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## A. Preliminary Remark\*

When Valéry Giscard d'Estaing presented the European draft Constitution in July 2003, the European Parliament adopted a Regulation on political parties at the same time. This Regulation – owing to the central role political parties play in democracy – is to be regarded as an integral part of constitutional law. It therefore has to be discussed within the current context of an emerging European constitution.

The established political parties have discovered a new source of income: the European Union. On June 19, 2003 the European Parliament adopted a Regulation introducing public funding for European political parties.<sup>[1]</sup> On September 29, 2003 the Council formally gave its consent<sup>[2]</sup> which it had already signalled informally beforehand.<sup>[3]</sup> The “Regulation of the European Parliament and of the Council on the regulations governing political parties at European level and the rules regarding their funding” as it is called officially, entered into force three months following the date of its publication in the Official Journal.<sup>[4]</sup> The provisions concerning the financing of the political parties (Art. 4 to 12), however “shall apply from the date of the opening of the first session held after the European Parliament elections of June 2004” (Art. 13 of the Regulation), that was on the 20<sup>th</sup> of July 2004.<sup>[5]</sup> Now the first money will be paid. And this, even though German parties, for instance, have already long been receiving money from the national German budget for the purpose of European elections.<sup>[6]</sup> Initially 6.5 m. Euros are laid down in the European budget,<sup>[7]</sup> a sum which can be confidently predicted to rapidly increase.<sup>[8]</sup> The gradual decrease of such subventions as is stipulated in the European Financial Regulation applicable to the general budget of the European Communities,<sup>[9]</sup> is explicitly suspended (Art. 9, 6) for the case of public funds for political parties at European level.

At the outset, especially the established, that is, the existing big party alliances will profit from the subvention.

The proposed Regulation fails to convince. The EU 's lack of democratic authenticity reaches its peak in this way, especially with regard to the distance of the political actors from the lives of their electors, and the infringement of the principle of political equality. The core issue of the Regulation is the institutionalisation and the public financing of a construct called “political parties at European level”. All constitutional standards valid in the member states are thrown overboard: this is true for the principles guiding the definition of political parties as well as for principles guiding their financing.

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[1] The vote took place with 345 ayes, 102 noes, and 34 abstentions. The vast majority of MEPs from the PES and the EPP voted in favour of the Regulation. However, the English conservatives belonging to the EPP voted against it.

[2] The decision was taken with a qualified majority. Italy, Austria and Denmark voted against the Regulation. – According to Art. 191, 2 EC, “the Council, acting in accordance with the procedure referred to in Article 251, shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding.” Art. 191, 2 was introduced in the Treaty by the Treaty of Nice. This Treaty entered into force on 1.2.2003 after the definite ratification by all member states. Art. 251 EC deals with the so-called co-decision. Here the decision requires a joint text of the European Parliament and the Council, but a qualified majority in the Council is sufficient. Before the introduction of Art. 191, 2 a regulation concerning the financing of European political parties could only have been adopted on the grounds of Art. 308 in connection with Art. 191 EC – that is, with unanimity. A first draft failed two years ago due to this requirement for a unanimous vote.

[3] The European Parliament and the Council had already agreed on a compromise before the vote in the Parliament of June 19, 2003. On June 16, 2003 also only Italy, Austria and Denmark had voted against this compromise. These three member states intended to lower the number of countries necessary for a qualification as political party at European level from one quarter of the Member States to three. The negotiations with the Council were led by the Rapporteur Jo Leinen (PES), former Rapporteur Ursula Schleicher (EPP) and Andrew Duff (ELDR).

[4] The Regulation was published in the Official Journal on 15.11.2004 (L297/1ff.), its first three articles therefore came into force on 16.2.2004. This Regulation is meant when we refer to the Regulation in the following. This Regulation is quoted in its full wording as **annex 1** in the appendix.

[5] If not otherwise indicated, the articles stated in the following are those of the Regulation.

[6] German parties receive public funds partly calculated according to the results of the European elections: For every valid vote obtained a party receives 70 cents in the year of the election and for the following years of the legislative period (§18,1 and 3 No 1 of the party law). For the first four million votes obtained a party even receives 85 cents per vote (§ 18, 3 No 2 of the party law).

[7] For the remaining six months after the elections the whole amount of 6.5 m. Euros was provided (Report on the draft general budget of the European Union for the financial year 2004 of 10.10.2003, A5-0350/2003, p. 8), contrary to previous drafts where only half of the annual amount was foreseen (Report on the draft general budget of the European Union for the financial year 2004 of 25.9.2003, PE 331.948, p. 8).

[8] See below, part 2, C III 2 b.

[9] Art. 113 of the Financial Regulation applicable to the general budget of the European Communities, Official Journal Nr. L 248 of 16.9.2002, p.1.

## Summary

1.1 Article 191 EC ascribes several functions to "political parties at European level" and empowers the European Parliament and the Council to regulate the status and the financing of these parties. On this legal grounding the European Regulation on Political Parties was adopted in the year 2003 and entered into force on July, 20th (part 1, A and B).

1.2 A "political party at European level" is defined by the Regulation as a "political party" (association of citizens) or an "alliance of political parties" (structured cooperation between at least two political parties) which is electorally successful in at least one quarter of the 25 member States. Every party which is represented by elected members in regional assemblies in at least seven member States will receive money from the European budget. Such a party will at least share in the 15 percent from the total available public subvention. The lion's share (85%), however, will be divided among those parties which are also successful in European elections (part 1, B III).

1.3 This applies to the existing party alliances on which the Regulation is obviously based, viz. the "Party of European Socialists" (PES) the "European People's Party" (EPP), the "European Liberal Democrats" (ELDR), the "European Federation of Green Parties" (EFGP) the "European Free Alliance" (EFA) and the "Party of the European Left", which was founded prior to the European elections (part 1, C I).

1.4 The public subventions intended for European party alliances glaringly violate constitutional principles developed in Germany. These principles are not binding on European institutions. They are not, however, completely meaningless because they have political relevance, at least in Germany. They will also influence the creation of European principles in the field of party financing (part 2, B I). The same is true for the standards developed by the Council of Europe (part 2, B II).

1.5 The public funding system violates European primary law. This is true for Article 191 EC as well as for the principle of equality which is binding at European level too. All of these standards aim at two democratic principles:

- promoting direct linkages between parties and citizens and
- ensuring the openness and fairness of political competition.

The Regulation violates these principles in several aspects:

1.6 Defining the European party alliances as political parties violates the meaning of the term "political party". In the member States of the European Union, the membership of natural persons as well as the fielding of candidates in elections are necessary conditions to qualify as a political party. The term "political party" defined in this uniform manner is relevant at European level. However, the party alliances in their present form fail to meet either of the two conditions. In the Statutes of all European party alliances natural persons only play at most a marginal role. The fielding of candidates at elections is monopolised by the national parties. The European party alliances lack everything which actually makes a political party. Therefore, these party alliances are not political parties within the meaning of Article 191 EC. From the very outset then the entire Regulation is devoid of a legal basis.

1.7 Without natural persons as members and by not fielding electoral candidates, the European party alliances cannot meet the functions ascribed to them in Article 191 EC. They can neither "express the political will of citizens" nor "form a European awareness". Both can – according to democratic principles – only be achieved in a bottom-up process and not in a top-down process. The European party alliances can therefore not be defined as "parties at pan-European level" (part 2, C II 2).

1.8 The provision of public funding will further increase the distance between citizens and the European party alliances. It will reduce any interest within these party alliances to recruit natural persons as members or to strengthen their links with voters. The required 25 percent of "own resources" will in fact consist of membership fees from political parties, from parliamentary groups, party taxes and donations from national parliamentary groups which may also be partly funded out of the public budget. Therefore, a complete public funding of European party alliances will occur. That is not compatible with the principle of grass roots support (part 2, C II 2).

1.9 The actual quantum of public funding is not defined in the Regulation itself, but remains to be set in the annual budget. Therefore, doors to a massive increase of the public funds are wide open because no relevant hurdles for the Parliament deciding on its own behalf exist. Increases are hidden among one of the many budget lines of the European Union. Any possible control by the fragmented nature of "European public opinion" is further weakened. The Council has to agree to the budget as a whole. However, based upon a "Gentleman's agreement" between Parliament and Council, neither body interferes with the adoption of the budget of the other body. We can, therefore, already foresee that the amount of 6.5 m. Euros set down for the year 2004 will soon explode. There is already talk of the need for about 100 m. Euros per year. This foreseeable and unchecked increase in public funding which in Germany itself is prevented

by the so-called "absolute limit", equally violates the principle of voter support at the grass roots level (part 2, C III 2 b and H II).

1.10 Real political parties in the sense of associations of citizens, which would meet the requirements of Article 191 EC and which would be able to fulfil the functions defined by this article do not exist at European level (part 1, C II) and are given no realistic chance to emerge. They are factually excluded from public funds. They would have to achieve at least three percent of the votes in seven member States in order to participate alone in the 15 percent share. These conditions are prohibitive (part 2, E I 2 a, ee).

1.11 The criteria defined in the Regulation unnecessarily extend the inequalities of the European electoral system to the public funding of European parties. Accordingly, one vote from Luxemburg will not only have sixteen times as much weight as one vote from Germany, it will also bring the respective parties at European level sixteen times as much public funding. This is not compatible with the principle of equality. While inequalities in the distribution of seats in the European Parliament are laid down in primary law, corresponding reasons do not exist for the distribution of public subventions to political parties (part 2, E I 2 b and 3 ff.).

1.12 National thresholds in elections to the European Parliament also lead to inequalities. In member States without threshold, a mandate can be won with as few as 30,000 votes. In Germany about 1.6 m. votes are necessary, that is about 53 times as many. This conflicts with the principle of equality (part 2, E I 2 and 3 a, bb).

1.13 Reserving 85 percent of the funds for parties represented in the European Parliament and dividing the remaining 15 percent into equal shares, clearly advantages the established parties. This too is incompatible with the principle of equality. Keeping open the process of political competition requires more scope being allowed for possible political opponents (part 2, E I 3 b and 4 f.).

1.14 An alternative compatible with the principle of equality would be to take into account only the number of votes won in European elections. This would prevent parties from larger member States or parties in member States with thresholds from being grossly disadvantaged. This alternative would conform with the requirements of the system since results in national or regional elections have nothing to do with the programs of European parties; nor is there any reason for them to influence the distribution of public funds to European parties (part 2, E I 6).

1.15 Transferring control of the applicability criteria to the Bureau of the European Parliament places responsibility into the hands of a political institution. This creates the danger that established political forces might exclude their political opponents for spurious reasons (part 2, F).

1.16 From a German perspective the prohibition of donations exceeding 12,000 Euros is especially welcome because in Germany no such limits for donations exist. The requirement that donations of 500 Euros and above must be published also represents progress, even though the Regulation seems to allow donations to be split up, so that this limit can easily be circumvented (part 2, H I).

1.17 Controls are deficient. Effective sanctions are almost totally absent. Only the refunding of funds improperly received is defined in the Regulation. Inaccurate declarations in the annual accounts, non-declaration of large donations, even the acceptance of prohibited donations: none of these lead to any legal consequences. Such donations are not required to be refunded, nor is there provision for any prosecution. The European Court of Justice could however, still bring the Regulation to a halt (part 2, H V).

1.18 The introduction of public funding for political parties at the European level was inspired by three motives which have long guided the political class (part 2, A):

- To gain access to public funds and to use the European budget for this purpose
  - To exclude political opponents and manipulate party competition in accordance with their own interests
- and
- To eliminate effective means of control over Parliament deciding on its own behalf.