

# EXTERNAL PUBLIC SECTOR AUDIT OF THE *LÄNDER* IN THE FEDERAL REPUBLIC OF GERMANY

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## Principles

External public sector audit of the federated states (*Länder*) in the Federal Republic of Germany is the task of the regional courts of audit. This is because of the federal structure of the German state. Alongside the Federation as the central state, there are 16 *Länder* as individual (federated) states. Both the Federation and each of the *Länder* have the status of a state. Whilst the sovereignty of the *Länder* is limited in concrete terms due to the assignment of clearly defined constitutional tasks to the Federation and the *Länder* by the Basic Law, which is the constitutional basis for the German state, that sovereignty is not granted by the Federation. In principle, the *Länder* decide on their own constitutions. In accordance with the principle of separate constitutional areas between the Federation and the *Länder*, the two also administer their budgets independently and are not reliant on one another. This means that the Federation and all the *Länder* have each set up their own autonomous audit bodies. The Federal Court of Audit audits the budgetary and financial operations of the Federation, whereas the regional courts of audit examine those of the *Länder*. The Federal Court of Audit has no right to supervise or issue instructions to the audit bodies of the *Länder*; it is not superior to them.

As institutions, the regional courts of audit are guaranteed under the constitutions of the *Länder*. This constitutional guarantee relates to their existence, the judicial independence of their members, and their core areas of responsibility. The courts of audit derive their powers from the constitution, but are not themselves constitutional organs, since they do not have creative powers within the state and do not play a direct role in shaping the will of the state. As autonomous, independent organs of public sector financial control, subject only to the law, the courts of audit are not part of any of the three state authorities, but stand between parliament and government, whose tasks they support to equal extent, without being an ‘auxiliary body’ to either of them. This constitutional form is characterised by the decision-making structure of the courts of audit as collegial authorities, and the judicial independence of their members, which gives rise to the independence of the institution as a whole.

Because of standards established by skeleton law at federal level, the status, duties and procedures of the *Land* courts of audits are largely the same. More precise details are set out in the *Land* court of audit laws and *Land* budget codes.

## Duties of the *Land* courts of audit

The *Land* courts of audit have a constitutional duty to audit the income and expenditure accounts and the summary of assets and liabilities which must be presented by the Minister of Finance of the *Land* for discharge of the regional government, as well as the efficiency and regularity of the *Land*'s financial management including its separate property funds and enterprises. This constitutional duty coincides in practical terms with the duties of the *Land* administration. Thus, all the public offices of a *Land*, to the extent

that they earn income, spend money, or act in a way which is otherwise relevant to public finances, are subject to auditing. No areas are exempt from auditing (principle of completeness of public sector audit).

The *Land* courts of audit also carry out audits, among other things:

- at offices outside the administration, for example, if they have received grants from the *Land*. These audits are normally limited to an efficient application of the funds for the intended purpose
- of the *Land*'s activities through private-law companies in which the *Land* has a direct or indirect stake
- of the financial management of the public legal entities which are subject to *Land* supervision
- of the financial management of political groups within the *Land* parliament.

The *Land* courts of audit are also responsible for auditing the financial management of regional banks (*Landesbanken*), radio and television organisations, whether they be *Land* organisations based on *Land* law, or community organisations serving several *Länder* based on interstate rules between the *Länder*.

Some regional courts of audit are also responsible (although not always to the same extent) for auditing the financial management of local authorities, for instance in Mecklenburg-West Pomerania, Rhineland-Palatinate, Saxony, Saxony-Anhalt and Schleswig-Holstein. In Hesse, Lower Saxony and Thuringia the external audit of local authorities is conferred on the chairman of the *Land* court of audit. In the city-states of Berlin, Bremen and Hamburg, the audit work performed by the *Land* court of audit also covers local government matters. In Baden-Württemberg, Bavaria and North Rhine-Westphalia, independent legal entities are responsible for auditing local government, and in the other *Länder* it is the superior *Land* authorities (ministries).

Last but not least, the duties of the regional courts of audit also include consulting functions. Here we must differentiate between tied and independent advice. Tied advice is characterised by the fact that it relates to actual audit procedures. This includes more than mere suggestions and recommendations as part of the communication of audit findings. Also important is the informal exchange of ideas and opinions about current administrative problems during the audit, where the courts of audit are able to act as an expert partner, contributing their expert knowledge and their experience gained from a large number of audits. This is separate from the provision of independent advice to parliaments, governments and individual ministers, which is unconnected with any actual audit process but must be justified on the basis of practical audit experience. This is about financial and organisational issues, measures or procedures which are planned by the government, ministries or subordinated bodies and where the court of audit has been asked to provide an expert evaluation or, where appropriate, optimisation proposals. The courts of audit are not obliged to give advice. They, therefore, decide on the nature and extent of the advice in accordance with their sense of duty. They respond to requests for advice – where possible and justifiable – by taking into account, in particular, the information needs of parliament and government.

## **Audit criteria**

The criteria for audits carried out by the Land courts of audit are not only regularity in law enforcement and administrative behaviour in general, but particularly the legal requirements for good practice and economy.

### Regularity

Regularity refers not only to proper bookkeeping, but also to legality in general. The audit covers whether or not the administration has completed its duties properly and on time, taking into account the substantive and formal regulations and principles. Auditing substantive accuracy takes priority over auditing formal aspects, and relates to the factual accuracy of administrative behaviour where this has had, or may have, a financial impact.

### Good practice and economy

The requirement for sound financial management refers to the obligation either to achieve maximum possible results with the resources available (maximum principle, productivity principle, effectiveness principle), or to achieve a specific result using minimum resources (minimum principle). The requirement for economy is part of the good practice requirement and corresponds to the minimum principle. The requirement for good practice in the context of the financial behaviour of the public sector should not be seen as the optimisation of profits, but rather as being geared towards the best possible relationship between the purpose – namely the realisation of a particular public task for the common good – and the resources used to achieve it.

The performance audit or analysis of good practice comprises a check for effectiveness, including success controls. In order to assess the effectiveness and efficiency of administrative organisations, there is an increasing need to apply business management principles.

### Political decisions

The evaluation of political decisions as such is not a task of the courts of audit. They do, however, examine on a rational basis the preconditions, resources and finance-related effects of those decisions. Thus, the courts of audit do not impose their own values and objectives in place of those of the democratically legitimate decision-makers, but they do provide them with information and assessments aimed at helping them to deal carefully with public resources. The decisions themselves are left to the bodies which are politically accountable.

## **Auditing process**

The auditing process is governed in outline only by the federal legislation on precepts for budgeting and accounting (Budgetary Principles Act, *Haushaltsgrundsätze-gesetz*), and the relevant *Land* budget regulations. In other respects it is left to the courts of audit, which rule on more detailed aspects in their own internal regulations (rules of procedure, codes of audit practice).

The auditing process is based on the principle that the courts of audit are independent. They themselves are responsible for deciding whether, when, with which staff (individual auditor or group of auditors), at what cost, where (with or without local investigations), and how, they will carry out an audit (full audit or spot checks). They may limit audits and leave accounts unchecked. In theory, neither the regional parliament nor the regional government can issue audit orders to the *Land* court of audit or give it instructions for carrying out audits. However, the courts of audit do generally comply with requests for audits where possible, within the scope of their constitutional responsibilities. In some *Länder* (for example, Hesse) courts of audit must express an opinion if regional parliament so wishes.

As it is a post-audit, only completed operations or transactions are subject to auditing. But it is not necessary for the financial consequences to have set in already; it is enough that a measure for which the office responsible has completed its decision-making process, or a definable part of that process, may have a financial impact (the so-called 'audits of ongoing measures'). Audits which commence at this stage make it possible to prevent uneconomic administrative actions in good time. This applies principally to the implementation of programmes, and to structural and civil engineering projects.

The courts of audit have access to all documents which they consider necessary in order to comply with their duties. The documents must be submitted or sent to them on request. The information requested must be given to them and their appointed agents. In principle, the entitlement to view documents and to have documents presented, and the entitlement to information, cannot be prevented from the outset either by the executive's privileged internal field of deliberation and decision-making or by any items protected under basic rights, or by special confidentiality or secrecy provisions.

Audits take place on the basis of the court of audit's work schedules, which are generally set out for a year at a time. The audit is initiated at the office concerned through a letter of notification announcing the audit. Where necessary, the aims of the audit are explained in an introductory discussion. After the investigations are complete, there is always a closing discussion, during which the office that has been audited is given an opportunity to comment. The audit letters prepared on this basis are sent to the administration for comments, so that the facts can be finally clarified and the court of audit can confirm its appraisal. The audited body must at least give its opinion on the extent to which the underlying facts are accurate, and on whether the court of audit's assessments and conclusions are accepted. Only after a reply to the audit letters has been given does the court of audit arrive at its definitive findings.

The auditing process is, theoretically, an internal procedure between the court of audit and the office being audited. The court of audit decides whether to advise other offices of the audit conclusions according to its sense of duty. In doing so, the court must take into account the provisional nature of the audit letters, the justified interest of the audited office in giving its views and in the assessment of those views if applicable, third party interests to be protected and, not least, possible interference with the court's final decisions as a result of an early parliamentary or public debate. In what concerns the municipal sector, supervisory authorities and, in other respects, the higher authorities receive copies of the audit letters on a regular basis. Audit conclusions with fundamental or major financial significance are reported to the Minister of Finance of the *Land* by the court of audit.

The court of audit cannot issue any orders or impose any sanctions with regard to the implementation of its demands. It is the responsibility of offices which have been subject to audit to draw the necessary conclusions from the audit letters in accordance with the applicable law. If errors in administrative behaviour have resulted in losses, they must examine the legal possibilities for compensation and pursue any claims. Where local government has been audited, the supervisory authorities must monitor how the audit findings are being dealt with.

### **Annual report, discharge procedure**

The *Land* court of audit summarises the results of its audits in an annual report (sometimes also referred to as the ‘Observations from the Court of Audit’), where it considers that they could be significant for the discharge procedure, a process whereby the regional parliament approves to regional government’s actions. This includes all processes which relate to the responsibilities of the *Land* government, even if only its supervisory duties or its right to initiate legislation, or processes which might have financial consequences for the *Land*.

The annual report is forwarded to the *Land* parliament and the *Land* government and published as a parliamentary document. For public information, the report is presented by the court of audit in a press conference.

The annual report is neither an accountability report nor a report of activities, but forms the constitutional basis for the parliamentary procedure relating to the approval of the regional government’s actions. The resolution of the *Land* parliament on this approval is prepared in parliamentary committees. This resolution is not limited to the question of granting formal discharge: in common German parliamentary practice a form of decision-making has developed which makes it possible to link the approval decision with concrete requests to the *Land* government, going as far as disapproval in individual cases. In this way parliament is able to influence the government’s action in a flexible and effective way.

### **Composition, organisation, and human and financial resources**

The *Land* courts of audit are made up of a collegial decision-making body, the officials and employees charged with carrying out the audits and preparing decisions, and the administrative and support staff.

The decision-making body is called a ‘college’ (Bavaria, Berlin, Brandenburg, Hamburg, Bremen, North-Rhine-Westphalia, Rhineland-Palatinate, Saarland and Saxony) or ‘senate’ (Baden-Württemberg, Hesse, Mecklenburg-West Pomerania, Lower Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia). The college/senate is made up of the president and vice-president of the court of audit, along with other officials especially appointed as members of the decision-making body. The size of the collegial body ranges from four members (Bremen) to 16 members (Bavaria).

The selection process of presidents is different from one *Land* to another. The right to submit proposals for the election of the president, in some cases also for the vice-

president, rests in the majority of the *Länder* with the regional government or the minister-president of the *Land*. In some *Länder* this right of proposal rests with the president or the council of elders of the regional parliament. The right to appoint presidents also differs from one *Land* to another. The presidents of the courts of audit and in some cases also the vice-presidents are elected by the parliament, which requires in some *Länder* a two-thirds majority.

The other members of the court of audit are elected by parliament in Brandenburg, Bremen, Hamburg, North-Rhine-Westphalia and Saarland, with the consent of the Land parliament in Saxony-Anhalt, and in most other cases by the head of government; the president and the collegial decision-making body have different types of involvement in the appointment of members. In Rhineland-Palatinate, for example, the president of the court of audit proposes the candidates following consultation with the college (in practice, the proposal which has been selected after a nationwide call for applications is accepted by the minister-president). In some *Länder* the selection is preceded by a vote in the political sphere. The term of office of the other members ends on retirement (at the age of 65).

The term of office of the president of the court of audit in Bavaria, Hesse, Mecklenburg-West Pomerania, Lower Saxony, Saxony-Anhalt, Saxony, Schleswig-Holstein and Thuringia is twelve years. In Hesse, Mecklenburg-West Pomerania, Lower Saxony, Schleswig-Holstein and Thuringia the vice-chairman serves for the same period. There is no possibility of re-election. Furthermore, the term of office of the president and vice-president ends on retirement (on attaining the age of 65; however in some *Länder*, such as Saxony, for example, at the age of 67).

The *Land* courts of audit are divided into audit areas/divisions, each of them headed by a member of the decision-making body, with responsibilities determined according to technical criteria. There is also a central organisational body (president's division or president's office) to administer the court of audit. In the *Länder* of Baden-Württemberg, Bavaria, Hesse, North-Rhine-Westphalia, Saxony and Thuringia, subordinate authorities have been set up which carry out auditing tasks under the supervision and managerial authority of the court of audit. Some courts of audit have set up branch offices.

The regional courts of audit must be provided with the staff they need to carry out their duties. Employees in the audit department, as well as administrative and support staff, are normally appointed by the president of the court of audit, or in the case of some higher officials by the minister-president of the *Land* at the suggestion of the president of the court.

A regional court of audit's budget and schedule of established posts form a separate part of the *Land* budget. If the regional government deviates from the audit institution's budget estimates when preparing the regional budget, then these different estimates prepared by the president of the court of audit must be submitted to the regional parliament together with the draft *Land* budget bill. The *Land* court of audit has sole responsibility for executing its budget and implementing the schedule of established posts, and the president is responsible for it; it is monitored by the parliament, taking into account the independence of the court of audit. Whether to approve the actions of the president of the court of audit is a decision to be adopted by the regional parliament in a special resolution.

## **Collegial decision-making process**

Those decisions that do not concern human resources and the court's own administration are made by the collegial body. In principle, decisions without fundamental significance are left to a small college or senate made up of two or three members, for example, the president and the responsible head of audit section. The collegial body as a whole decides on the annual report, the audit planning, other questions of fundamental significance and in case of conflict.

## **Cooperation between the courts of audit**

There are many points of contact between the Federal Court of Audit and the *Land* courts of audit due to overlaps and the interwoven jurisdictions of the Federation and the *Länder*, and against a background of each institution's technical and financial responsibilities. If an audit is the responsibility of both the Federal Court of Audit and a regional court of audit, or of the audit institutions of two different *Länder*, a joint audit should always take place. Under the Constitution, a court of audit may also agree to transfer audit tasks to another court of audit, or take over these tasks from another court. The aim of these agreements is to avoid duplicate audits – including those affecting only parts of a whole – and to ensure as far as possible that no areas escape auditing.

The Conference of the presidents of the Federal Court of Audit and the *Land* courts of audit (*Konferenz der Präsidentinnen und Präsidenten der Rechnungshöfe des Bundes und der Länder*) meets twice per year and has in particular the following tasks:

- ensure mutual information and the exchange of auditing experiences and methods
- encourage a view as uniform as possible on overarching questions of public sector auditing
- co-ordinate audit projects of common interest which involve different courts of audit
- prepare audit agreements
- discuss matters of general interest for courts of audit and develop common forms of vocational training
- promote the public image of the courts of audit.

This does not alter the fact that the courts of audit carry out their duties independently and separately from one another. The deliberations of the conference of presidents and the exchange of views and experiences are supported by working groups, of which there are currently ten (for instance, human resources policy, radio and television, budgetary law and questions of principle) set up by the conference of chairmen to cover the various technical areas. The preliminary work performed by these groups often enable courts of audit to express common concerns in dealings with the governments and the general public in a reliable and purposeful manner and give an impetus for necessary developments and decisions.

In addition to the German Member of the European Court of Auditors, the conference of presidents is also attended by the Director of the Swiss Federal Audit Office and the President of the Austrian Federal Court of Audit.