



Student Paper Series

**A tale of toothless tigers: Political accountability in the
German system of parliamentary intelligence service oversight**
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Abstract

The ongoing expansion of intelligence service activities in mandate, budget and technological possibilities increases the relevance of holding the government and its intelligence services to account. This deepens the already existing conflict between the transparency necessary for political accountability and the secrecy under which intelligence services usually operate. Against this background, our research focuses on analyzing how parliamentary oversight of intelligence services in Germany can be effective. Using Grounded Theory, we conducted twelve interviews with experts from the political arena, the media, and a think tank in order to understand the process and current mechanisms of parliamentary intelligence oversight, and to what extent political accountability is achieved.

Our research shows that there are considerable deficiencies in the parliamentary oversight system regarding the possibilities to collect and analyze information on intelligence service activities as well as regarding the limited instruments of sanctioning possible misconduct of the executive. The usual lines of control in the German political system between the opposition parties on the one hand and the executive and parliamentarians of the government coalition parties on the other does not effectively work in the context of intelligence oversight. This is the result of the secret nature of intelligence activities, and limited minority rights in bodies of oversight. Furthermore, most interviewees stated that the media currently play an indispensable role in the process of achieving political accountability, both as a source of information for parliamentary oversight as well as by making government action public. Based on these findings, we developed policy recommendations, including the proposition to increase exchange between the different oversight bodies, to deliberately use budget control as an instrument of enforcement, and to reform the Parliamentary Control Committee (PKGr). This should include a strengthening of minority rights, instruments to sanction false statements made in the PKGr, as well as the introduction of a more systematic and proactive oversight process.

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List of abbreviations (German terms in brackets)

BfDI	Federal Commissioner for Data Protection and Freedom of Information (<i>Bundesbeauftragte für den Datenschutz und die Informationsfreiheit</i>)
BfV	Federal Office for the Protection of the Constitution (<i>Bundesamt für Verfassungsschutz</i>)
BHO	Federal Budget Code (<i>Bundeshaushaltsordnung</i>)
BMI	Federal Ministry of the Interior (<i>Bundesministerium des Innern</i>)
BND	Federal Intelligence Service (<i>Bundesnachrichtendienst</i>)
BNDG	Law on the Federal Intelligence Service (<i>Gesetz über den Bundesnachrichtendienst</i>)
BRH	Federal Court of Audit (<i>Bundesrechnungshof</i>)
BVerf-SchG	Law on the Federal Office for the Protection of the Constitution (<i>Bundesverfassungsschutzgesetz</i>)
CSU/CDU	Christian Social Union (<i>Christlich-Soziale Union</i>) and Christian Democratic Union (<i>Christlich-Demokratische Union</i>)
GG	The Basic Law for the Federal Republic of Germany (<i>Grundgesetz</i>)
GO-BT	Rules of Procedure of the German Parliament (<i>Geschäftsordnung des Bundestags</i>)
MAD	Military Counterintelligence Service (<i>Militärischer Abschirmdienst</i>)
MdB	Member of the German Parliament (<i>Mitglied des Deutschen Bundestages</i>)
NSA	American National Security Agency
NSU	National Socialist Underground (<i>Nationalsozialistischer Untergrund</i>)
PKGr	Parliamentary Control Panel (<i>Parlamentarisches Kontrollgremium</i>)
PKGrG	Law on the Parliamentary Control Panel (<i>Kontrollgremiumgesetz</i>)
PUAG	Law of parliamentary committees of inquiry (<i>Parlamentarisches Untersuchungsausschussgesetz</i>)
SPD	Social Democratic Party of Germany (<i>Sozialdemokratische Partei Deutschlands</i>)
StPO	Code of Criminal Procedure (<i>Strafprozessordnung</i>)

1. Introduction

The revelations of the former US National Security Agency (NSA) contractor Edward Snowden in 2013 on the surveillance activities of the NSA have spurred a widespread debate, especially in Germany (see, for example, Bundestag Plenarprotokoll 18/2, 2018; Leicht, 2013), on the legitimacy of the scope of activities of intelligence services. In light of this ongoing debate, we would like to investigate how an effective parliamentary oversight of intelligence services can be achieved in Germany.

On a general level, the existence of intelligence services seems to be an inherent contradiction to democratic principles: The rule of law requires accountability and transparency, yet intelligence services usually undertake their activities in secret, meaning that there is little publicly accessible information available. While mass surveillance can be a common phenomenon in authoritarian regimes, it conflicts with liberty, autonomy and privacy of citizens in democracies. The **empirical puzzle** that we are facing is that constant and comprehensive strategic digital surveillance of citizens, meaning the comprehensive collection of digital information by intelligence agencies, is also taking place in Western democracies:

“Unlike ‘targeted surveillance’ (...), strategic surveillance does not necessarily start with a suspicion against a particular person or persons.” (Venice Commission, 2015, p. 3)

As the Venice Commission summarizes, this characteristic of signals intelligence is “both the value it can have for security operations, and the risks it can pose for individual rights” (2015, p. 3). With these considerations and the active debate in Germany in mind, we aim to answer the following **research question**:

In a context of ever-advancing digitization, how can parliamentary oversight of intelligence services in Germany be effective?¹

Although intelligence oversight is carried out by all three branches of power, we focus our research on the parliamentary oversight of intelligence services. Hence, the core of our analysis is the oversight by the direct representatives of the citizens, which is based on the democratic principle of political accountability. Our research is specified in the following ways: First, we conduct a single case study, an in-depth

¹ For a definition of our use of the concept of digitization and oversight see chapter 4.1

analysis of the institutional setup of intelligence oversight in Germany. Secondly, we focus on the collection of information on German citizens. Third, we only include two of the three German federal intelligence agencies in our research: the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV) and the Federal Intelligence Agency (*Bundesnachrichtendienst*, BND). The primary task of the BfV is the collection of information on domestic groups or individuals who pursue aims that are unconstitutional and/or pose a threat to the security of the country.² The BND on the other hand is responsible for intelligence on foreign and security issues³. This can also entail communication between domestic and foreign individuals. Therefore, we only exclude the Military Counterintelligence Service (*Militärischer Abschirmdienst*, MAD) as our analysis aims at civilian oversight, not the oversight of surveillance in the military.⁴ Finally, we limited our analysis to the federal level of parliamentary intelligence oversight, as the inclusion of oversight bodies on the state level (*Länder*) is beyond the scope of this thesis project.

It should be noted that it is not the objective of this paper to analyze general arguments for or against the existence of intelligence services. Intelligence services exist in Germany and in most countries across the world. This thesis is building on the reality of their existence, and the notion that all state action needs parliamentary oversight.

The high degree of **relevance** of this research topic is based on the fact that existing constraints on the political accountability of intelligence agencies are reinforced through digitization, which makes democratic oversight much more important. There are a number of reasons for this: Before the digitalization of communication, intelligence agencies often faced technological constraints, and were also restricted by high costs of surveillance (Heumann & Wetzling, 2014, p. 2). Today, digitization strengthens the capacity of intelligence services in two distinct ways: there is more information on communication available as more communication is conducted digitally, and intelligence services have increasing means for the analysis of communication data due to the development of soft- and hardware, at low costs (Heumann & Wetzling, 2014). This calls into question the existing rules that regulate the activities

² For more information on the tasks of the BfV see (Bundesamt für Verfassungsschutz, n.d.-b)

³ For more information on the BND's tasks see (Bundesnachrichtendienst, n.d.)

⁴ For more information on the tasks of the MAD see: (Bundesministerium der Verteidigung, n.d.)

of intelligence services. There is a profound asymmetry between international data streams and national regulations, challenging the legal and technical capabilities of the nation state to regulate and monitor international digital communication.

Hence, digitization changes the work of intelligence services, which in turn affects the privacy of citizens (i.e. through proactive surveillance independent of a tangible suspicion). This calls for a strengthening of democratic oversight. In this respect, our research follows a **normative approach**. This thesis does not focus on specific technological developments and instruments, instead we **use the concept of digitization as a background condition**, meaning that it touches upon all aspects of intelligence actions and oversight (see also chapter four for our methodology).

The following chapter gives an overview of the academic literature on parliamentary intelligence oversight. In chapter three, we outline the theoretical framework of our analysis (the foundation of parliamentary control in Germany and the concept of militant democracy). Chapter four is an exploration of the methodology we used (Grounded Theory). In chapter five, we give an overview of the German system of intelligence oversight. This is followed by a detailed analysis based on our empirical work (chapter six and seven). Afterwards, we describe subsequent policy recommendations (chapter eight), and close this paper with concluding remarks on limitations and options for further research (chapter nine).

2. State of the Field

In this chapter, we give a broad overview of the main concepts discussed in the academic literature on intelligence oversight. To begin with, much work has been done on the **history of intelligence services** (Jäger & Daun, 2009; Krieger, 2014). Wolfgang Krieger gives an extensive overview of how intelligence services and distinct patterns of oversight historically evolved worldwide (2014). Thomas Jäger and Anna Daun published a book on various aspects of intelligence services in Europe. The book examined British, French, German, Italian, Spanish and Polish agencies as well as their cooperation in Europe and beyond (Jäger & Daun, 2009). Smidt et al. describe democratic control of intelligence services in Western Europe (with a special focus on Germany), Eastern Europe, the United States of America, and Israel (Smidt, Poppe, Krieger, & Müller-Enbergs, 2007). This also includes a chapter on democratic control through the media.

Another part of the literature focuses on the **change of the work of intelligence services due to digitization**. Jelle van Buuren, for instance, claims that the international cooperation and technological transformation of intelligence services leads to the exacerbation of existing problems of overseeing intelligence services (2013). Furthermore, Abram N. Shulsky and Gary J. Schmitt published a book on the basic concepts “involved in the practice of intelligence” with a special focus on how the “information revolution” has changed their work (2002, p. vii). The article “The Dangers of Surveillance” by Neill M. Richards outlines how strategic surveillance can alter the lives of citizens in the digital age:

“(...) surveillance is harmful because it can chill the exercise of our civil liberties. With respect to civil liberties, consider surveillance of people when they are thinking, reading, and communicating with others in order to make up their minds about political and social issues. Such intellectual surveillance is especially dangerous because it can cause people not to experiment with new, controversial, or deviant ideas” (Richards, 2013, p. 1935).

This concept is generally known as the ‘chilling effect’.⁵ Central to our analysis however, is the **literature on parliamentary oversight**. The idea of putting intelligence services under democratic scrutiny is a phenomenon that has started to evolve only

⁵ For more information see (Richards, 2013, pp. 1949–1950)

in the 1970s (Born, Johnson, & Leigh, 2005; Born & Leigh, 2007; Krieger, 2009). Before, intelligence services were usually kept beyond public accountability, mainly functioning “on the basis of executive decrees” (Born & Leigh, 2007, pp. 193–194). The precursor of the German Federal Intelligence Service (BND), the *Organisation Gehlen*, even existed before the foundation of the Federal Republic of Germany in 1949, as it was founded in 1946 by the US Military (Krieger, 2009). This is an interesting fact which illustrates that intelligence services partly used to operate without any parliamentary control, yet there is rather an increase in parliamentary oversight over time. However, oftentimes, it was only scandals that provided an impetus for change, which resulted in a process where states successively increased democratic oversight (Born & Leigh, 2007). Yet, the pace of this increase varies substantively: France implemented a legal basis for parliamentary intelligence oversight only in 2007 (Krieger, 2009, p. 303), and still today “no set of international standards for democratic oversight of intelligence” exists (Bochel, Defty, & Kirkpatrick, 2014, p. IX). Correspondingly, the research field of parliamentary oversight of intelligence services is still developing. In the book “Who’s Watching the Spies? Establishing Intelligence Service Accountability” by Born, Johnson and Leigh (2005) central criteria for placing intelligence agencies under democratic supervision are addressed by collecting and evaluating examples and procedures from a diverse range of countries. Germany is not among the analyzed countries.

Moreover, in the book “Democratic Control of Intelligence Services: Containing Rogue Elephants” edited by Hans Born and Marina Caparini (2007) differing systems and reform processes of intelligence oversight in both authoritarian and democratic states are contrasted. The authors equally access the scope of the expansion of power of intelligence agencies after September 11, 2001. The importance of parliamentary control is stressed as follows: “Parliamentary oversight is the necessary counterweight to executive control in a liberal democracy (...).” (Born & Jensen, 2007, p. 260). Among others, they stress that there is currently very little research regarding the “international comparison of democratic accountability of intelligence services” (2007, p. 13), and that they intend to contribute to filling this gap. They, and others, provide a framework for the analysis of political accountability, on which we build in this thesis (see chapter four).

Other authors focus their research on single challenges to democratic accountability. Among them are Wills, Leigh, and Born who analyze international intelligence cooperation as a challenge to political accountability (2011). Ott on the other hand focuses on the role of partisanship in the work of intelligence services and its democratic oversight bodies (2003). Another focus is offered by de Jonge who describes existing and potential cooperation structures among different institutions of democratic intelligence oversight (de Jonge, 2014). Michael Kowalski, Chairman of the Netherlands Intelligence Studies Association (NISA), develops ten practical approaches on how to improve intelligence oversight, including the recommendation that more control of the oversight bodies themselves is needed (2013, p. 285).

Some authors **focus on specific countries**, e.g. on the United States of America (Zegart, 2011) or on the Netherlands (Hijzen, 2013). A prominent example is the book “Watching the watchers: parliament and the intelligence services” by Hugh Bochel, Andrew Defty and Jane Kirkpatrick (2014). Bochel et al. analyze mechanisms of accountability in the British system of intelligence oversight. Among other issues, they describe weak spots in the system such as information leaks, a lack of separation of powers between the executive, legislative, and judiciary overview bodies, and the challenges that arise from shifting positions between intelligence services and bodies of scrutiny (Bochel et al., 2014).

The academic literature in this field is complemented by **policy papers**. Hans Born and Ian Leigh describe challenges of executive, parliamentary, and non-political oversight, and stress the role of parliamentary oversight as a necessity to democracy in order to “ensure that security and intelligence organizations are serving the state as a whole and protecting the constitution” (2007, p. 10), in a report published as a policy paper of the Geneva Center for the Democratic Control of Armed Forces (DCAF). It should be noted that literature which focuses on the implications of digitization on intelligence oversight mainly consists of policy papers, not of scientific journal articles or books. Exemplarily, in a policy brief published in September 2013, Stefan Heumann and Ben Scott compare surveillance programs and corresponding oversight mechanisms in the US, Great Britain and Germany (2013). Other policy papers include recommendations on possible reforms of the German G10 Commission (Wetzling, 2015) or on foreign surveillance by the German Federal Intelligence Service (Heumann & Wetzling, 2014). Noteworthy in this context is the report by

the ‘European Commission for Democracy Through Law’ of the Council of Europe – also called the Venice Commission – on the democratic oversight of signals intelligence in Europe. This report raises the question to what extent control mechanisms need to be adapted due to the fact that signals intelligence has a much “greater potential of affecting individual human rights” (Venice Commission, 2015, p. 3).

Consequently, we identified a **research gap** in that that there is very little academic literature on parliamentary oversight in Germany which takes on the perspective of political science. One exception to this is the work by Stefanie Waske, who describes in great detail how the executive and parliamentary oversight of the German Federal Intelligence Services (BND) developed from 1955 to 1978 (2009). A part from that, most of the existing academic literature takes a legal perspective. We will briefly introduce two examples of legal books that only consider the German system.

Erik Hansalek published a legal dissertation on the parliamentary control of the German government with regard to intelligence services (Hansalek, 2006). He describes the system of parliamentary control before and after the 1999 reform of the German Parliamentary Control Panel (PKGr), and he reflects on the constitutional principles of parliamentary control. Christoph Gusy (2011) describes the legal aspects of intelligence oversight in Germany. As Germany has three different federal intelligence agencies, and on the state level 16 agencies of the Office for the Protection of the Constitution, there is also a high number of corresponding oversight bodies. This includes oversight bodies as part of the executive, of the state (*Länder*) parliaments, as well as those of the judiciary. This set up entails a lack of coordination, and thus raises the question of effectiveness (Gusy, 2011, p. 12). Gusy is especially focused on the G10 Commissions on the federal and state level, and states that this body is a ‘sui generis’, a body that is somewhat between the legislative and the judiciary powers (2011, p. 133). It is appointed by the PKGr, and meets in the Bundestag, yet performs judiciary control. This entails that parliamentary and judiciary overview of intelligence activities are not completely separated in the German system. Gusy furthermore gives an extensive overview of the legal foundations of parliamentary oversight, to which we will turn to in more detail in the following chapter on our theoretical framework.

This thesis contributes to the academic debate, particularly within political science, on parliamentary intelligence oversight in Germany by identifying deficiencies in the institutional set-up and current processes. We seek to analyze to what extent the German system of parliamentary intelligence oversight achieves political accountability.

3. Theoretical Framework

3.1 Militant Democracy

The activities of intelligence services can be connected to the **concept of ‘militant democracy’**, a term which was shaped by Karl Loewenstein, who published his articles on “Militant Democracy and Fundamental Rights” in 1937, observing fascist movements in Europe. Originally, this concept mainly applied to the protection of democratic values against actors that seek to attack democracy from within, such as undemocratic political parties. In this section, we first give a brief overview of the concept of militant democracy, and how this concept might be linked to the aim of intelligence services to detect anti-democratic actors. Secondly, we then outline why in turn, the democratic control of intelligence services is then even more crucial to a functioning democracy. With regard to the first section of this chapter, the reader should note that the aim here is to give a brief outline of a possible reasoning of the existence of intelligence agencies. This outline will not, however, give any indication on whether the work of intelligence agencies is justified or effective.

As a German lawyer and an advocate for constitutional democracy in exile, Karl Loewenstein observed which laws were adopted in Europe in order to restrain the uprising of fascist parties in 1937. Loewenstein claimed that “the main principle of democracy is the notion of legality” (1937, p. 424). With this close tie to the rule of law, “democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties under the condition that they conform outwardly to the principles of legality and free play of public opinion” (1937, p. 424). Yet, while democracy has to accept the formation of all parties, it must at the same time come up with safeguards that ensure that the core principles of democracy are protected. This understanding of an ex ante protection of the very core of democratic values and principles originates not only in Karl Loewenstein's work, but also

in "Legality and Legitimacy" written by Carl Schmitt in 1932, who stated that core constitutional concepts cannot be altered, even when procedural rules change (Schmitt, 2004). In Germany, this has been realized with Article 9 of the Basic Law (which allows limitations to the right to association for groups that pursue goals that are against the constitution) and Article 18 which renders the forfeiture of basic rights possible. Article 21 of the Basic Law allows outlawing political parties that openly fight for values and ideas that are unconstitutional:

"Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." (German Basic Law, Article 21)⁶

As stated above, the concept of 'militant democracy' has mostly been used in the context of the observation or prosecution of undemocratic parties or other organizations (consider especially the context of the Cold War and anti-communist policies). Today, however, the concept can be applied much more broadly:

"(...) militant democracy is no longer directed simply to the question of which political parties can compete for elections, but rather who can participate in political discourse in a general sense. Terrorism and political Islam (...) are perceived as a threat not only to the lives of citizens but to the entire democratic structure and constitutional security." (Tyulkina, 2015, p. 46)

The main goal of intelligence services is the detection of potential threats to the security of a country. With this in mind, the activities of the two intelligence agencies included in our analysis, the Federal Office for the Protection of the Constitution (BfV) and the Federal Intelligence Service (BND) are arguably based on two different aspects of militant democracy: While the BfV targets individuals and organizations in Germany (and which is why its self-assertion is closer to the original core of militant democracy, meaning the surveillance of actors within a country that pose a threat to democracy, for instance extremist parties such as the right-wing extremist party NPD), the BND follows the logic of militant democracy on an international level, by targeting actors outside the country, i.e. in the wider context of the war on terror.

⁶ Basic Law for the Federal Republic of Germany

Yet, militant democracy is a double-edged sword. First of all, there is no general definition of what constitutes militant democracy (Tyulkina, 2015, p. 14 and 28). Secondly, it is difficult to determine where to draw the line: which behavior, party program or other action is still within the framework of a legitimate critique of liberal democracies, and which behavior poses a real threat to democracy? And at which point in time should action against such an individual or organization take place? The protection of democracy through means of strategic intelligence and surveillance is difficult to demonstrate empirically, as this secret work cannot be reconstructed and hence it is usually invisible after it is completed. To use the concept of militant democracy means to ban potential enemies of democracy by restricting the democratic freedoms of those suspects. The potential misuse of the concept of militant democracy is high. Therefore, the need for control and oversight of the actors who use this concept to justify their action, in our case the German intelligence services, is evident. For this reason, the work of intelligence agencies, which restricts basic freedoms (in the German case especially Article 10 of the Basic Law) needs to be embedded in a system of democratic control.

3.2 The Need for Parliamentary Control of the Executive

This system strongly depends on parliamentarians as representatives of the people. Jürgen Habermas, with his theory of deliberative democracy, claims that democratic decision making depends on well-informed citizens and civil servants; this in turn depends on publicly accessible information (1996). As the activities of intelligence services are not disclosed to the public, citizens do not have direct access to information. In this case the representative function of the parliament, as enshrined in the Basic Law of the Federal Republic of Germany, becomes even more important than in other areas of executive action, as we will outline in the following. When this is not guaranteed (e.g. due to a lack of functioning control mechanisms), intelligence can itself pose a threat to democracy. We therefore assume that intelligence oversight is crucial to a proper functioning of democracies.

Christoph Gusy points out that a secret service was actually not explicitly provided for by the German Basic Law, yet it states that there can be a need for secret activities of government agencies (Gusy, 2011, p. 131). Germany, as a result of its history of

dictatorships, has a clear separation of powers between intelligence services and police forces which is very unique (Gusy, 2011, p. 2). While the police can act as soon as there is reasonable suspicion, intelligence services are only allowed to collect information. As Gusy puts it, intelligence services are allowed to know a lot, but have a rather narrow scope of action; the police, on the other hand know less, but have a wider scope of action (Gusy, 2011, p. 2). Today, it is especially the fight against global terrorism that has widened the portfolio of tasks and instruments available to intelligence services. This increases the need for oversight.

We regard the parliamentary oversight of intelligence services within the overall framework of parliamentary control of the executive. This is a fundamental principle of democracy in Germany, as all action by the state must be closely tied to the will of the people, who are represented through the parliament:

“Article 20 [Constitutional principles – Right of resistance] (1) The Federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (...)” (German Basic Law, Article 21)⁷

Gusy therefore argues that parliamentary control and oversight is the central link between the separation of powers and the functioning of democracy (Gusy, 2011, p. 128). Hence, parliamentary control does not express a mistrust of the executive, but is the normal operating procedure of the German democratic system - it is the rule, not the exception, and it is only the exception that needs further justification (Gusy, 2011, p. 128). Parliamentary oversight mainly entails oversight over the administration with regard to the protection of basic rights. Yet political accountability goes beyond narrow legal definitions: it aims at holding the government accountable for its actions, even when no laws have explicitly been broken. This function of constant scrutiny is a vital element of democracy. In the case of the secret activities of intelligence services this is especially important; because citizens might not even know that their rights are being constrained or violated. For this reason, parliamentary intelligence oversight, meaning the protection of basic rights of citizens through their representatives, has a distinct importance within the overall framework of parliamentary control of the executive.

⁷ idem

Thus, it is not a question of whether parliamentary oversight can or should be exercised with regard to intelligence agencies, but rather how this oversight is designed (Gusy, 2011, p. 131). As the separation of powers and lines of control in the German political system do not simply run between executive and legislative powers but rather between the opposition parties on the one hand and the executive and parliamentarians of the government coalition parties on the other, the strength of the German parliamentary control system should always be assessed in light of minority rights of the opposition (Schmidt, 2011, p. 159).

In the context of parliamentary intelligence oversight, the 'principle of a gradual decrease in publicity' applies,⁸ which Gusy describes as follows: Parliamentary control is generally legitimate when there is no legal constraint on the access to information (2011, p. 131). Yet, there can be limits to this when handling information on specific persons or operations. When access to information is denied, it needs to be decided whether the parliament should be informed in another way, for instance by establishing secret oversight bodies that will hold closed sessions (*in camera*) (Gusy, 2011, p. 132). It should be noted that this principle puts a constrain on parliamentary oversight, as publicity is one of the key prerequisite and instruments of parliamentary control (Gusy, 2011, p. 131). For this reason, among many others, Gusy calls the parliamentary intelligence oversight in Germany "blind watchers and watchers without a sword" (Gusy, 2011, p. 132).⁹

However, in this section, we do not want to go into the details of the constraints faced by parliamentarians in this context, as we will focus on this in our empirical analysis. The main goal of this theoretical framework was to demonstrate why parliamentary oversight is of distinct importance with regard to the activities of intelligence agencies. Secrecy might impede accountability if actions are carried out in a legal 'gray zone', yet this fact just makes the necessity of political accountability even more apparent. In the following chapter, we will outline which definitions and methodology we used for our analysis of parliamentary intelligence oversight in Germany.

⁸ Translation by the authors. In the original text: "*Prinzip der abgestuften Öffentlichkeit*" (see Gusy 2011, p.131).

⁹ Translation by the authors. Original quote: "Die parlamentarischen Kontrollinstanzen sind nicht nur blinde Wächter; sie sind auch Wächter ohne Schwert" (Gusy 2011, p. 132).

4. Methodology

4.1 Definitions of Key Concepts

- Definition of intelligence: Intelligence “refers to information relevant to a government’s formulation and implementing policy to further its national security interests and to deal with those interests from actual or potential adversaries” (Shulsky & Schmitt, 2002, p. 1). Intelligence as an action can then be defined as “the collection and analysis of information, presented to policy-makers in a form that will help them in their decision-making process and their choice of policy options” (Caparini, 2007, p. 5).
- Definition of oversight: The terms ‘control’, ‘oversight’ and ‘review’ are often used interchangeably. Oversight is defined by Caparini as “supervision, watchful care, management or control” (Caparini, 2007, p. 8). Control means the political and administrative control, i.e. the management of intelligence agencies (Caparini, 2007, p. 8). Oversight, including control, has, according to Caparini two objectives, propriety and efficacy (2007, p. 9) which she ties back to the concept of accountability of intelligence services as described by Reg Whitaker: “Propriety refers to compliance with the law and with ethical norms, in relation both to ends and to means. (...) Efficacy tends to focus on the relation of means to given ends: are they efficient and giving value for money?” (1999, p. 131).

In our analysis, only the dimension of propriety is considered. This focus has two main reasons: First, as stated in the introduction, we focus on German citizens, meaning that predominantly the compliance with legal and ethical norms (propriety) relating to a country’s own citizens is considered. Secondly, we structure our analysis around the concept of political accountability, which falls into the dimension of propriety. Furthermore, we use the term of oversight instead of control, as we do not seek to analyze the direct executive control and management of intelligence agencies.¹⁰ Although we

¹⁰ In fact in German, the term ‘*Kontrolle*’ has a different connotation, which is not as strong as the connotation of the English term ‘control’. In German, ‘*Kontrolle*’ includes both control and oversight.

acknowledge the further analytical difference between review (referring to an ex post control) and oversight, we include both bodies of oversight and review in our analysis, as we seek to analyze the German parliamentary system of intelligence oversight, and two of its bodies (the Parliamentary Control Panel as well as the committees of inquiry) are also in charge of a retrospective review.

- Definition of accountability: We use the definition of accountability as framed by Andreas Schedler: “A is accountable to B when A is obliged to inform B about A’s (past or future) actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct.” (Schedler, 1999, p. 17). More specifically, political accountability is the supervision “of the exercise of state power, specifically the behavior of public officials and involves the possibility of redressing abuses” (Caparini, 2007, p. 9).
- Definition of digitization: We define digitization as increasing digital communication and production of digital data including national and international data flows (see also Helbing, 2015). Note that the technological developments are not a core element of our analysis of effectiveness of parliamentary intelligence oversight. Instead, digitization is an important **background condition** (Gerring, 2012) which reinforces the relevance of our research, as digitization is assumed to activate or magnify problems of political accountability.

4.2 Operationalization of Effectiveness of Parliamentary Oversight

Based on the function of parliamentary oversight stated earlier, effective parliamentary oversight needs to ensure political accountability, as defined above. Coming back to the concept developed by Andreas Schedler, we can differentiate between horizontal and vertical accountability (1999, p. 23). *Horizontal accountability* means a “relationship between equals: it refers to somebody holding someone else of roughly equal power accountable.” (Schedler, 1999, p. 23). This refers to executive, legislative, and judiciary powers. *Vertical accountability* on the other hand “de-

scribes a relationship between unequals” (Schedler, 1999, p. 23). This entails hierarchical dimensions within institutions, but also goes all the way ‘down’ to citizens and the media, who can also hold political actors accountable.

Locating our research in Schedler’s framework, we concentrate on horizontal accountability (specifically the accountability of the executive to the legislative power). The vertical accountability to citizens, established for instance through petitions, or advocacy of NGOs, is not in the focus of the analysis, as it is not part of the system of parliamentary oversight, although it might play an important role to achieve political accountability on a general level.

According to Caparini, there are two main requirements to ensure political accountability (2007): First, the provision of information, explanation and justification of the actions and decisions of agencies and of public officials; secondly, the enforcement and capacity to impose sanctions when improper behavior of the body that is held accountable has been identified. To which extent these requirements are fulfilled can be evaluated using the following indicators: the provision of information to oversight bodies, explanations and justifications delivered to these bodies when requested, and the ability to impose sanctions such as the enforcement of legal sanctions or the public exposure of questionable government action (Caparini, 2007, p. 9).

In sum, the **effectiveness of parliamentary oversight of intelligence services is reflected in the extent to which political accountability is achieved**. Building these definitions, we derive three dimensions of effectiveness of parliamentary oversight:

1. Collection of information
2. Analyzing and evaluating information
3. Imposing sanctions

These dimensions serve as the key analytical framework for our analysis (and hence our coding system) of the empirical data gathered in the expert interviews, and in other documents, to which we will turn in chapter 6 (Empirical Analysis).

4.3 Grounded Theory

In order to investigate the research question (*In a context of ever-advancing digitization, how can parliamentary oversight of intelligence services in Germany be effective?*) we use the methodology of **Grounded Theory**. Grounded Theory was initially developed by Barney Glaser and Anselm Strauss, and was later continued by Anselm Strauss and Juliet Corbin (Corbin & Strauss, 2008). Its main aim is to develop theoretical explanations from empirical data. As it is rooted in sociology, it is mainly applied to developing theories of human behavior and societal phenomena. However, it can also be applied in other disciplines (2008). When using Grounded Theory, the gathering of empirical data and the analysis of the data complement each other in a continuous process. To this aim, the researcher will continually draft memos/keep written records on his or her thoughts when listening or reading recorded interviews or other data (2008). This can be complemented with the use of visualizations and diagrams which summarize important thoughts. The most important aspect of this is the **coding process**, meaning the identification of patterns and themes, which appear in the data. The codes written down for one interview for example can then be checked in another interview, where new codes might also come up while others repeat themselves. Ultimately, categories will be developed out of the coding process (Corbin & Strauss, 2008) which aim at explaining the phenomenon studied.

The reason why we deem this methodology to be appropriate for our research is the fact that we would not only like to review existing literature on parliamentary control of intelligence services, but also to develop our own understanding of which factors are necessary for an effective intelligence oversight in Germany. This is possible through the constant analysis of newly gathered empirical data. We believe that the research process of Grounded Theory is especially suitable for our two-person project. This allows us to cross-check codes and ideas in order to come up with a robust result by ensuring **inter-coder reliability** (for more information on our coding process, see below).

As we use Grounded Theory, it is important to make our own assumptions explicit in the research to avoid an unidentified bias. Before conducting the analysis, we therefore explicitly state the **assumptions of our research** on which we reflected during the research process:

- 1.) Our research is normative as it is based on the notion of political accountability. We assume that democratic oversight of intelligence services is a vital part of ensuring the rule of law in democracies, meaning that state power can only be exercised in line with the constitution, and with the objective of protecting human dignity, freedom, justice, and legal certainty.
- 2.) This further entails that the expansion of intelligence activities due to the technological advances of digitization should be accompanied by a proportional adaptation of democratic oversight to ensure legitimacy.
- 3.) The current institutional setup of parliamentary oversight of the intelligence services in Germany needs reform as it lacks resources (personnel and technological know-how), and misses a clearly defined role vis-à-vis the executive.
- 4.) National democratic oversight of intelligence services might be insufficient or even impossible in new situations of borderless international data flows.

4.4 Methodology of the Interviews

To gather empirical data, we conducted **semi-structured expert interviews** with a variety of people in German intelligence oversight or affiliated with it. In preparation for the interviews, we developed a semi-structured interview questionnaire based on Gläser and Laudel (2009). We adjusted the questionnaire according to new insights, and so that it would fit the personal context of each interviewee (for instance with regard to the institutions he or she worked in), yet in general we kept the core outline. Further sources of our analysis included:

- Newspaper articles or printed interviews of people who are relevant for our study but who we were not able to talk to in person.
- Official documents of the G10 Commission, the Parliamentary Control Panel, and the committees of inquiry of the Bundestag on the NSA and NSU affair.
- Legislature on the G10 Commission and the Parliamentary Control Panel.

Selection of interview partners

Following the methodology of Grounded Theory, we selected the interview partners based on their expertise and personal experience with regard to intelligence oversight in Germany, with the aim to get first hand insights into the mechanisms, processes and information flows at play. We chose interview partners with different perspectives, for example parliamentarians of both opposition and government coalition parties who are active in different oversight bodies, journalists that have published on the topic, research associates to relevant parliamentarians, and a think tank that actively conducts research in this field. Following the techniques of Grounded Theory, we conducted **theoretical sampling**, meaning a conscious choice of interview partners which are relevant to our research question (Corbin & Strauss, 2008, p. 143). Hence, we do not aim at representativeness, but at a choice of sources that enables a deep insight into the relevant concept of study. A list of our interview partners can be found in chapter six.

We selected two examples of domestic cases where the work of intelligence services became public either through media reports and/or through litigation. These are the **NSA/BND affair** (concerning the activities of the American National Security Agency and its cooperation with the German Federal Intelligence Agency BND), and the **NSU affair** (concerning the 'National Socialist Underground' and the failure of the Federal Office for the Protection of the Constitution to identify this right-wing extremist group and its activities). Both cases are similar regarding the convocation of parliamentary committees of inquiry, yet differ in a key aspect of which intelligence agency is under scrutiny (the BND and the BfV respectively). Please note that we do not deliver details on each of these cases but include the two respective parliamentary committees of inquiry in our assessment of the overall institutional setup of parliamentary oversight in Germany. The interviewees were also confronted with questions on general processes and mechanisms at play. For more detailed information on the content of our questionnaire, see chapter six or the sample questionnaire in the appendix (in German).

Transcription and coding

After the interviews were conducted, they were transcribed in order to facilitate the analysis of the interviews. Because our interview partners did not give their consent to this, we did not include the transcripts in the appendix. They are only made available to our thesis advisor. To ensure scientific standards and consistency in the transcription process, we used a fixed set of rules for the transcription of all interviews. In line with the objective and requirements of this research, we chose simplified transcription rules based on Kuckartz, Dresing, Rädiker & Stefer (2008, p. 27). They are designed to concentrate on the content of the interview statements, as opposed to including other dimensions of communication, such as body language or phonetics.

We started the **coding process** by structuring a first set of codes along main themes of the interview questionnaire. At the beginning, both researchers coded the same interview. We ensured inter-coder reliability by comparing our results. In the process, we used the software MAX-QDA with which we both handled the coding process, and the process of **writing memos**. The memos helped us to reflect the coding and research process, and were saved in the program, often linked directly to a specific code. The process of coding is defined as: "Extracting concepts from raw data and developing them in terms of their properties and dimensions" (Corbin & Strauss, 2008, p. 159). Throughout the process, we developed categories that combined several codes and that helped us to structure our analysis. Categories are defined as: "Higher-level concepts under which analysts group lower-level concepts according to shared properties" (Corbin & Strauss, 2008, p. 159). Ideally, the coding process would end when reaching **theoretical saturation**, which is "the point in the analysis when all categories are well developed in terms of properties, dimensions, and variations. Further data gathering and analysis adds little value to the conceptualization, though variations can always be discovered" (Corbin & Strauss, 2008, p. 263). Although we reached a level of theoretical saturation in most levels of our analysis, in some there remained room for further research on some aspects which were not realized due to time constraints (on the limitations of our research, see chapter 9).

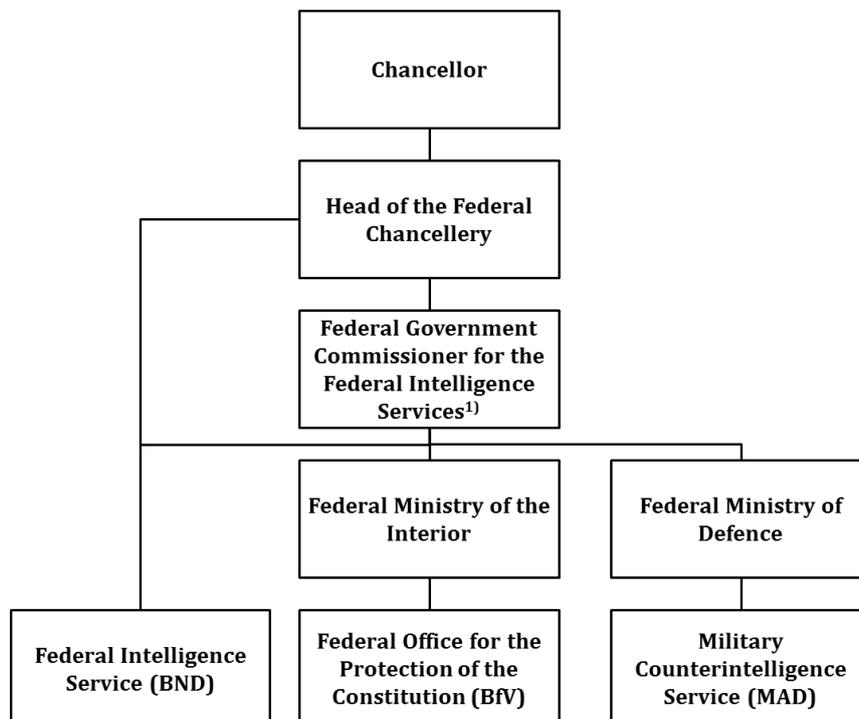
5. The German Intelligence Services and Corresponding Oversight Institutions

Before we analyze the effectiveness of the parliamentary oversight of intelligence services, we here give a brief outline of the most important intelligence agencies and their political and administrative control. Furthermore, we give an overview of the existing institutions of oversight and their legal foundations.

5.1 German Intelligence Services and their Political and Administrative Control

Overall, as stated above, the German intelligence services are responsible for the delivery of information relevant to issues of security and foreign affairs to the executive. Over time their tasks have expanded, increasingly becoming an instrument to detect organized crime and terrorism (J. P. Singer, 2009). The Federal Government, consisting of the chancellor and of the federal ministers (Art. 62 GG), is responsible for all German intelligence services.

Figure 1: Intelligence services and their administrative and political supervision



1) The Commissioner for the Federal Intelligence Services is at the same time the State Secretary at the Federal Chancellery and deputy of the Head of the Federal Chancellery

Source: Own illustration based on the current institutional setup, e.g. see <https://www.bundestag.de/bundestag/gremien18/pkgr/nachrichtendienste/248040>

Federal Intelligence Service (BND)

The German Federal Intelligence Service (*Bundesnachrichtendienst*, BND), is the German foreign intelligence service which is subordinated to the Federal Chancellery. Its activities on the German territory are specified in the Law on the Federal Intelligence Service (BNDG). The BND's tasks include intelligence on political, economic, military, and scientific-technological intelligence (Daun, 2009). The BND's budget has massively increased in recent years: For 2016, around €720 million are estimated for the BND in the budget, compared to €530 million in 2014, only two years earlier (Bundesministerium der Finanzen, 2015, p. 253). When compared with the US's CIA budget of \$15 billion or the NSA's \$11 billion (Andrews & Lindeman, 2013) the German figures can appear to be rather paltry sums. However, the budget's increase in recent years combined with the new possibilities of signals intelligence constitute a major increase in power of the BND.

Federal Office for the Protection of the Constitution (BfV)

The Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*, BfV) is responsible for the domestic intelligence, and is subordinated to the Federal Ministry of the Interior. Its tasks are specified in the Law on the Federal Office for the Protection of the Constitution (BVerfSchG), and mainly comprise the collection of information on all activities that are unconstitutional. The budget for 2016 is planned to be €260 million, up from €205 million in 2014 (Bundesministerium der Finanzen, 2015, p. 683).

Military Counterintelligence Service (MAD)

The Military Counterintelligence Service (*Militärischer Abschirmdienst*, MAD) is responsible for counterintelligence and counterterrorism within the armed forces, and is subordinated to the Federal Ministry of Defence.¹¹ Its budget for 2016 is €3 million (Bundesministerium der Finanzen, 2015, p. 2189). As stated earlier, the MAD is excluded from the analysis as its work falls into the realm of the military.

¹¹ For more information on the MAD see (Bundesministerium der Verteidigung, n.d.)

5.2 The German System of Parliamentary Intelligence Oversight

A major challenge of intelligence oversight is that some of the usual parliamentary instruments to achieve political accountability of the executive only work to a limited extent due to the secrecy of operations. The parliamentary right to demand information from the government is based on the idea of making government activities public (Busch, 1991). Hence, many instruments, such as debates on matters of topical interest, in German *Aktuelle Stunde*, as well as minor and major interpellations (§§ 100 to 106 GO-BT) are not fully functional with regard to intelligence services due to the secret nature of most of their work. As a consequence, parliamentary bodies need to operate under a certain degree of confidentiality in order to balance transparency and secrecy (Busch, 1991, pp. 146–147). The German parliamentary bodies entrusted with intelligence overview mainly are:

1. **The Parliamentary Control Panel (PKGr)**
2. **Confidential Body of the Budget Committee**
3. **Committees of inquiry** (only in exceptional cases)

In the following, we first explain why we focused our analysis on the PKGr and the parliamentary committees of inquiry but to a lesser extent the Confidential Body of the Budget Committee. Also, we present our arguments as to why we included the **G10 Commission** in our analysis, although it performs the function of judiciary control of intelligence services. Then, we briefly map the relevant oversight organizations.

Our focus: The PKGr and committees of inquiry

We focused our analysis on the parliamentary institutions of the PKGr and committees of inquiry, as our definition of oversight excluded the dimension of ‘efficacy’, which is the budgetary control of intelligence agencies as conducted by the Confidential Body of the Budget Committee (see chapter 4.1. on the definition of oversight). Nevertheless, we do cover potential cooperation of the PKGr with the Confidential Body of the Budget Committee.

A note on the inclusion of the G10 Commission: As discussed in chapter 2, the G10 Commission is an oversight body that is a '*sui generis*' yet fulfills the function of judiciary control of the intelligence services. In a narrow understanding, it is not part of the system of the parliamentary oversight. Nevertheless, we have decided to include this body into our analysis because we think that it is vital for the comprehensive understanding of German parliamentary oversight. First, we think that it is important to know which ground is already covered by the activities of the G10 Commission. Second, we observed that sometimes members of the G10 Commission are at the same time active members of parliament (which is for instance currently the case for the active parliamentarian and G10 Commission deputy member Halina Wawzyniak of the parliamentary group DIE LINKE).¹² Therefore, there is some personnel overlap between the G10 Commission and other parliamentary oversight bodies. To investigate possible consequences for the effectiveness of parliamentary control, we interviewed one former parliamentarian, Hartfrid Wolff, who was not only an active parliamentarian while being a member of the G10 Commission, but concurrently part of the PKGr and the committee of inquiry on the NSU.

The Parliamentary Control Panel (PKGr)

The Parliamentary Control Panel is responsible for the parliamentary oversight of all intelligence activities, which is even stated in the German Basic Law (Art. 45d GG), and specified in the Law on the Parliamentary Control Panel (PKGrG) which has been implemented as part of a reform in 1999. Importantly, in the law it is explicitly stated that the political responsibility for the intelligence services lies with the Federal Government. It is responsible for the oversight of all intelligence services. The PKGr meets in secrecy at least four times a year, and consists of parliamentarians appointed by parliament at the beginning of each term. It also appoints the members of the G10 Commission. The Federal Government needs to inform the PKGr about the general activities of the intelligence services as well as on 'procedures of particular significance (§4 (1) PKGrG).¹³ Upon request of the PKGr, the government also has to inform the committee on all other issues (PKGrG §5 (1)). To obtain infor-

¹² For more information on Halina Wawzyniak see (Deutscher Bundestag, n.d.-c)

¹³ Own translation of the German term '*Vorgänge von besonderer Bedeutung*'

mation, apart from what it receives from the government, the PKGr can demand documents as well as conduct hearings with intelligence services employees (PKGrG §5 (2)). For obtaining all documents, the PKGr can request administrative assistance from courts and state agencies. It issues a report at least twice each legislative period.

The Confidential Body of the Budget Committee

The Confidential Body of the Budget Committee is entrusted with the approval of the budget of all intelligence services. The body's rationale is that the detailed budget of intelligence services might reveal much of their activities. Hence, all meetings are held in secrecy, and only the final budget of the intelligence agencies is disclosed to the Budget Committee. Its legal basis is the §10a of the Federal Budget Code, in German *Bundeshaushaltsordnung* (BHO).

The parliamentary committees of inquiry

At the request of the parliament, committees of inquiry can be appointed to investigate incidences of special interest to the parliament, often relating to suspected misconduct of the government. They have a possibility to meet in camera. The legal basis for committees of inquiry is the Law of Parliamentary Investigation Committees, in German *Parlamentarisches Untersuchungsausschussgesetz* (PUAG). Committees of inquiry are not permanent committees but can be appointed upon request of a quarter of the parliament's members (§1 PUAG) and are dissolved once they present the final report of their investigation. They are the strongest instrument of parliamentary investigation and reflect the supervision of the executive by the opposition parties, as in the past, it is mostly the opposition that request the installation of committees of inquiry (Busch, 1991, pp. 115–116). Committees of inquiry mirror the proportion of the parties in the parliament, and the opposition has the possibility to publish dissenting opinions in the final report (§33 (2) PUAG). As committees of inquiry are only formed in exceptional circumstances, this institution of oversight is a special case of parliamentary control.

The G10 Commission

The G10 Commission fulfills the function of judiciary control of intelligence services. All measures of intelligence services that restrict the constitutional right to privacy

of correspondence and telecommunications (Art. 10 GG) of German citizens need to be authorized by the G10 Commission, as stated in the respective law.¹⁴ As the normal legal process for citizens under surveillance is not possible – the respective citizens usually do not know about the secret surveillance – it is the idea of the G10 Commission to act in representation of the citizens under observation. Examples of activities that need to be authorized by the G10 Commission include the wiretapping of telephones or the surveillance of postal traffic or e-mail communication. In each new legislative term, the PKGr appoints the four members of the G10 Commission and their four deputies. The chairman of the commission needs to be qualified to hold judicial office (§15 (1) Art. 10-Gesetz - G 10). The G10 Commission meets in secrecy at least once a month, and has the rights to be admitted to the intelligence service offices, and to request and analyze information (§15 Art. 10-Gesetz - G 10 (2-5)).

Other oversight bodies

Apart from the above-mentioned parliamentary oversight bodies, also the Parliamentary Committee on Internal Affairs (*Innenausschuss*) can hold confidential meetings concerning the BfV, and demand the latter to report to the committee.¹⁵ The Defense Committee (*Verteidigungsausschuss*) might deal with activities of the MAD as part of the parliamentary oversight of the Federal Ministry of Defense.¹⁶ As this is only a point by point oversight, and our interview partners did not attribute much importance to them, hence the committees' role is not analyzed any further.

Further oversight bodies include the Federal Commissioner for Data Protection and Freedom of Information, (*Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*, BfDI), and the Federal Court of Audit (*Bundesrechnungshof*, BRH). Since 2014, the BfDI is an independent federal authority with the objective to oversee the implementation of the data protection regulation, also in the realm of the intelligence services. The BRH exercises financial oversight of the intelligence services, reporting to the executive as well as to the Confidential Body of the Budget

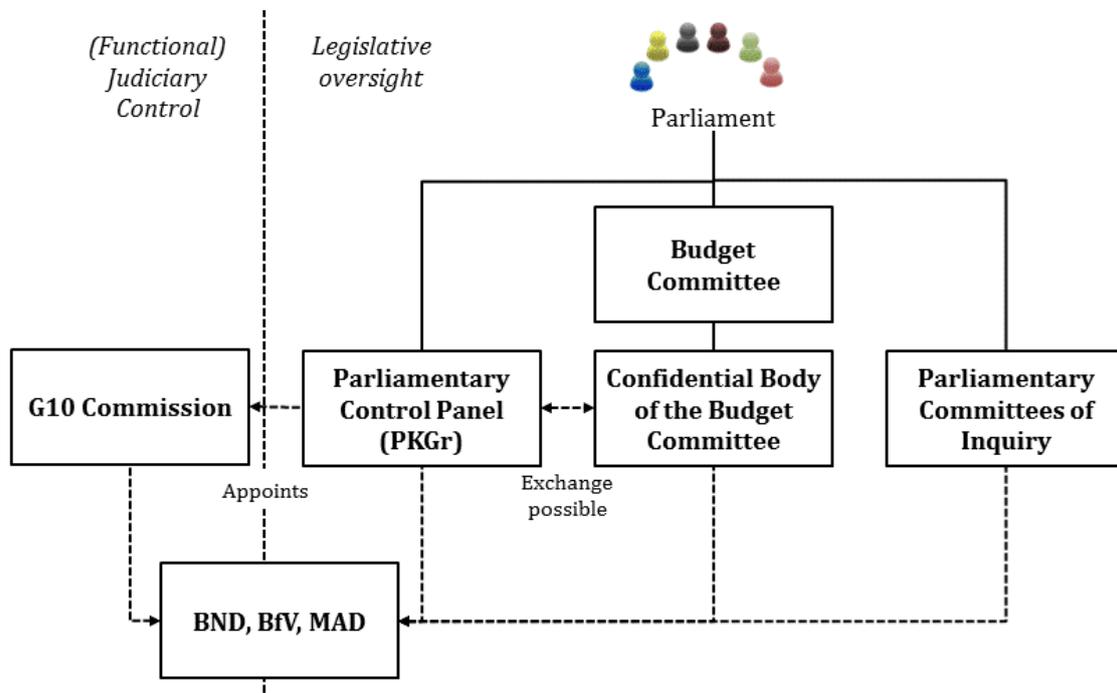
¹⁴,Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses' or in short 'Artikel 10-Gesetz'

¹⁵ For more information see (Bundesamt für Verfassungsschutz, n.d.-a)

¹⁶ For more information see (Deutscher Bundestag, n.d.-a)

Committee as well as the PKGr. Both oversight institutions are to some extent involved in the parliamentary oversight system, but do not perform the function of achieving political accountability. Hence, both institutions are not part of our primary research focus.

Figure 2: Overview of legislative oversight and judiciary control



Source: Own illustration based on the current regulation and institutional set-up. For more information see the pages of the Federal Government the German Bundestag and the intelligence services, such as <https://www.bundestag.de/bundestag/gremien18/pkgr/nachrichtendienste/248040>

6. Empirical Analysis: Assessment of Effectiveness of Parliamentary Oversight

As stated earlier, the parliamentary oversight institutions try to balance the contradicting objectives of transparency and secrecy to achieve political accountability. Building on the introduced framework of Caparini (2007), we structured our analysis of the parliamentary oversight into three dimensions: The collection of information, the analysis and evaluation of information, and the imposition of sanctions. In the following, we outline the deficiencies and mechanisms we identified in each of these dimensions.

List of Interview Partners

We have conducted twelve interviews between January 15, 2016 and March 01, 2016. Eight of the interviews were personal meetings in one of the German parliamentary buildings or in a hotel lobby, three of them were conducted via telephone and one was conducted via written correspondence. We interviewed the following people:

1. Anonymous: A journalist that has published on the activities of intelligence services and their parliamentary oversight
2. Anonymous: An advisor to one of the parliamentarians active in the field of intelligence oversight
3. Anonymous: A former member of the PKGr
4. Anonymous: Representative of the CDU/CSU
5. **Dr. Hans de With** (SPD; former President of the G10-Kommission)
6. **Christian Flisek** (SPD; MdB; member of the NSA committee of inquiry)
7. **Dr. Bertold Huber** (Currently Vice President of the G10 Commission)
8. **Heike Kleffner** (research associate of and advisor to the parliamentary group DIE LINKE for the current second NSU committee of inquiry)
9. **Konstantin von Notz** (Bündnis90/Die Grünen; MdB; member of the current NSA committee of inquiry)
10. **Hans-Christian Ströbele** (Bündnis90/Die Grünen; MdB; member of the PKGr & of the NSA committee of inquiry)

11. **Dr. Thorsten Wetzling** (researcher at the stiftung neue verantwortung (snv) in the Privacy Project; has written extensively on international and German parliamentary oversight of intelligence services)
12. **Hartfrid Wolff** (former MdB for the FDP; former member of the PKGr, the G10 Committee and the first NSU committee of inquiry)

Clearly, most of the interview partners are situated in the sphere of the democratic oversight of intelligence services. We contacted representatives of the BND for interviews; unfortunately, the BND responded that they do not answer requests relating to thesis projects.

A note on the NSA committee of inquiry

Triggered by the revelations of Edward Snowden, the German committee of inquiry on the NSA affair has the mandate to investigate to what extent the 'Five Eyes' project – the cooperating intelligence services of the USA, UK, Canada, Australia and New Zealand – has collected communication data flowing from, to or inside Germany from 2001 onwards. Furthermore, the committee aims to investigate the role of the German executive, and the German intelligence services in this regard, meaning to what extent they knew about or even contributed to this (Bundestag Drucksache 18/843, 2014).

A note on the NSU committee of inquiry

This committee investigates the right-wing terrorist group '*Nationalsozialistischer Untergrund*' (NSU) and its supporters, the murders and other crimes it is charged with as well as how it was possible that the group escaped law enforcement authorities for thirteen years. Among other security authorities, the role of the BfV is investigated (Bundestag Drucksache 17/14600, 2013; Bundestag Drucksache 18/6330, 2015).

6.1 First Dimension of Effectiveness: Collection of Information

Limited access to classified information

The interviewees from the PKGr and the committees of inquiry stated that they often have very limited access to information on the activities of intelligence services. The

German intelligence services often seem to reject the disclosure of classified material on operations, sources, and methods. Justifications, among others, include that this disclosure would compromise their mission of protecting national security, and that they need to protect their human sources, in German so-called *V-Leute*, as stated by anonymous sources (also see Bundestag Drucksache 17/14600, 2013). In addition, information received through the cooperation with foreign intelligence services is often only shared between intelligence services under the condition of non-disclosure. According to §6 (1) of the PKGrG and as stated by an anonymous source, information obtained from foreign intelligence services does not need to be shared with oversight bodies as it is not in the domestic intelligence services' 'area of jurisdiction'.¹⁷ The refusal to disclose sensitive material takes the following forms:

- Refusal of handing over documents or blackening of documents: Examples are the blackened or non-disclosed documents in the case of the committee of inquiry on the NSA affair (K. von Notz, personal communication, January 15, 2016). But the same also occurred in the PKGr (H.-C. Ströbele, personal communication, February 02, 2016).
- Limited testifying permission of witnesses: The BMI has only given limited permission to employees of the BfV to disclose information in the NSU case (H. Kleffner, personal communication, February 8, 2016). When visiting the NSA committee of inquiry on January 14, 2016, the authors have witnessed the same when employees of the BND were stopped in their statements by the representatives of the Chancellery based on the argument that these statements were beyond the scope of investigation.¹⁸

Apart from these official possibilities of objecting to the handover of information to parliamentary oversight bodies, there were also other incidences that prevented or hampered the collection of information. This included handing over incomplete documents, as has happened for example in both the NSU committee of inquiry (H. Kleffner, personal communication, February 8, 2016) and the PKGr (H.-C. Ströbele, personal communication, February 02, 2016). Moreover, in the context of the NSU

¹⁷ The German term that is used in the PKGr is '*Verfügungsberechtigung*'. Also see (J. Singer, 2016).

¹⁸ In German: '*Außerhalb des Untersuchungsgegenstandes oder - zeitraums*'

scandal documents were shredded in the BfV (Bundestag Drucksache 17/14600, 2013).

It is the executive that decides on the classification of documents. Hereby, the classification of documents, or more generally, keeping information secret, seems to follow only vague criteria. Hans-Christian Ströbele states that the secrecy of the government is often arbitrary, as illustrated by issues that have already been discussed publicly in the media, while still officially treated as confidential (personal communication, February 02, 2016).

Limited minority rights and passive oversight of the PKGr

Party politics seem to play an important role in committees of inquiry, such as stated by von Notz (personal communication, January 15, 2016), Flisek (personal communication, February 25, 2016) or Wolff (personal communication, February 1, 2016). However, according to the perception of Christian Flisek, party politics mainly play a role in public debates - once committees of inquiry operate *in camera*, party politics are much less dominant (personal communication, February 25, 2016). Also, all the interviewed former and current members of the PKGr stated that party politics have a considerable influence.¹⁹ Ströbele states that “the parliamentarians from the government coalition generally see their main task in defending the government” (personal communication, February 02, 2016, own translation), which leads to conflicts in performing the tasks of the PKGr.

Currently, the PKGr and its regular process of intelligence oversight is usually informed by the Federal Government which is obliged to report procedures of so-called ‘particular significance’²⁰ (§ 4 PKGrG). As stated in §3 (6) of its procedural rules, decisions are usually taken by majority vote (Parlamentarisches Kontrollgremium, 2014). Ströbele sees this, that oversight is only performed if the members of the government parties agree, as a significant hurdle to oversight (personal communication, February 02, 2016). In addition to the limited minority rights

¹⁹ Interestingly, there is also a discrepancy to what extend partisanship and party politics in the process of intelligence service oversight should play a role in the academic literature. For example, Schreier (2007, p. 42) argues that the parliamentary oversight should be non-partisan, although others state that it is necessarily the opposition that is performing the oversight of the government (Busch, 1991, p. 21).

²⁰ Own translation of the German term ‘Vorgänge von besonderer Bedeutung’

for initiating proactive control, members of the opposition cannot take denied requests of information before the constitutional court, as this can only be done with a two thirds majority (§14 PKGrG).

The limited minority rights might in this regard also contribute to the rather passive character of the oversight through the PKGr. According to Flisek, the oversight process is usually initiated by information delivered by the executive or by investigative journalism, as opposed to a regular, systematic oversight. The introduction of a work plan for the PKGr in 2014²¹ which is updated every year is not sufficient to ensure an effective and proactive oversight for Flisek (personal communication, February 25, 2016).

Party politics and limited minority rights can also reduce the effectiveness of parliamentary oversight in committees of inquiry. The distribution of seats in the PKGr is proportional to the distribution of parties in the parliament (§4 PUAG). This entitles the members of the government coalition parties to set the agenda, which is frequently the case according to Ströbele (personal communication, February 02, 2016). Furthermore, a distribution of members proportional to the parties in the parliament can lead to rather extreme cases, especially when the legislature is operating with a grand coalition. For example, in the current NSA committee of inquiry only two of eight members are from the opposition,²² which leads, according to von Notz, to an inadequate representation of the opposition especially given that they are more critical in the investigation (K. von Notz, personal communication, January 15, 2016). However, the opposition has more rights in committees of inquiry than in the PKGr. This is inter alia reflected in the fact that a minimum of 25% of members can demand the Federal Constitutional Court to decide on the legality of cases where the executive has refused to comply with a request to obtain evidence (§18 (3) PUAG), which is for example currently done by parliamentary groups of Bündnis 90/Die Grünen and DIE LINKE with regard to the NSA committee of inquiry.²³

²¹ For the 2014 and 2015 work plan see (Bundestag Drucksache 18/7962, 2016)

²² Also see (Deutscher Bundestag, n.d.-b)

²³ See (Bündnis 90/Die Grünen & DIE LINKE, n.d.) and (Biermann, 2015)

Obstruction of oversight through limited documentation

The collection of information is additionally complicated through the limited systematic documentation of activities in the intelligence agencies. As Christian Flisek puts it, the parliamentary oversight of intelligence is like finding a “needle in the haystack” (personal communication, February 25, 2016, own translation). There is no real possibility to check whether requested information is missing. This is illustrated with the example that requested documents are not paginated (H.-C. Ströbele, personal communication, February 02, 2016), or that there is no documentation at all for large parts of intelligence operations (K. von Notz, personal communication, January 15, 2016). Also, within the intelligence agencies there is often very limited exchange of information (B. Huber, personal communication, February 17, 2016). The consequent intricate traceability of information hampers oversight, and facilitates plausible denial of activities. Examples of this can possibly be seen in the NSA committee of inquiry, where many witnesses claim that they do not remember details or entire processes, even if they are of high importance (K. von Notz, personal communication, January 15, 2016). Lastly, there are many grey zones of the legal basis of intelligence activities complicating the parliamentary oversight (C. Flisek, personal communication, February 25, 2016). As an illustration of limited documentation, it took the first NSU committee of inquiry in the 17th legislative period more than one year to find out about the existence of an entire work unit inside the BfV that was specifically entrusted with research on right-wing terrorism (H. Kleffner, personal communication, February 8, 2016).

Importance of unofficial information streams

The media are not only important in their role of expressing public interest and exerting public pressure, but are also a crucial source of information for the oversight bodies themselves, as has been stated and emphasized by the vast majority of our interview partners. H.-C. Ströbele states that the media are even his main source of information. For example, when he was informed about incidences of special importance regarding intelligence services, it was not through the government (which is obliged to inform the PKGr about the mentioned procedures of ‘particular significance’) but mostly through the press (personal communication, February 02, 2016). Furthermore, Heike Kleffner states that committees of inquiry would probably not

be half as effective without investigative journalism (personal communication, February 8, 2016). This information from interview partners is in line with personal observations of the authors in the public hearing of the NSA committee of inquiry on January 14, 2016, where employees of intelligence services were confronted by the committee's members with information that was published in newspapers such as the *Süddeutsche Zeitung* or *DIE ZEIT*.

The importance of the media can partially be explained by the fact that information is leaked primarily through the media, and that there are only limited possibilities for legal whistleblowing. Crucially, if members of intelligence services want to report misconduct to the PKGr, they are obliged to inform the leadership of their organization as well (§8 (1) PKGrG).

In addition to the media, it seems that informal networks and the knowledge of individual members of the oversight bodies are of high importance. For example, both Wolff and Ströbele as members of more than one oversight body highlighted that an overlap of personnel between oversight bodies is very informative as it offers a more holistic view on matters of oversight (H. Wolff, personal communication, February 1, 2016; H.-C. Ströbele, personal communication, February 02, 2016). Wolff also added that the development of a personal network of contacts is important for obtaining information (personal communication, February 1, 2016). The importance of informal information sources also helps to explain why the continuity of personnel across legislative terms is mentioned as important for effective oversight (see B. Huber, personal communication, February 17, 2016 or H. Wolff, personal communication, February 1, 2016).

Lastly, civil society was mentioned as an important source in the NSU context, namely the antifascist organization NSU Watch (H. Kleffner, personal communication, February 8, 2016).

6.2 Second Dimension of Effectiveness: Analyzing and Evaluating Information

Limited resources and technological competence

Another deficiency of parliamentary oversight is the rather small amount of available resources, both in terms of personnel and technological competence, an idea which was heavily emphasized by the interview partners, such as Wolff, de With, von Notz, Huber, and Kleffner. For example, for von Notz, the low budget leads to a huge disparity of power between the executive and the parliamentary oversight. With only three regular members of staff, it is almost impossible to manage the tasks related to the NSA committee of inquiry on top of all other duties of parliamentarians. According to von Notz, the discrepancy becomes obvious when compared to the 100 people that were entrusted by the Federal Chancellery to assemble and blacken the documents that had been requested by the committee (K. von Notz, personal communication, January 15, 2016). The lack of resources of both the PKGr and the committees of inquiry is so significant that it calls into question their ability to adequately fulfill their oversight mandate. As Heike Kleffner puts it, the PKGr resources are generally not sufficient to oversee the normal ongoing of intelligence activities (personal communication, February 8, 2016).

Evaluation of the effectiveness of intelligence is difficult

All of the interviewed persons stated that it is very difficult, if not impossible, to assess the effectiveness of intelligence services, through measuring to what extent intelligence services have actually contributed to the prevention of security threats, and establishing causality (C. Flisek, personal communication, February 25, 2016). In fact, only the two interviewees that are or were members of the G10 Commission stated that they saw evidence of intelligence services contributing to the prevention of security threats, for example in the case of the 'Sauerland' terrorist group (B. Huber, personal communication, February 17, 2016). It appears that an impact assessment of the intelligence services is difficult.

The uncertainty about the impact of intelligence to prevent security threats is contrasted by cases where intelligence services reduce security. For example, in the NSU case, intelligence services hampered effective law enforcement by prioritizing the

protection of their sources over the prosecution of criminal offenses (Bundestag Drucksache 17/14600, 2013). Furthermore, according to Heike Kleffner, the secret services' system of paid informants within the neo-Nazi scene in the 90s has significantly contributed to the formation of the current right-wing social movement (personal communication, February 8, 2016).

Personnel overlap between G10 Commission and PKGr

Personnel overlap between the G10 Commission and the PKGr might have the advantage that individuals that are members of both entities at the same time are much better informed, but this also has potential downsides. An anonymous source thinks that this is a problem as the involvement in the approval of G10 measures in the G10 Commission potentially reduces the same person's inclination to critically assess the same measure in its role as a PKGr member. In the academic literature, this problem is called 'regulatory capture', and can generally be described as the reduction of the independence and critical perspective that is necessary to effective scrutiny due to a certain degree of identification with the institution that is controlled (McCamus, 1989, p. 4). Put differently, "if an oversight body has foreknowledge of sensitive or controversial operations this will hamper its ability to dispassionately review them later" (Born et al., 2005, p. 7).

No exchange between different oversight bodies

Between the G10 Commission, PKGr, and committees of inquiry, although they all operate in secrecy, there is no legally allowed possibility to exchange confidential information between the oversight bodies (see for example H. de With, personal communication, February 26, 2016, or the PKGrG). Hence, the already mentioned overlap of personnel between institutions is the only way to receive information of several oversight bodies, albeit only for individual members.

6.3 Third Dimension of Effectiveness: Imposing Sanctions

It is in the principle nature of parliamentary oversight to not be able to dispose legal sanctions (Busch, 1991, p. 16). The sanctioning of abuses, shortcomings or questionable behavior of the executive and its intelligence services mainly lies in the public

exposure of government activity. Parliamentary sanctions can take the form of influencing public perception of the government which can lead to the resignation of government officials or more generally a change in the course of action of government activities. Apart from that, the parliament can also restrain future misconduct by changing the legislation or cutting back budgets.

Limited public disclosure

There are limited minority rights in the PKGr to publicly disclose information due to the secret nature of the PKGr (J. Singer, 2016, p. 159). For example, single members can only issue public evaluations of specific incidents if a two-thirds majority of PKGr members agree to suspend the requirement of secrecy for the respective information (§10 (2) PKGrG).²⁴ This means that opposition parties alone cannot publish information received in the PKGr on misconduct of executive agencies, which entails a considerable imbalance in the parliamentary oversight of intelligence services (K. von Notz, personal communication, January 15, 2016). Committees of inquiry have better possibilities for the opposition to disclose their findings. They usually have at least some public hearings and meetings, and as stated above, there is a possibility of publishing dissenting opinion in the final report, which has for example been used by the parliamentary group DIE LINKE in the first NSU committee of inquiry (Bundestag Drucksache 17/14600, 2013, p. 1031). Nevertheless, the committees of inquiry cannot disclose information that is classified by the government (K. von Notz, personal communication, January 15, 2016).

Budgetary oversight not used as instrument of sanctions

Apart from publicity as an instrument to achieve political accountability, the budget could also be used as a deliberate instrument through which to make oversight effective. Although the law allows for the exchange between the PKGr and the Confidential Body of the Budget Committee, this possibility is in reality rarely used due to time constraints of the respective parliamentarians (H.-C. Ströbele, personal communication, February 02, 2016).

²⁴ Also see (J. Singer, 2016) for further detail.

False statements in the PKGr not sanctioned

In committees of inquiry, false statements by subpoenaed witnesses can be prosecuted using the German code of criminal procedures (StPO). This is not the case in the PKGr, where false statements cannot be sanctioned using the StPO (J. Singer, 2016). According to Ströbele, this contributes to the fact that deliberate deception by the executive takes place in meetings of the PKGr (personal communication, February 02, 2016). Additionally, the absence of written minutes from the PKGr makes it difficult to actually prove that false statements have been made (H.-C. Ströbele, personal communication, February 02, 2016). This means that the government cannot really be held to account for its statements to the PKGr (K. von Notz, personal communication, January 15, 2016).

Limited attribution of personal responsibility

Currently, the Federal Government can to some extent be shielded from accountability for misconduct. It can claim that it is uninformed, with the Commissioner for the Federal Intelligence Services (see chapter 5) acting as an additional ‘firewall’ which can always take responsibility for misconduct (C. Flisek, personal communication, February 25, 2016). An example of this could be observed by the authors when visiting the public hearing of the NSA committee of inquiry on January 14, 2016. The committee members asked Ernst Uhrlau, who was Commissioner for the Federal Intelligence Services from 1999 to 2005, to what extent the Head of the Federal Chancellery, at the time Frank-Walter Steinmeier, was involved in approving the BND operation *Eikonal* in 2003 which included automated bulk collection of data. Although Uhrlau stated that Steinmeier was involved in some way, Uhrlau claimed that he could not remember in what way exactly.²⁵

Summing up, there are currently very limited instruments for sanctions. As Dr. Konstantin von Notz puts it: “If insincerity and missing obligations for reporting are not sanctioned at all, this calls into question the effectiveness of the oversight system as a whole – it is then a rather toothless tiger” (personal communication, January 15, 2016, own translation).

²⁵ Also see (Biermann, 2016) and the website of the NSA committee of inquiry (Deutscher Bundestag, n.d.-d)

7. Evaluation: Reflections on the Oversight System

Following the empirical analysis, we can summarize with regard to our original research question (*In a context of ever-advancing digitization, how can parliamentary oversight of intelligence services in Germany be effective?*) that parliamentary oversight can only be effective if the respective bodies are perceived as powerful actors in the political landscape. Only then it will receive the information necessary to exercise effective oversight. In order to achieve this, the parliamentary bodies need to be equipped with sufficient minority rights as well as with possibilities to sanction non-compliance. Furthermore, they should dispose of the necessary know-how and resources to analyze the information received. Lastly, effective parliamentary oversight needs to exercise a credible threat to sanction misconduct of the executive. Beyond this, the media play an important role by providing oversight bodies with information, and by generally informing the public about political processes.

As shown in chapter six, there are considerable deficiencies of the current system of parliamentary oversight and its function to achieve political accountability of government action. The usual frontline of parliamentary oversight between the opposition parties on the one hand and the executive and parliamentarians of the government coalition parties on the other hand does not work effectively in the context of intelligence oversight. This leads to the fact that the government is not democratically held accountable for the rapidly expanding activities of intelligence services. As a consequence, the current system might only be suited to sanction illegal behavior or cases of significant misconduct if cross-party consent is established. In the following, we elaborate on these findings.

Figure 3: Overview of findings from the empirical analysis in chapter six

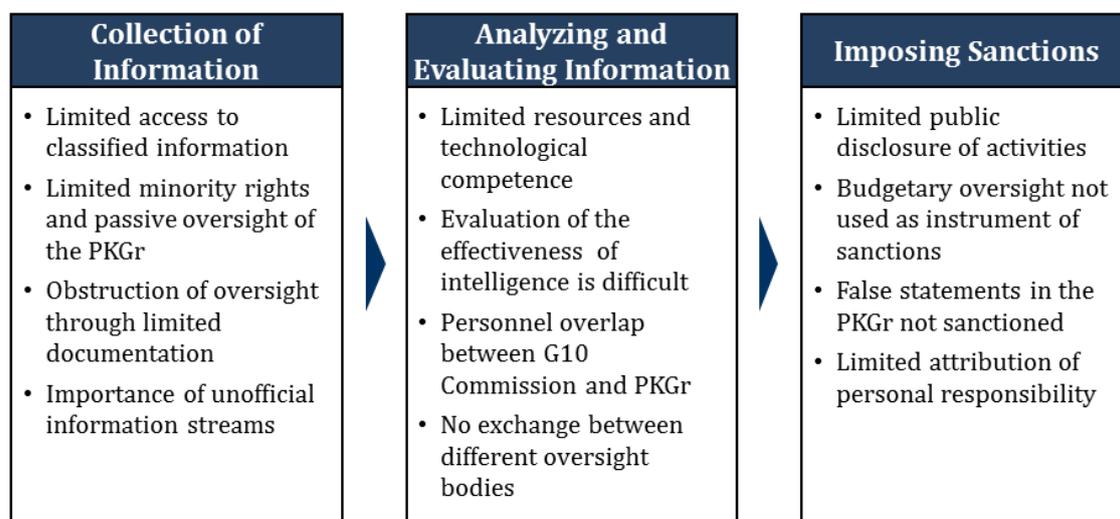


Table based on the findings outlined in chapter six.

Imperative for secrecy

Considering the illustrated limitations of parliamentary oversight in all three steps necessary for achieving political accountability – the collection of information, their analysis, and the sanctioning of misconduct – it can be said that the parliamentary oversight is severely hampered. Oversight bodies are in many respects not part of the ‘ring of secrecy’ (Born, 2007, p. 173) which would be necessary to facilitate full scrutiny. It seems that a considerable amount if not the majority of the secret activities of intelligence services are not overseen by the PKGr, with the committees of inquiry only stepping in if there is a strong suspicion of misconduct. This problem, that considerable parts of intelligence activities are exempt from parliamentary oversight, is aggravated by the fact that the G10 Commission, PKGr and committees of inquiry are not allowed to exchange information, not even on information with the same level of confidentiality, and that resources seem to be so little that even the disclosed information cannot be effectively evaluated. Going further, for the remaining information that has been disclosed and effectively analyzed, the opposition has very limited possibilities to make government action public. As Heike Kleffner puts it, parliamentary oversight is hampered by strong defense mechanisms that impede the flow of information (personal communication, February 8, 2016).

Overall, there seems to be a strong imperative for secrecy that is hampering the oversight process if not prohibiting it. It appears that secrecy is rather the norm than the exception. Combined with the general difficulty to assess the impact of secret

intelligence services, the executive is relatively immune to criticism regarding intelligence activities.

Yet even though the necessity for secrecy to protect national security is a strong argument brought forward by intelligence services, if this argument is not scrutinized itself, it is not enough to compensate for this by secreting parliamentary oversight. Hence, a more sophisticated process of assessing what needs to remain secret and what not should be introduced. This is tied to giving the parliament a better possibility to scrutinize decisions of the executive on what is classified as secret.

Committees of inquiry as a compensation mechanism

Apart from the ongoing two committees of inquiry on the NSA and NSU cases, there have been eight committees of inquiry in the past relating to intelligence services (Berger, 2014, p. 130). This might reflect the parliamentary interest to shift as much oversight as possible to committees of inquiry, as stated by Christian Flisek (personal communication, February 25, 2016). In fact, it seems that much of the political accountability function is performed by the committees of inquiry, although they are, unlike the PKGr, no regular instrument of intelligence service oversight. This is to a certain extent problematic as these committees are not designed to oversee the regular and ongoing activities of intelligence services, but rather perform an ex-post oversight of potential cases of serious misconduct. Consequently, they are not suited to compensate for all limitations of the PKGr as the main body of parliamentary oversight.

Media: Vital and problematic at the same time

The researcher van Buuren concluded that

“(...) almost every intelligence scandal has been revealed by investigative journalists and/or whistle-blowers. None by the institutions formally in charge of overseeing intelligence. That is a track record that cannot simply be ignored or downplayed.” (van Buuren, 2013, p. 250).

Also with regard to the German intelligence oversight, the media seem to be an indispensable element in facilitating the parliamentary oversight in all of the three analyzed dimensions. At the same time, leaked information in the media, no matter whether it originates in the executive or legislative, is also problematic: First, unlike

parliamentarians, the media are not representatives of citizens. Second, it might reduce the pressure to reform the system – the temptation being to allow a highly functional media and investigative journalism to compensate for poor oversight elsewhere. And third, the media have no solutions as to what can be done in the case of information that should indeed be kept secret. A system that offers varying degrees of publicity, such as the system of parliamentary oversight, is different in that regard. Lastly, one should keep in mind that media tend to exaggerate and to emphasize bad news, as also stated by Flisek (personal communication, February 25, 2016). Therefore, while acknowledging the importance of media, they cannot substitute parliamentary oversight.

The effects of digitalization

Our assumption that the expansion of intelligence activities due to the technological advances of digitization should be accompanied by an increase of democratic oversight in order to ensure legitimacy can be confirmed by our research. The expansion of intelligence services in responsibilities, budget, and technological possibilities reinforces the need to strengthen parliamentary oversight. Up to now, as T. Wetzling puts it, intelligence services have profited from digitalization in the shadow of democracy (personal communication, March 01, 2016). The severe deficiency of political accountability is now much more dangerous, as intelligence services have more capabilities, and can access data more easily. However, the identified problems of parliamentary oversight in Germany are mostly not created by digitization. The main identified problem exclusively related to digitization is the limited technological understanding of oversight bodies to fully assess the digital dimension of intelligence activities.

8. Policy Recommendations

In order to establish more effective parliamentary oversight, a reform of the current system is needed. In the following, we develop policy recommendations based on our research, and primarily focus on options for strengthening the Parliamentary Control Panel (PKGr) as the main body of parliamentary intelligence oversight.

Increase resources of oversight bodies

We recommend to further increase personnel and IT competencies inside the oversight bodies. As this aspect has already been discussed in-depth in various policy briefs (see for instance Heumann & Wetzling, 2014) as well as in the media, and was shared by most of our interview partners, we do not go into the details of this general policy recommendation.

Strengthen minority rights in the PKGr

We recommend with emphasis the strengthening of minority rights inside the PKGr. Improved minority rights can take the following form, based on suggestions included in the bill put forward by Wolfgang Nešković (2015). All individual members of the PKGr should be able to exercise the right of the PKGr to request and access information individually. Furthermore, on request of 20% of the PKGr members, non-compliance with the requests of the PKGr should be sanctioned by reporting these breaches to the parliament. The parliament should have the possibility to equip the PKGr with the rights of a committee of inquiry for a specific scope of investigation.

Allow for exchange between oversight institutions

One key feature that was apparent throughout our analysis is the fact that the prohibition on exchanging information impedes effective oversight. We are convinced that an exchange between the PKGr and the G10 Commission would generate a more holistic view of intelligence oversight, and would ease the identification of legal and political loopholes. This idea has also been stressed by several interview partners (see for instance B. Huber personal communication, February 17, 2016, or T. Wetzling, personal communication, March 01, 2016).

Use budgetary control as an instrument of enforcement

To link the budget allocation with the implementation of reforms or with the delivery of information would make for a very effective instrument of oversight. This would be a strong means of sanctioning noncompliance of intelligence services with claims of the oversight bodies. In this case, sanctions would not even have to include the public disclosure of information as there is no contradiction at all between reducing the budget and maintaining secrecy. Even though currently exchange is possible, the division of labor between the PKGr and the Confidential Body of the Budget Committee prevents the use of budgetary control as an explicit instrument of parliamentary oversight. For this reason, it might be a viable policy option to merge the PKGr with the Confidential Body of the Budget Committee. This idea has been proposed by several interview partners (see for instance C. Flisek, personal communication, February 25, 2016, or T. Wetzling, personal communication, March 01, 2016).

Clarify reporting obligations of the executive

In order to give the PKGr a better understanding of intelligence activities, it should be clarified what constitutes a ‘procedure of particular significance’²⁶ which the executive has to report to the PKGr according to § 4 PKGrG. This should essentially include information on new technology and digital instruments used by intelligence services.

Increase possibilities to sanction non-cooperation with the PKGr

In addition to using budgetary control as a means to sanction non-cooperation, the PKGr needs further measures of establishing a credible threat when the executive deliberately blocks oversight without reasonable justification. False statements in the PKGr should be prosecuted using the code of criminal procedure (*Strafprozessordnung*, StPO) as suggested by Hans-Christian Ströbele amongst others (personal communication, February 2, 2016). Furthermore, we propose to introduce the documentation of sessions of the PKGr, for instance by taking minutes

²⁶ Own translation of the German term ‘*Vorgänge von besonderer Bedeutung*’

or audio recording, to be able to prove that false statements have been made in the first place.

Improve the proactive oversight of the PKGr

Proactive oversight would significantly increase the effectiveness and credibility of the PKGr. The documentation of PKGr meetings would facilitate this, as minutes or recordings allow members to better recall discussions, and subsequently develop a more systematic approach by linking past events with current developments. Also, new members of the PKGr can use minutes to inform themselves on past issues.

Today, members of the PKGr can already visit intelligence services. Yet these visits are mostly likely announced and prepared for beforehand. Proactive oversight then again could entail access to classified information at any time, as has been suggested with regard to the G10 Commission by Hans de With (personal communication, February 26, 2016). A much more direct instrument would be digital access to files and information of intelligence agencies. This model of proactive oversight is exercised for instance in the Netherlands, where the Intelligence and Security Services Review Committee (CTIVD) “has its own workspace and computers at the service. There, the CTIVD has direct access to the digital system of GISS. [General Intelligence and Security Service]” (Wills & Vermeulen, 2011, p. 257).

9. Limitations and Further Research

For this paper's limitations, we would like to mention that most of the interviews were conducted with experts from the sphere of the parliamentary oversight. This might induce some bias as they have an interest in increasing parliamentary oversight, and might additionally use the interview to voice political statements. In this context, it is important to mention that we mainly got hold of members of the opposition parties, and conducted only four interviews with members of former or current government coalition parties (CDU/CSU, SPD, and FDP). Also, due to the secret nature of intelligence service activities, it is not possible to assess in how far these activities are scrutinized by parliamentary oversight. We did not conduct an interview with a member of the Confidential Body of the Budget Committee, as we did not want to focus on budgetary oversight. We only realized the potential for political oversight of this body during the research process. The fact that we were not able to interview members of intelligence services means that we lack this perspective in our analysis. Furthermore, the temporal scope of our findings and arguments demands some consideration. Our research analyzes the German institutional framework and its mechanisms in its current set-up. New legislation or new instruments on either the side of the parliamentary oversight bodies or on the side of the intelligence services can substantially change the possibility of establishing political accountability. With this in mind, we are eager to see the outcome of the planned reform of the Law of the BND (BNDG), and the result of the proposal of the parliamentary group of the Green party of March 15, 2016 proposing a new design of parliamentary intelligence oversight in Germany.

Further research should analyze the ability to establish accountability of parliamentary oversight bodies on the state level (*Länder*). Additionally, it would be useful and interesting to investigate how official whistleblowing procedures can be improved in order to facilitate the sharing of potential misconduct with members of the parliamentary oversight bodies. Furthermore, legal and technical options for digital oversight as mentioned in chapter eight in the policy recommendations would be an important topic to evaluate. Lastly, options for cooperation or a sharing of best practices between bodies of oversight on a European or global level should be analyzed further.

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11. Appendix

I. Sample Questionnaire

Please note that all interviews for this thesis have been conducted in German. The following English sample questionnaire is a translation of the original German questionnaire which can be found below the English version.

Preliminary remarks: We are both candidates of the Master of public Policy at the Hertie School of Governance in Berlin. The aim of our master thesis is to assess how parliamentary oversight of intelligence services on Germany can be effective in light of increasing digitization. Our thesis advisor is Prof. Claus Offe. With this interview, we would like to gain a better understanding of parliamentary oversight at the federal level, and especially its interaction with other possible oversight mechanisms. We would like use direct quotes from this interview, and can offer you to have all quotes first authorized by you. Do not hesitate in case of any further questions.

Relations between different mechanisms of oversight

1. In your opinion, what is the role of parliamentary intelligence oversight?
2. In your opinion, how does the role of the different instruments of parliamentary oversight differ? (*G10 Commission, Parliamentary Control Panel, Confidential Body of the Budget Committee, Parliamentary Committees of Inquiry*)
3. How would you assess the relation and the exchange between the different parliamentary oversight bodies?
4. How would you assess the juridical oversight of intelligence services?
5. What is the role of the German Constitutional Court as a decision-making body in case of disputes?
6. How would you assess the resources of the G10 Commission, the Parliamentary Control Panel, and the Parliamentary Committees of Inquiry?

II. Political balance of power

1. To what extent do party politics matter in the Parliamentary Control Panel? (*depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU*)
2. What is the role of the PKGr in relation with the executive, a. o. the Chancellor? (*depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU*)

3. To what extent do you see a conflict of interest between the executive's oversight of intelligence services and its role as the executive?

III. Political influence

1. In your opinion, what political influence does the Parliamentary Control Panel have? *(depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU)*
2. Do you deem parliamentary committees of inquiry more effective as a mechanism of oversight than the Parliamentary Control Panel?

IV. Possibilities of control – effectiveness review and limits due to international data streams

1. How can one assess whether intelligence services are effective?
2. Have you, personally, seen proof that intelligence services have contributed to the national security?
3. To what extent can national parliaments control the work of internationally active intelligence services?

V. Information procurement

1. How does the PKGr receive information on the activities of intelligence services? What sources of information does it have? *(depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU)*
2. How do you know what you do not know? *(Blackened documents, documents that have not been delivered etc.)*
3. In your opinion, how big of a problem is it that the investigators potentially do not have enough details to ask the right questions?
4. To what extent is parliamentary control limited, when the ones that are controlled and overseen can decide themselves which parts of documents to blacken?
5. How important is media coverage for the work of the PKGr? *(depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU)*
6. Which difficulties arise when members of the PKGr give information to the media? *(depending on the interview partner: G10 Commission, Parliamentary Committee of Inquiry on the NSA or NSU)*

7. By whom and why is secret information given to the media?
8. Which strategies do intelligence services apply to prevent that they must deliver information?
9. How can oversight be applied to documents that are classified as secret?

Reform proposals

1. How should the institutional framework of parliamentary intelligence oversight be altered to better conduct parliamentary control?
2. To what extent does parliamentary intelligence oversight itself need secrecy? → *If yes, how can secrecy be ensured?*
3. In your opinion, which other institutions (other than the Parliamentary Control Panel, the G10 Commission, or Parliamentary Committees of Inquiry) would be suitable to improve the democratic oversight of intelligence services in Germany?
4. In your opinion, would it be suitable to have an ombudsperson for inquiries by citizens with regard to the activities of intelligence services?

Beispiel-Interviewleitfaden (German version)

Vorbemerkung: Wir studieren beide im Master „Public Policy“ an der Hertie School of Governance in Berlin. Das Ziel unserer Masterarbeit ist es herauszufinden, wie parlamentarische Kontrolle von Nachrichtendiensten in Deutschland im Kontext der zunehmenden Digitalisierung effektiv sein kann. Betreut wird unsere Arbeit von Prof. Claus Offe. Mit diesem Interview möchten wir ein besseres Verständnis für die Möglichkeiten der parlamentarischen Kontrolle auf Bundesebene erhalten, gerade auch in Bezug auf andere mögliche Kontrollmechanismen. Wir würden gerne aus diesem Interview in unserer Masterarbeit namentlich zitieren. Wir bieten gerne an das Interview erst von Ihnen autorisieren zu lassen. Für Rückfragen stehen wir gerne zur Verfügung.

I. Verhältnis verschiedener Kontrollinstitutionen

1. Was ist für Sie die Funktion parlamentarischer Kontrolle von Nachrichtendiensten?
2. Wie unterscheidet sich für Sie die Funktion der verschiedenen Instrumente parlamentarischer Kontrolle? (*G10, Parlamentarisches Kontrollgremium, Vertrauensgremium des Haushaltsausschusses, Untersuchungsausschüsse*)

3. Wie schätzen Sie das Verhältnis und den Austausch der einzelnen Kontrollmechanismen parlamentarischer Kontrolle untereinander ein?
4. Wie beurteilen Sie die juristische Kontrolle der Nachrichtendienste?
5. Welche Rolle hat das Bundesverfassungsgericht als Entscheidungsinstanz über Streitigkeiten?
6. Wie schätzen Sie die Ressourcen von G10-Kommission, PKGr und Untersuchungsausschüssen ein?

II. Politische Machtverhältnisse

1. Welche Rolle spielt Parteipolitik im PKGr? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
2. Welche Rolle hat das PKGr im Verhältnis zur Exekutive, unter anderem zum Bundeskanzleramt? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
3. Inwiefern sehen Sie bei der Exekutive einen Interessenskonflikt zwischen der Aufsicht über Nachrichtendienste und der Rolle als Exekutive?

III. Politischer Einfluss

1. Welchen politischen Einfluss hat das PKGr Ihrer Meinung nach? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
2. Halten Sie Untersuchungsausschüsse als Kontrollinstrument für effektiver als das Parlamentarische Kontrollgremium?

IV. Möglichkeit der Kontrolle – Wirksamkeitsprüfung und Grenzen durch internationalen Datenverkehr

1. Wie kann geprüft werden, ob Geheimdienste wirksam sind?
2. Lagen Ihnen persönlich schon Beweise vor, dass Nachrichtendienste mit Sicherheit zum Schutze der nationalen Sicherheit beigetragen haben / wirksam sind?
3. Inwiefern können nationale Parlamente die Arbeit von international agierenden Nachrichtendiensten kontrollieren?

V. Informationsbeschaffung

1. Woher erfährt das PKGr, was Nachrichtendienste tun? Welche unterschiedlichen Informationsquellen gibt es? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
2. Woher wissen Sie, was Sie nicht wissen? *(Geschwärzte Stellen, nicht gelieferte Dokumente etc.)*

3. Wie groß schätzen Sie das Problem ein, dass die fragenden Personen eventuell nicht genügend Detailinformationen erhalten, um die richtigen Fragen zu stellen?
4. Inwiefern ist es eine Einschränkung für parlamentarische Kontrolle wenn die zu Kontrollierenden selbst entscheiden können, welche Stellen geschwärzt werden?
5. Wie wichtig ist die Medienberichterstattung für die Arbeit des PKGr? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
6. Welche Schwierigkeiten ergeben sich aus der Weitergabe von Informationen an die Medien durch Mitglieder des PKGr? *(je nach Interviewpartner: G10-Kommission, NSA/NSU-Untersuchungsausschuss)*
7. Von wem und warum werden geheime Informationen an die Medien weitergegeben?
8. Welche Strategien gibt es, die von Nachrichtendiensten angewendet werden, um zu verhindern, dass sie Informationen liefern müssen?
9. Wie kann Kontrolle bei Dokumenten/Akten/Vorgängen angewendet werden, die „VS geheim“ oder höher eingestuft sind?

VI. Reformvorschläge

1. Wie sollte der institutionelle Rahmen von parlamentarischer Geheimdienstkontrolle angepasst werden, um die Funktion der parlamentarischen Kontrolle besser erfüllen zu können?
2. Inwiefern benötigt parlamentarische Nachrichtendienst-Kontrolle auch selbst Geheimhaltung?
→ *Falls ja, wie kann diese gewährleistet werden?*
3. Welche anderen Institutionen (anders als PKGr, G10, U-Ausschüsse) wären Ihrer Meinung nach dazu geeignet, die demokratische Kontrolle von Nachrichtendiensten in Deutschland zu verbessern?
4. Bräuchte es eine Ombudsperson für Bürgeranfragen in Bezug auf die Aktivitäten von Nachrichtendiensten?

II. Coding System

MAXQDA12		
Liste der Codes		
Code	Count	
Codesystem	354	
Sammelsurium	0	
Personelle Kontinuität	5	
Funktion parlamentarischer Kontrolle	11	
Austausch und Verhältnis der Kontrollinstanzen (PKGr, UAs, G10)	22	
Juristische Kontrolle	14	
Wirksamkeit von Geheimdiensten	15	
(Un-)Abhängigkeit der parl. Kontrolle	0	
Proaktive oder reaktive Kontrolle	8	
Parteilpolitik in Kontrollinstrumenten	22	
Rolle der Exekutive	4	
Interessenskonflikt der Exekutive	5	
Personelle Identitäten innerhalb Kontrollgremien	13	
Wechsel zwischen Kontrolle, Exekutive und NDs	2	
Politischer Einfluss von Kontrolle/Verantwortlichkeit herstelle	20	
Informationsflüsse	0	
Gründe für begrenzten Info-Zugriff	0	
Kontrollmöglichkeit angesichts internat. Daten / Aktivitäten	17	
Unklare Zuständigkeit	2	
Eingeschränkte Aussagegenehmigungen	1	
Keine Info-Systematik/eingeschränkte Verschriftlichung bei NDs	8	
Quellenschutz (z.B. V-Leute)	6	
VS-Einstufung/Geheimhaltung/schwärzen	8	
Verschweigen/lügen	7	
Unterlagen verschwinden (z.B. schreddern)	3	
Keine passenden Zeugen / Zeugen sind krank	2	
Informationsquellen	2	
Anonyme Tipps	1	
Mitarbeiter der Dienste	1	
Whistleblowing	2	
Eigenes Netzwerk	2	
Medien (including whistblowing through media)	18	
Parlamentarische Anfragen	1	
Ausländische Nachrichtendienste	2	
Zivilgesellschaft	2	
Sachverständige und Gutachten	3	
Akten	8	
Zeugen	6	
Durchstechen von Infos	12	
Hürden der Kontrolle (z.B. Ressourcen und Befugnisse)	1	
Mangelnde Eskalationsinstanzen	6	
Politische zurechnung schwierig	1	
Kein ausdifferenzierter Rechtsrahmen/Generalklauseln	1	
Rechte der Opposition	6	
Keine Whistle-Blower Gesetzgebung	1	
Geheimhaltung (Aufwand und Schweigepflicht)	13	
Keine Systematik in der Kontrolle	6	
Keine Protokollierung innerhalb des PKGr	1	
Befugnisse	3	
Sanktionen aussprechen	2	
Akten anfordern	2	
Zu geringe Ressourcen	19	
Reformen	37	
Sets	0	