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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

DRAFT JOINT OPINION

ON THE DRAFT LAW

ON AMENDMENTS AND ADDITIONS

TO THE ORGANIC LAW

OF GEORGIA

ON POLITICAL UNIONS OF CITIZENS

on the basis of comments by

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I. Introduction

1. At the request of the first deputy Chairman of the Parliament of Georgia, the European Commission for Democracy Through Law ("the Venice Commission") of the Council of Europe and the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe ("OSCE/ODIHR") have prepared the present opinion on the draft Law on amendments and additions ("the draft amendments"; CDL-REF(2011)057)[1] to the Organic Law on Political Unions of Citizens of Georgia ("the Organic Law"; CDL-REF(2011)056).[2] The most recent previous joint opinion of the Venice Commission and OSCE/ODIHR on this legislation is dated 16 June 2009 and concerns comments on amendments adopted by the Parliament of Georgia in December 2008. The present joint opinion contains commentary and recommendations on the draft Law on amendments and additions as submitted to the Venice Commission on 22 November 2011.

2. The draft amendments aim at introducing a number of provisions against corruption and for more control on reporting and disclosure of information. The most important measures are the ban on corporate donations (donations by legal persons), the introduction of a requirement for bank wire transfers of donations, and the inclusion of the Control Chamber (Auditing Office) as a body controlling the reports of the parties. The measures proposed are commendable and are in general compatible with existing legal standards and good practices.

3. This opinion is also based on:

- An official translation of the Draft Election Code as of 1 September 2011 provided by the Parliament of Georgia (CDL-REF(2011)044rev);
- Draft Joint Opinion on the draft new Election Code of Georgia by the Venice Commission and the OSCE/ODIHR (CDL(2011)094);
- Opinion on the Organic Law of Georgia on changes and additions to the Organic Law of Georgia on Political Unions of Citizens adopted by the Council for Democratic Elections at its 29th meeting (Venice, 11 June 2009) and the Venice Commission at its 79th plenary session (16 June 2009, CDL-AD(2009)033);
- Venice Commission, Guidelines and report on the financing of political parties (CDL-INF(2001)008);
- Venice Commission, Code of Good practice in the Field of Political Parties (CDL-AD(2009)021);
- OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation (CDL-AD(2010)024);
- Council of Europe, Committee of Ministers, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies);
- Council of Europe, Group of States against Corruption – GRECO, Evaluation Report on Georgia on transparency of party funding (Greco Eval III Rep (2010) 12 E; Theme II).[3]

[1] Official translation of the Draft Law amending the Organic Law of Georgia on Political Unions of Citizens as of 17 November 2011 provided by the Parliament of Georgia (CDL-REF(2011)057).
[2] Official translation of the Organic Law of Georgia on Political Unions of Citizens provided by the Parliament of Georgia (CDL-REF(2011)056).
[3] It is recalled that evaluations in the third Round are carried out on the basis of a selected number of provisions of Recommendation Rec(2003)4 *on common rules against corruption in the financing of political parties and election campaigns*, and of Resolution 97(24) on the Twenty Guiding Principles for the Fight against Corruption, namely articles 8, 11, 12, 13b, 14 and 16 of the Recommendation and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).

4. *The present Joint Opinion was adopted by the Venice Commission at its …plenary session (Venice… 2011).*

II. Executive Summary

5. While most provisions of the draft amendments to the Organic Law are commendable, a few further changes can be suggested to help ensure that the Organic Law is fully in line with international law and best practices, as follows:

Key Recommendations:

A. To consider replacing the general ban on the delivery of goods to voters (Article 5[1]) with a cap on party expenditures [para 9]
B. To reconcile the prohibition of corporate donations, contained in Article 26 of the draft amendments, with the permissibility of corporate contributions to party campaign funds, contained in Article 55 of the Election Code [paras 14, 17]
C. To prescribe with greater precision the powers of the Chamber of Control [paras 23, 24, 25]

Additional Recommendations:

D. To either delete the term "subversion" from Article 5 par. 2 of the Organic Law, or replace it with a more exact term, such as "armed revolution" [para 11]
E. To re-assess whether there is a need to maintain the prohibition against parties established according to regional or territorial principles, contained in Article 6 of the Organic Law [para 12]
F. To clarify what is meant by the prohibition of contributions from "citizens having no citizenship" [para 16]
G. To consider re-assessing the annual cap (0.2% of GDP) on public funding, donations and other sources of legal incomes of political parties [para 19].

III. General comments

6. The broad majority of the draft amendments to the Organic Law concern political financing from the perspective of transparency, supervision and sanctions, thereby aiming at introducing improvements recommended by the Council of Europe Group of States against Corruption ("the GRECO") in the context of the above mentioned mutual evaluation report[4] or which are pertinent from the point of view of the Recommendation of the Council of Europe's Committee of Ministers no. Rec(2003)4, according to which "*[t]he rules regarding funding of political parties should apply* mutatis mutandis *to: – the funding of electoral campaigns of candidates for elections; – the funding of political activities of elected representatives.*"[5] These draft amendments intend to regulate and to promote good practices of political parties, and aim at reinforcing these institutions' "internal democracy and increase their credibility in the eyes of citizens, thus contributing to the legitimacy of the democratic process and institutions as a

[4] Council of Europe, Group of States against Corruption – GRECO, Evaluation Report on Georgia on transparency of party funding (Greco Eval III Rep (2010) 12 E; Theme II).
[5] Council of Europe, Committee of Ministers, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies).
Source: http://www.coe.int/t/dghl/monitoring/greco/general/Rec(2003)4_EN.pdf.

whole and fostering participation in political life, as well as to promote democratic principles such as equality, dialogue, co-operation, transparency and the fight against corruption."[6]

7. Simultaneously, the draft amendments have been drafted with a view to avoid any conflict in the regulation of public financing between the draft new Election Code[7] and the Organic Law of Georgia on Political Unions of Citizens before the amendments.[8]

8. Considering that a code should encompass all legislation pertaining to a specific subject, the convenience of including this Organic Law in the Election Code should be evaluated. Having separate laws on related topics may compromise their uniformity.

IV. Formation of parties and limits to illegal expenditure and vote buying

Illegal expenditure and vote buying

9. The draft amendments propose the addition of Article 5^1, which forbids parties to deliver funds, gifts and other material valuables, as well as to sell goods at preferential values, to the citizens of Georgia. Additionally, it forbids parties to provide work or services with their personal funds or the funds of election campaigns which, according to Georgian legislation, belong to the competence of state and/or local self-governing authorities of the country. The purpose of this provision is to prevent too large structures around the political parties, unclear relationships through selective disbursement of public services and vote-buying through the provision of gifts and services.

10. These are welcome amendments, but even though it is important to avoid bribing and other non-democratic practices of this kind, this provision prohibiting the delivery of gifts or other material valuables is ambiguous and generic. The term "forbidden" is excessively restrictive. This prohibition could conceivably be used to block activities of local governments controlled by the opposition. If – especially before elections – a local government decides to provide financial help or electricity subsidies for instance, this prohibition will also cover such subsidies. This may result in unwanted restrictions on the political process. In any event, the wording of Article 5^1 is vague enough so as to allow for discriminatory application against opposition parties. In addition, , promising material benefits is a practice that can hardly be eliminated from politics. It would be advisable to limit the annual amount of expenditures made by parties instead of establishing a general ban on the delivery of goods to voters which would also cover items such as caps or t-shirts, to name but a few examples.

11. As stated in the Guidelines on Political Party Regulation, "[i]t is reasonable for a state to determine a maximum spending limit for parties in elections in order to achieve the legitimate aim of securing equality between candidates. […] The maximum spending limit usually consists

[6] Venice Commission, Code of good practice in the field of political parties and explanatory report (CDL-AD(2009)021), paragraph 4.

[7] Draft Election Code provided by the Parliament of Georgia (CDL-REF(2011)044rev).
Chapter VII, Election Funding, Articles 52-57. See also the GRECO Report, §76: "ix. (i) to harmonise existing provisions on sanctions in the Election Code, Law on Political Unions of Citizens and Code of Administrative Violations; (ii) to ensure that effective, proportionate and dissuasive sanctions can be imposed for all infringements of the Election Code and Law on Political Unions of Citizens and on all persons/entities on which these two laws place obligations and (iii) to clarify the procedure for initiating and imposing sanctions pursuant to the Law on Political Unions of Citizens, including appeals/judicial review, and assess whether there is a need to do so in respect of the Election Code (paragraph 76)".

[8] Organic Law of Georgia on Political Unions of Citizens provided by the Parliament of Georgia (CDL-REF(2011)056).

in an absolute sum or a relative sum determined by factors such as the voting population in a particular constituency and the costs for campaign materials and services."[9]

Formation of political parties

12. While Article 5 para 2 of the Organic Law is not the subject of the amendments, the opportunity of amendments being made in other areas may be taken by the Georgian authorities to also address the prohibition of the formation and operation of parties aimed at "subversion or forced change of constitutional order of Georgia", which is contained in the mentioned provision of the current law. The term "subversion" is unclear and could be used to restrict the freedom of expression and activities of any party. Therefore, it would be relevant to consider the elimination of this term or substitute it by another one such as "armed revolution".

13. Also in the case of Article 6 of the Organic Law, the provision could be the subject of review in the process of amendment to the current law, considering that it prohibits the creation of parties according to regional or territorial principles.[10] This provision means that only national parties can exist and participate in elections.

V. Property and funding of political parties

Prohibition of corporate donations

14. The draft amendments introduce a broad prohibition of corporate donations (donations by legal persons) to the party finances (Article 26 para 1 of the Organic Law).[11] The banning of corporate donations exists in a number of models: France, Poland, Bulgaria, *inter alia*. The French model has been very influential in Europe over the last decade. When combined with significant state financing of political parties, the model aims to decrease the pressure exerted by big business on the political process. It is a legitimate choice for a country to make. However it should be borne in mind that corporate bans may be circumvented in a number of ways, through channelling of corporate money through individual donations (employees of a company, for instance); donating to party-related NGOs (foundations) etc. Also, if there is no adequate level of state subsidies for the political parties, the banning of corporate funding coupled with strict disclosure provisions may create difficulties for the opposition to fundraise.

Donations by natural persons

15. The draft amendments still allow private contributions by natural persons. Seemingly, the aim of this provision is to avoid excessive private funding to parties and potentially illicit donations. This is in line with the OSCE/ODIHR and Venice Commission's Guidelines on Political Party Regulation, which specify that "[r]easonable limitations on private contributions may include the determination of a maximum level that may be contributed by a donor. Such limitations have shown to be effective in minimizing the possibility of corruption or the purchasing of political influence."[12]

16. Article 26 para 1d of the Organic Law specifies that parties are prohibited to accept financial and material contributions from "citizens having no citizenship". It should be clarified

[9] OSCE/ODIHR-Venice Commission "Guidelines on Political Party Regulation" (CDL-AD(2010)024), paragraph 196.
[10] OSCE/ODIHR-Venice Commission "Guidelines on Political Party Regulation" (CDL-AD(2010)024), paragraphs 80-81.
[11] Amendments to Article 25 §1b and Article 26 (the addition of sub-clause "a[1]" to Article 26), and making technical adjustments, for instance to Article 27 §1 of the draft amendments.
[12] OSCE/ODIHR-Venice Commission "Guidelines on Political Party Regulation" (CDL-AD(2010)024), paragraph 175.

whether this sentence refers to persons who are residents in the country but have not obtained Georgian citizenship, or whether it applies only to stateless persons.[13]

Donations to political parties and donations for electoral campaigns

17. While reviewing the differences between the funding schemes for political parties on the one hand and electoral campaigns on the other, it seems that some problematic issues may arise. Mainly, banning legal entities from donating to political parties, while allowing them to donate three times as much as natural persons to campaign funds (Article 55 of the draft Election Code)[14] may open several backdoors for illegal donations. The Law and the Election Code should therefore take into consideration this issue and harmonise the donations for both political parties and campaigns.

18. Prohibitions of foreign and anonymous donations and contributions established are in line with Article 7 of Rec(2003)4. They have been envisaged in the draft amendments to the Organic Law, and in Article 55 §3 of the draft Election Code they have been foreseen as inadmissible contributions to the electoral campaign.

Ceilings on donations

19. One draft amendment (the new Article 25[1]) stipulates that the total amount of revenues granted to a party during a year through state financing or contributions should not exceed 0.2% of the gross domestic product, including all types of funding, both public and private. Funds that exceed this limit have to be transferred by parties to the fund of the state budget formed for financial support of the parties. Limitations to contributions are positive, as they help prevent excessive donations to parties. A link between public and private sources of funding could also be established in order to avoid a situation where a party is financed by only one of these sources. For example, the Organic Law could specify that neither public nor private donations shall constitute more than 70% of the total amount of financing received by a party. Another solution may be that both private and public limits should also comply with the maximum determined by a percentage of the gross domestic product of Georgia. Nevertheless, the establishment of a maximum level of party funding by public and private sources may be overly broad, especially taking into consideration commonplace structures in the political field, such as, pollsters working with political parties, think tanks not directly related with the party but still providing advice, reports and analyses to them.

20. It is noted that, the draft amendment concerning Article 27 paragraph 1 (increase of ceilings on donations and introduction of ceilings on membership fees) responds to recommendation iv of the GRECO report.[15]

VI. Reporting and monitoring of political parties' funds

New monitoring body for political funding: the Chamber of Control

21. The draft amendments attribute the supervision of political financing in Georgia to a specialised body: the Chamber of Control of Georgia, the supreme public auditing institution (new Article 34[1]). According to Article 97 of the Constitution of Georgia and Article 3 of the Law

[13] Venice Commission, *Opinion on the Organic Law of Georgia on changes and amendments to the Organic Law of Georgia on Political Unions of Citizens*, CDL-AD(2009)033, paragraph 11.d, p. 3.
[14] CDL-REF(2011)044rev.
[15] Rec. iv of the GRECO's Report: "*to take appropriate measures to ensure that (i) in-kind donations, including loans (whenever their terms or conditions deviate from customary market conditions or they are cancelled) and other goods and services (other than voluntary work by non-professionals) provided at a discount, are properly identified and accounted for and (ii) membership fees are not used to circumvent the rules on donations*" (paragraph 67).

on the Chamber of Control, this body is the supreme state financial control institution which enjoys departmental, financial, functional and organisational independence. The Chamber of Control is entitled to monitor the legality and transparency of financial activities of political parties. The relevant draft amendment enumerates the powers of the Chamber of Control. Removing such activities from the mandate of the Central Election Commission ("CEC") is intended to make oversight of party finances more effective.

22. The establishment of the Chamber of Control as the single monitoring body for political finance is in conformity with the international standards, more precisely in line with the Venice Commission Guidelines on the financing of political parties, which establish that the financing of political parties through public funds should promote control by specific public organs (like a Court of Audit) over the accounts of political parties.[16]

23. In the current legislation, the responsibility in this area is split between the tax authorities and the CEC for the financing of political parties and real supervision does not take place in practice. With regard to the financing of election campaigns, the responsibility lies with the CEC – together with the Financial Monitoring Group (an *ad hoc* body set up by the CEC). An independent and effective supervisory mechanism was therefore needed and pointed out in GRECO's recommendation viii.[17] GRECO's recommendation expressed[18] a clear preference for the monitoring of party and campaign financing by a single body given the difficulty in practice of separating campaign financing from regular party funding when it comes to the supervision of the latter. Having this in mind, the powers and responsibilities of the Chamber of Control could be spelled out more precisely under Article 34[1] of the draft amendments to respond to these duties.

24. The Law should provide for a more clear separation of powers between the Chamber of Control and the Oversight and Audit Service of the CEC, notably regarding on-site checks and access to original financial or accounting documents.[19]

25. The new draft Article 34[1] 2 f) and g) stipulates that the "Chamber of Control of Georgia is authorized to (…) f) Request information on party's finances from political parties, administrative bodies and commercial banks in case of necessity; g) Respond to violations of party funding regulations and apply sanctions prescribed by law (…)". To carry out its tasks, the Chamber of Control should have the necessary staff and resources. The Law should ensure such means. If it is indeed tasked to monitor on the ground, the Chamber of Control should have a number of electoral and campaign experts at its disposal – not only auditors. Additionally, it is not clear whether the Chamber of Control has the capacity to audit financial donations received from private entities. These issues should be clarified in the Law.

Financial Declaration

26. The draft amendments propose to re-draft Article 32, which specifies that before 1st February of each year, a party has to send its financial declaration of the previous year together with the auditor's conclusion to the Chamber of Control of Georgia. It states that the declaration should include the annual income of a party which no longer takes into

[16] Venice Commission, Guidelines and report on the financing of political parties (CDL-INF(2001)008), paragraph 5.
[17] Rec viii: *"(i) to ensure that an independent mechanism is in place for the monitoring of the funding of political parties and election campaigns, in line with Article 14 of Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns; (ii) to provide this mechanism with the mandate, the authority, as well as adequate resources to effectively supervise the funding of political parties and election campaigns, to investigate alleged infringements of political financing regulations and, as appropriate, to impose sanctions*" (paragraph 74).
[18] Paragraph 74 of the report.
[19] OSCE/ODIHR-Venice Commission "Guidelines on Political Parties Regulation" (CDL-AD(2010)024), paragraphs 212 and 219.

consideration the donations made by legal entities, which is consistent with the proposed introduction on corporate donations. This is a good option.[20] Additionally, the reference to "auditor (auditing firm)" could be buttressed through a reference to 'certified auditors'.

Sanctions

27. The draft amendment relating to Article 34 of the Organic Law, which specifies that a party that fails to timely submit its financial declaration to the Chamber of Control will not be entitled to receive state funds during the next year, is a positive step, as well as the five-day period allowed to a party for clarification, but appears to be disproportionate as a sanction. The imposition of progressive pecuniary sanctions or fines, clearly defined by law, appears to be a better solution to address those problems. In general, the law should provide for a range of effective and dissuasive sanctions, so as to enable the enforcing body to apply in each specific case a sanction which is proportionate to the nature of the violation.[21]

VII. Other recommendations and technical issues

28. The new draft Article 26 paragraph 1^1, which aims at extending the concept of donation to "any material valuable and service received free of charge or by discount", except the work of volunteers, responds to recommendation iv of the GRECO.[22]

29. The changes proposed in respect of Article 32 paragraph 2 on keeping financial documentation for a period of 6 years go in the direction suggested by recommendation v.[23] However, it is not totally clear which improvements are intended by the new draft provisions of Article 32 (apart from the inclusion of a 6-year period for the conservation of financial documentation). One of the strengths of the current version (not the new draft) of this Article is that it requires the clear identification of campaign expenditure in the financial statements of political parties and of the individual situation of political parties which are part of a coalition ("block"); these arrangements have not been retained in the new drafting proposed by the Parliament. Also, Georgia could take the opportunity to ensure that political parties' financial statements are consolidated to include all items of income and expenditure, including all assets and liabilities, and leave it to the future standardised format for financial statements (to be adopted by the Chamber of Control in accordance with draft Article 34^1 para 2(a)) to determine the individual items; as it stands, the enumeration of items in Article 32 is not sufficiently inclusive and could constitute a negative constraint for the adoption of an adequate and ambitious format at a later stage, in the implementing regulations/arrangements.

30. In draft Article 34^1 para 2, it appears that the Chamber of Control will be responsible for implementing several recommendations issued by GRECO, especially recommendations ii and vii which deal *inter alia* with the need for a standardised format for the annual financial statements of political parties and for adequate standards for private auditing;[24] these tasks are

[20] OSCE/ODIHR-Venice Commission "Guidelines on Political Parties Regulations" (CDL-AD(2010)024), paragraph 212.
[21] OSCE/ODIHR-Venice Commission "Guidelines on Political Parties Regulation" (CDL-AD(2010)024), paragraphs 215-217 and 225.
[22] Rec. iv of the GRECO's Report: "*to take appropriate measures to ensure that (i) in-kind donations, including loans (whenever their terms or conditions deviate from customary market conditions or they are cancelled) and other goods and services (other than voluntary work by non-professionals) provided at a discount, are properly identified and accounted for and (ii) membership fees are not used to circumvent the rules on donations*" (paragraph 67).
[23] Rec v "*to ensure that all financial documentation relating to the funding of political parties and election campaigns is kept for an appropriate period of time*" (paragraph 68).
[24] Rec ii: "*(i) to establish a standardised format for the annual financial declarations to be submitted by political parties, seeing to it that financial information (on parties' income, expenditure, assets and debts) is disclosed in an appropriate amount of detail and (ii) to ensure that information contained in the annual financial declaration (including*

mentioned under items a. and b. of this provision. At the same time, certain other tasks are drafted in vague terms: for instance, item d. reads "to provide transparency of financing of the parties" and it is unclear what exactly this refers to, and whether for instance the Chamber of Control would be responsible for facilitating access of the public to financial statements pertaining to political parties and election campaigns. These provisions should therefore be made more specific.

31. Although it is understandable to use superscripts while drafting the law, in the final draft it would be best to avoid them by enumerating the articles and paragraphs again.

32. The word "etc." in the proposed new Article 25[1], para 1, should be eliminated in order to avoid vagueness.

VIII. Concluding remarks

33. In conclusion, the draft amendments and additions to the Organic Law on Political Unions of Citizens have successfully addressed many international standards in the field of political finance and in particular many GRECO recommendations,[25] with a view to establishing a more uniform and transparent legal framework. In particular, the following positive points should be underlined:

- the ban of corporate donations (donations by legal persons);
- the introduction of a requirement for bank wire transfers of donations; and
- the inclusion of the Control Chamber (Audit Office) as a body controlling the reports of the parties.

34. Nevertheless, a few further improvements could be made to the text of the law with a view to ensuring its compliance with international standards and best practices. In particular, the uncertainties highlighted above concerning corporate donations (to campaign funds), and the separation of powers (between the Chamber of Control and the CEC) should be addressed and clarified.

35. More importantly, the OSCE/ODIHR and the Venice Commission call upon all stakeholders to ensure an effective implementation of these forthcoming improved provisions in the Law, and in line with the principles of legal certainty, above all in view of the 2012 parliamentary elections.

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donations above a certain threshold) is made public in a way which provides for easy access by the public" (paragraph 65);
Rec vii: "*(i) to apply, in consultation with the competent bodies, appropriate auditing standards to party and election campaign financing and (ii) to ensure adequate standards are in place as regards the independence of auditors entrusted with the verification of party accounts and campaign funds*" (paragraph 71).

[25] Paragraph 62 of the report.