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(Theme I)

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I. INTRODUCTION

1. Georgia joined GRECO in 1999. GRECO adopted the First Round Evaluation Report (Greco Eval I Rep (2001) 5E) in respect of Georgia at its 5th Plenary Meeting (15 June 2001) and the Second Round Evaluation Report (Greco Eval II Rep (2006) 2E) at its 31st Plenary Meeting (8 December 2006). The aforementioned Evaluation Reports, as well as their corresponding Compliance Reports, are available on GRECO's homepage (http://www.coe.int/greco).

2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:

   - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).

   - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).

3. The GRECO Evaluation Team for Theme I (hereafter referred to as the "GET"), which carried out an on-site visit to Georgia from 13 to 14 December 2010, was composed of Mr Fabrizio GANDINI, Judge, Tribunal of Rome (Italy) and Ms Camelia SUTIMAN, Chief Inspector of the Judicial Inspection for Prosecutors at the Superior Council of Magistracy (Romania). The GET was supported by Ms Tania VAN DIJK from GRECO's Secretariat. Prior to the visit the GET was provided with a comprehensive reply to the Evaluation questionnaire (document Greco Eval III (2010) 15E, Theme I) as well as copies of relevant legislation.

4. The GET met with officials from the following governmental organisations: the Ministry of Justice, the judiciary (the Supreme Court and Tbilisi City Court), the Office of the Chief Prosecutor and the Financial Police. The GET also met with representatives of academia, the Liberty Institute, the Georgian chapter of Transparency International (TI) and the Georgian Young Lawyers Association (GYLA).

5. The present report on Theme II of GRECO's Third Evaluation Round on Transparency of party funding was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Georgian authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Georgia in order to improve its level of compliance with the provisions under consideration.

6. The report on Theme II – Transparency of party funding, is set out in Greco Eval III Rep (2010) 12E-Theme II.

II. INCRIMINATIONS

Description of the situation

7. Georgia ratified the Criminal Law Convention on Corruption in January 2008. It entered into force in respect of Georgia on 1 May 2008. Upon depositing its instrument of ratification Georgia did not make any reservations.[1] Georgia has not ratified (nor signed) the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).

8. The current Criminal Code (hereafter: CC) dates back to 1999. Substantive amendments were made to the provisions on bribery and trading in influence in July 2009 (when the first note to Article 332 CC on abuse of official authority was amended to extend the scope of the provisions on bribery and trading in influence to also cover employees of so-called "Legal Entities of Public Law (…), which exercise public authority", arbitrators and so-called "private enforcers", and a second note was added – which was previously a note to the provision on passive bribery in Article 338 CC – to include foreign and international public officials) and in September 2010 (when a third note was added to Article 332 CC to cover jurors and candidate jurors). At the time of the on-site visit of the GET, amendments to Article 338 CC were being discussed in Parliament. These amendments would reduce the current minimum sanctions for passive bribery, but have not yet been adopted.

Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

Definition of the offence

9. Active bribery of domestic public officials is criminalised by Article 339 CC. Bribery of a public official for an illegal act will be considered an aggravated bribery offence (paragraph 2), as is bribery committed by an organised group (paragraph 3).

> **Article 339. Active Bribery**
>
> 1. Promising, offering or giving, directly or indirectly, of money, securities, property, material benefit or any other undue advantage to a public official or a person with an equal status, for himself or herself or for anyone else in order that public official or a person with an equal status to act or to refrain from acting in the course of carrying out his/her official rights and duties, in favour of the bribe giver or a third person, as well as to use his official position for that end or to exercise official patronage,
> shall be punished by fine or corrective labour for a term of two years or the restriction of liberty for the same term and/or the deprivation of liberty for a term up to three years.
> 2. Giving bribe to an official or a person with an equal status in exchange of the commission of an illegal act shall be punished by fine or the deprivation of liberty for a term from four to seven years.
> 3. The conduct defined in paragraphs 1 and 2 of the present Article committed by an organized group, shall be punished with the deprivation of liberty for a term from 5 to 7 years.
>
> *Note:*
> 1. The briber shall be released from criminal liability if the bribe was extorted from him/her or s/he voluntarily informed law enforcement agencies thereof.

[1] Georgia did make a declaration that "the Convention shall be applicable on the part of the territory of Georgia where Georgia exercises its full jurisdiction."

2. For the action foreseen by this Article a legal person shall be punished by fine.

10. Passive bribery of domestic public officials is criminalised by Article 338 CC. The article foresees in two sets of aggravating circumstances giving rise to higher sanctions.

Article 338. Passive Bribery

1. Receipt or request by a public official or a person with an equal status directly or indirectly of money, securities, property, material benefit or any other undue advantage, or acceptance of an offer or a promise of such an advantage, for himself or herself or for anyone else, to act or refrain from acting in the course of carrying out his/her official rights and duties, in favour of the bribe-giver or other person, as well as use his or her official position for that end or to exercise official patronage,
   shall be punished by the deprivation of liberty from six to nine years.
2. The same act committed:
   a) by a state official with political status;
   b) in respect of a large amount;
   c) by a group, due to an agreement in advance,
   shall be punished by the deprivation of liberty for a term from seven to eleven years.
3. The conduct defined in paragraphs 1 and 2 of the present Article, committed:
   a) by the person previously convicted for bribery;
   b) repeatedly;
   c) through extortion;
   d) by an organised criminal group;
   e) in respect of an especially large amount ,
   shall be punished by the deprivation of liberty for a term from eleven to fifteen years.

Note:
For the purposes of this article a large amount is money, securities, other property or material benefit above 10,000 GEL and especially large amount is an amount exceeding 30,000 GEL.

Elements/concepts of the offence

"*Domestic public official"*

11. Articles 338 and 339 refer to a "public official" or "a person with an equal status". The Georgian authorities report, pursuant to Article 4 of the Law of Georgia on Public Service, that a public official is "a citizen of Georgia who, according to the rules set forth by this law and in accordance with the position s/he occupies, serves on a remunerated position in a state or self-governing agency".[2]

[2] In turn, Article 2 of the Law on Public Service lists state agencies as: (1) the Parliament of Georgia, except fractions and offices of ad hoc investigative commissions or other kinds of commissions of the Parliament; (2) the administration of the President; (3) the State Chancellery of the Government of Georgia, the Office of the State Minister, ministries, and state subordinated agencies; (4) the Council of Justice of Georgia; (5) the Constitutional Court, common courts, prosecution service of Georgia; (6) the National Bank of Georgia; (7) the Chamber of Control of Georgia; (8) the Office and agencies of the Public Defender of Georgia and the (9) Governor and his/her administration. State agencies of the autonomous republics of Abkhazia and Ajara are; (1) Highest representative agencies of autonomous republics of Abkhazia and Adjara; and (2) Agencies of executive authorities of autonomous republics of Abkhazia and Adjara. Local self-governing agencies are: (1) *Sakrebulo* (regional councils), (2) city halls and (3) municipalities.

12. In addition, to extend the applicability of the provisions on bribery to certain other categories of employees in the public service, who cannot be considered as public officials within the meaning of the Law on Public Service, a note was added to Article 332 CC on Abuse of Official Authority (which is the first article in the chapter on offences relating to public office). This note *inter alia* specifies that the articles on bribery of public officials also cover any person who "conducts public authority". Furthermore, a second note to Article 332 CC provides a clarification of what is to be understood by the phrase "person with an equal status [to a public official]" which is used in the provisions on bribery and trading in influence (and is of particular significance as regards bribery of foreign public officials, members of foreign public assemblies, officials of international organisation, members of international parliamentary assemblies and judges and officials of international courts – see also paragraphs 30, 31 and 43 below). Finally, a third note, extends the applicability of the bribery provisions to also include jurors and candidate jurors (see also paragraph 56 below).

> **Article 332. Abuse of Official Authority**
>
> (…)
> *Note*:
> 1. Subjects of the offences foreseen by the present Chapter also include staff members of the Legal Entities of Public Law (except political and religious unions), who exercise public authority, members of arbitration, private enforcers, as well as any other person, who pursuant to legislation of Georgia conducts public authority.
> 2. For the purposes of this Chapter, persons with an equal status to a public official also include foreign public officials (including member of legislative bodies and/or agencies exercising administrative authority), as well as any person who performs any public function for another state, an official or contracted staff member of an international organization or agency, as well as any designated or non-designated person who performs functions equal to such official or staff member, member of international parliamentary assemblies, representative of international criminal court, judge or official of international court or judicial body.
> 3. For the purpose of the Articles 338-339[1] of present Criminal Code, subjects of the crime are also jurors (candidates for jurors), that undertake the functions pursuant to the legislation of Georgia.

13. The Georgian authorities report that these provisions cover the separate categories of persons listed in Article 1(a) and (b) of the Convention (officials/public officers, mayors, ministers, prosecutors, judges and holders of judicial office).

14. Article 338, paragraph 2 CC stipulates that a passive bribery offence committed by a "state official with political status" is an aggravating circumstance. Pursuant to Article 1, paragraph 3 of the Law on Public Service, "state officials with political status" are the President of Georgia, Members of Parliament, the Prime Minister and other members of the government of Georgia, members of the high representative bodies of Abkhazia and Adjara and the head of government of Abkhazia and Adjara.

"*Promising, offering or giving" (active bribery)*

15. Article 339, paragraph 1 CC on active bribery explicitly includes the terms "promising, offering or giving".

"*Request or receipt, acceptance of an offer or promise" (passive bribery)*

16. Article 338, paragraph 1 CC on passive bribery refers to the "receipt or request" as well as the "acceptance of an offer or promise".

"*Undue advantage"*

17. Articles 338 and 339 CC refer to "money, securities, property, material benefit or any other undue advantage", which according to the Georgian authorities includes both material and non-material advantages, regardless of their value.[3] The value of the bribe does come into play, however, in relation to the severity of the passive bribery offence: acceptance of an undue advantage with a value of more than 10,000 GEL (approximately €4,167) or more than 30,000 GEL (approximately €12,500) leads to higher sanctions (respectively seven to eleven years' imprisonment and eleven to fifteen years' imprisonment).

18. In this context, the Georgian authorities also point to the offence "the acceptance of illegal presents" under Article 340 CC. In contrast to bribery, for the offence of illegally accepting gifts, the value of the gift in question is important in ascertaining whether the act is illegal or not. To this end, Article 5 of the Law of Georgia on Conflicts of Interest and Corruption in Public Service prohibits the acceptance of gifts with a (total) value in a given year of more than 15 percent of the annual income of the public official and gifts with an individual value of more than five percent of the annual income of the public official concerned. The acceptance of gifts by a public official above these thresholds will be considered as a criminal offence under Article 340 CC (or as bribery under Article 338 CC, if the public official has accepted the gift to act or refrain from acting in the course of carrying out his/her official rights and duties).

> **Article 340. Accepting Illegal Gifts**
>
> 1. Accepting an illegal gift by an official or a person with an equal status,
> shall be punishable by fine or socially useful labour from one hundred to three hundred hours or deprivation of right to occupy a position or pursue a particular activity for up to three years and/or by deprivation of liberty for two years.
> 2. The same act committed repeatedly,
> shall be punishable by fine or socially useful labour from two hundred to four hundred hours or deprivation of right to occupy a position or pursue a particular activity for the term up to three years and/or by deprivation of liberty extending from two to four years.

"Directly or indirectly"

19. Articles 338 and 339 CC specify that the offence may be committed "directly and indirectly", addressing the commission of bribery through intermediaries.

"*For himself or herself or for anyone else"*

20. Articles 338 and 339 CC explicitly refer to third party beneficiaries of the undue advantage, by use of the phrase "for himself or herself or for anyone else". In addition, both articles also refer to

[3] However, no examples of cases of undue advantages with little or no monetary value or immaterial advantages were provided.

third party beneficiaries of the act (or omission) of the public official - which may benefit someone else than the bribe-giver - with the use of the phrase "in favour of the bribe-giver or [other/third] person" in Article 338 CC and 339 CC.

"*To act or refrain from acting in the exercise of his or her functions*"

21. Both Articles 338 and 339 CC use the phrase "to act or refrain from acting in the course of carrying out his/her official rights and duties". It was explained to the GET on site that this was to be interpreted broadly as to cover any act/omission the public official could carry out because of his/her position, even if this would not fall within the scope of his/her job.

22. In addition, Article 339 CC on active bribery makes a distinction between legal acts and illegal acts performed by the public official in return for the bribe, with illegal acts on the part of the public official being subject to more severe sanctions on the part of the bribe-giver.

"Committed intentionally"

23. Pursuant to Article 10, paragraph 4 CC, a person can only be held liable for committing a criminal offence by negligence if this is explicitly stipulated in the Criminal Code. As the provisions on bribery (Articles 338 and 339 CC) do not stipulate that these offences can be committed by negligence, they can only be committed intentionally.

Case-law

24. As regards case-law which could clarify some of the elements of the offence and concepts described above, the Georgian authorities have indicated in the replies to the questionnaire that, in analysing fifteen recent court decisions, no interpretation or clarification of relevance to the above-mentioned elements and concepts was found. In addition, the Georgian authorities state that the interpretation and clarification of legal provisions are provided in explanatory notes and commentaries to the Criminal Code.

Sanctions

25. The applicable sanction for active bribery of public officials (Article 339) is a fine, up to two years' corrective labour[4], up to two years restriction of liberty[5] or up to three years' imprisonment. With aggravating circumstances – i.e. if active bribery has been committed in exchange for an illegal act – the bribe-giver can be sentenced to four to seven years' imprisonment (Article 339, paragraph 2 CC). If the offence has been committed by or on behalf of a legal person, the legal person in question can be fined.

26. The applicable sanction for passive bribery of public officials (Article 338 CC) is six to nine years' imprisonment. Under aggravating circumstances – i.e. in the case of a state official with political status[6], if the public official in question has been bribed with a large amount[7] or as part of a group

[4] Pursuant to Article 45 CC, corrective labour is performed at the offender's workplace and can be imposed for a term of one month to two years, whereby 5 to 20 percent of his/her salary will be transferred to the state budget.
[5] Pursuant to Article 47 CC, restriction of liberty means the placement of the offender in a corrective institution. It is different from imprisonment in that the offender is not entirely isolated from society.
[6] See paragraph 14 above: state officials with political status are the President of Georgia, Members of Parliament, the Prime Minister and other members of the government of Georgia, members of the high representative bodies of Abkhazia and Adjara and the head of government of Abkhazia and Adjara.

by prior agreement – a prison sentence of seven to eleven years can be imposed (Article 338, paragraph 2 CC). The presence of further aggravating circumstances, when the public official has previous convictions for bribery, committed the act repeatedly, through extortion, as part of an organised group or in an especially large amount[8], the sentence can be raised to eleven to fifteen years' imprisonment (Article 338, paragraph 3 CC).

27. As indicated in paragraph 8 above, at the time of the on-site visit by the GET, amendments to Article 338 CC reducing the current minimum sanctions were being discussed in Parliament. If adopted as foreseen, these amendments would reduce the sanction for 'basic' passive bribery of a public official under paragraph 1 of 338 CC to three to six years' imprisonment; under aggravating circumstance this would be slightly reduced to six to eleven years' imprisonment (paragraph 2) and ten to fifteen years' imprisonment (paragraph 3).

28. The applicable sanctions for some comparable crimes are as follows:
- abuse of official authority (Article 332): up to three years' imprisonment (or a fine and/or deprivation of the right to hold a certain post or engage in certain activities for a period of three years) or up to eight years' imprisonment (and deprivation of the right to hold a certain post or engage in certain activities for a period of three years), if committed under certain aggravating circumstances;
- fraud (Article 180 CC): two to four years' imprisonment (or 170 to 200 hours of "socially useful labour"[9] or three months jail sentence[10]) to up to ten years' imprisonment, if committed under certain aggravating circumstances;
- embezzlement (Article 182 CC): three to five years' imprisonment (or a fine or "restriction of liberty"[11] for up to three years) to up to eleven years' imprisonment, if committed under certain aggravating circumstances.

Bribery of members of domestic public assemblies (Article 4 of ETS 173)

29. Members of domestic public assemblies officials would be considered to be public officials, as they are citizens of Georgia serving "on a remunerated position in a state or self-governing (municipal) agency", as stipulated by Article 4 of the Law on Public Service (see paragraph 11 above). In cases where members of a public assembly in Georgia do not receive a salary for their work, they would nevertheless still be considered to be covered by the provisions on bribery of public officials, as they "conduct public authority" within the meaning of the note added to Article 332 CC. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials thus also apply to bribery of members of domestic public assemblies. In addition, a Member of Parliament is considered to be a "state official with political status" (see paragraph 14 above). Consequently, passive bribery of a Member of Parliament is subject to more severe sanctions, pursuant to Article 338, paragraph 2 CC. The GET was not provided with any case law involving Members of Parliament or members of other domestic public assemblies (see paragraph 24 above)

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[7] Pursuant to the note to Article 338 CC, a large amount refers to a value of more than 10,000 Georgian Lari (approximately €4,167).

[8] Pursuant to the note to Article 338 CC, an especially large amount refers to a value of more than 30,000 Georgian Lari GEL (approximately €12,500).

[9] Socially useful labour refers to unpaid labour to be performed in the spare time of the offender. It can be imposed for twenty to four hundred hours (Article 44 CC).

[10] The term jail sentence is only used to denote a term of imprisonment of 6 months or less (Article 48 CC).

[11] See footnote 5 above

Bribery of foreign public officials (Article 5 of ETS 173)

30. Foreign public officials are to be covered by the phrase "public official or a person with an equal status" in Articles 338 and 339 CC. To this end, Note 2 to Article 332 CC (see paragraph 12 above) provides: "For the purposes of this Chapter, persons with an equal status to a public official also include foreign public officials (including member of legislative bodies and/or agencies exercising administrative authority) as well as any person who performs any public function for another state (…)". The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials thus apply to bribery of foreign public officials. As indicated before, the GET was not provided with any case law in this regard.

Bribery of members of foreign public assemblies (Article 6 of ETS 173)

31. Members of foreign public assemblies are considered to be persons "with an equal status" to a public official, for the purpose of the provisions on bribery, pursuant to Note 2 to Article 332 CC (see paragraph 12 above), which refers to "foreign public officials (including members of legislative bodies and/or agencies exercising administrative authority)". The elements and applicable sanctions as described for bribery of domestic public officials thus apply accordingly to bribery of members of foreign public assemblies. There has not been any court decision to date involving members of foreign public assemblies.

Bribery in the private sector (Articles 7 and 8 of ETS 173)

Definition of the offence

32. Active and passive bribery in the private sector is criminalised by Article 221 CC on commercial bribery.

> **Article 221. Commercial bribery**
>
> 1. Offering, promising or giving, directly or indirectly, of money, securities, property or any undue advantage or rendering property service to a person who exercises managerial, representative or other special authority in a commercial or other type of organization or works in such organization, in order for that person to act or refrain from acting in breach of his/her duties, for the interest of the briber or other person,
> shall be punished by fine or restriction of liberty up to two years and/or deprivation of liberty up to three years, by deprivation of the right to occupy a position or pursue a particular activity for the term not extending three years or without it.
> 2. The action referred to in Paragraph 1 of this Article, committed:
> a) by a group;
> b) repeatedly,
> shall be punished by fine or by restriction of liberty up to four years and/or by deprivation of liberty for the term extending from two to four years, by deprivation of the right to occupy a position or pursue a particular activity for the term not extending three years.
> 3. Request or receipt of offering, promising or giving, directly or indirectly, of money, securities, property or any undue advantage or rendering property service by a person who exercises managerial, representative or other special authority in a commercial or other type of organization or works in such organization, in order that person to act or refrain from acting in breach of his/her duties, for the interest of the briber or other person,

shall be punished by restriction of liberty up to three years and/or deprivation of liberty from two to four years, by deprivation of the right to occupy a position or pursue a particular activity for the term not extending three years.

4. The action referred to in Paragraph 3 of this Article, committed:
   a) by a group;
   b) repeatedly;
   c) through extortion,

   shall be punished by fine or by deprivation of liberty from four to six years, deprivation of the right to occupy a position or pursue a particular activity for the term not extending three years.

Note:

1. The perpetrator of the crimes referred to in Paragraph 1 or 2 of this Article shall be released from criminal liability if he/she was extorted of his/her property or he/she voluntarily informed a government authority thereon.
2. Legal person shall be punishable by liquidation or by deprivation of the right to pursue a particular activity or by liquidation and fine.

Elements/concepts of the offence

"*Persons who direct or work for, in any capacity, private sector entities*"

33. With regard to the scope of perpetrators, Article 221 CC refers to bribery of "a person who exercises managerial, representative or other special authority in a commercial or other type of organization or works in such organization". According to the Georgian authorities, this would cover persons who direct or work for private sector entities, including consultants, commercial agents, partners, lawyers and others, who have an employer-employee relationship with the entity.

"*Promising, offering or giving" (active bribery)*

34. Article 221, paragraph 1 CC on active commercial bribery explicitly refers to "offering, promising or giving".

"*Request or receipt, acceptance of an offer or promise" (passive bribery)*

35. Article 221, paragraph 3 CC on passive commercial bribery refers to '"Request or receipt of offering, promising or giving".

"*Undue advantage"*

36. Both paragraph 1 and 3 of Article 221 CC refer to "money, securities, property or any undue advantage or rendering property service", as before – although worded slightly differently from the public sector offence – is meant to include material and immaterial advantages, regardless of their monetary value.

"Directly or indirectly"

37. Both paragraphs 1 and 3 of Article 221 CC use the term "directly or indirectly", addressing bribery committed through intermediaries.

"*For himself or herself or for anyone else"*

38. Article 221 CC uses the phrase "for the interest of the briber or other person" in both paragraph 1 on active private sector bribery and paragraph 3 on passive private sector bribery. However, in the understanding of the GET this refers either to acts performed by the bribe-taker in return for the undue advantage or to situations in which the briber acts on behalf of his/her employer. During the on-site visit, it was sometimes argued that "indirectly" would also refer to third party beneficiaries of the undue advantage.

"In the course of business activity"

39. Article 221 CC is not limited to bribery committed in the course of business activities, as long as the person who is being bribed works/manages/represents or acts on special authority of a commercial or other type of organisation. As such, it is of no consequence whether this happens in the course of business activities or not. In this connection, Article 221 CC goes somewhat further than the requirements of Article 7 and 8 of the Convention, in that other types of organisation – outside the context of business activities – are also covered.

"In breach of their duties"

40. Article 221 CC requires a breach of duties on the part of the passive party to the offence.[12]

Committed intentionally"

41. As indicated above (see paragraph 23), pursuant to Article 10, paragraph 4 CC, a person can only be held liable for committing a criminal offence by negligence if this is explicitly stipulated in the Criminal Code. As Article 221 CC does not stipulate that this offence can be committed by negligence, it can only be committed intentionally.

Sanctions

42. The sanctions applicable to active commercial bribery are a fine, 'restriction of liberty' for up to two years or up to three years' imprisonment (with or without deprivation of the right to occupy a position or to pursue a particular activity for up to three years); with aggravating circumstances (i.e. by a group or repeatedly) the sanction can be increased to up to four years' 'restriction of liberty', or two to fours years' imprisonment (with or without a disqualification sanction for a period of up to three years). For passive commercial bribery, a fine, up to three years' 'restriction of liberty', or two to four years' imprisonment can be imposed (with or without a disqualification sanction for a period of up to three years); with aggravating circumstances (i.e. by a group, repeatedly or through extortion) the applicable sanctions are a fine or four to six years' imprisonment (with or without a disqualification sanction for a period of up to three years).

[12] Examples given of breaches of duties concerned incorrect decisions by a referee in a football match and a person bribing a psychiatrist (from a private hospital) to write a false forensic assessment of the mental health of a person.

Bribery of officials of international organisations (Article 9 of ETS 173), bribery of members of international parliamentary assemblies (Article 10 of ETS 173) and judges and officials of international courts (Article 11 of ETS 173)

43. Officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts are all considered to be persons with an equal status to a public official, pursuant to Note 2 of Article 332 (see paragraph 12 above). The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials thus also apply to bribery of officials of international organisations, members of international parliamentary assemblies and judges and officials of international courts. To date there has been no court decision concerning bribery of officials of international organisations, members of international parliamentary assemblies or judges and officials of international courts.

Trading in influence (Article 12 of ETS 173)

Definition

44. Trading in influence is criminalised by Article 339[1] CC.

Article 339[1] –Trading in influence

1. Promising, offering or giving, directly or indirectly of money, securities, other property, material benefit or any undue advantage to a person, who asserts or confirms that he/she is able to exert an improper influence over decision-making of public official or a person with an equal status, for the interest of himself/herself or other person, whether or not influence is exerted or whether or not the supposed influence leads to the intended results
   shall be punishable by fine or by corrective labour up to two years or by restriction of freedom for the similar term and/or by deprivation of liberty for up to two years.
2. Request or receipt, directly or indirectly, of money, securities, other property, material benefit or any undue advantage by a person, who asserts or confirms that he/she is able to exert an improper influence over decision-making by public official or a person with an equal status for the benefit of himself or herself or anyone else, from the person who acts for his/her interests or interests of anyone else, as well as acceptance of such offer or promise, whether or not influence is exerted or whether or not the supposed influence leads to the intended results
   shall be punishable by deprivation of liberty from three to five years
3. The Act referred to in paragraph 2 of this Article, committed by the organized group,
   shall be punishable by deprivation of liberty from four to seven years.

Note:
1. Person who has committed crime envisaged by paragraph 1 of present article shall be released from criminal liability if he/she voluntary informers a prosecuting body on the commission of crime.
2. For the action foreseen by this Article a legal person shall be punished by fine.

Elements/concepts of the offence

"Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]"

45. Article 339[1] CC, paragraph 1 (active trading in influence) and paragraph 2 (passive trading in influence), both include the phrase "asserts or confirms that s/he is able to exert an improper influence over the decision-making of a public official or a person with equal status". As regards the target of the supposed or real influence, Article 339[1] CC refers to "a public official or a person with an equal status", which as before (see paragraphs 11 and 12 above) covers both domestic public officials (and members of domestic public assemblies), as well as foreign and international public officials.

"Promising, offering or giving"

46. The elements "promising, offering or giving" are explicitly mentioned in paragraph 1 of Article 339[1] CC.

"Request or receipt, acceptance of an offer or promise"

47. Article 339[1], paragraph 2 CC refers to the "request or receipt" and "as well as the acceptance of such offer or promise".

"Any undue advantage"

48. Similar to the provisions on bribery (Article 338 and 339 CC, see paragraph 17 above), Article 339[1] makes reference to "money, securities, other property, material benefit or any unlawful advantage", which is understood to include both material and immaterial advantages, regardless of their monetary value.

"Directly or indirectly"

49. Article 339[1] CC refers both in paragraphs 1 and 2 to "directly and indirectly", to signify that the offence can be committed directly or through an intermediary, both on the passive and active side.

"For himself or herself or anyone else"

50. Article 339[1] CC, paragraph 2 on passive trading in influence contains the phrase "for the benefit of himself or herself or anyone else". Paragraph 1 on active trading in influence contains a similar phrase "for the interest of him/herself or other person", which is, however, likely to refer to the influence (to be) exerted by the influence-peddler (which could be in the interest of the active party to the offence or for someone else) and not to third party beneficiaries.

"Committed intentionally"

51. As Article 339[1] CC does not stipulate that this offence can be committed by negligence, it can only be committed intentionally.

Other elements

52. As becomes clear from the phrase "whether the influence is exerted or whether or not the supposed influence leads to the intended results" used in both paragraph 1 and 2 of Article 339[1] CC, the requirements of the Convention are, in this respect, reflected in Article 339[1] CC.

Sanctions

53. The sanction applicable to the offence of trading in influence is up to two years' imprisonment (or a fine, up to two years' corrective labour or 'restriction of freedom') for active trading in influence and three to five years' imprisonment for passive trading in influence. If passive trading in influence was committed by an organised group a prison sentence of four to seven years can be imposed.

Bribery of domestic arbitrators (Article 1-3 of ETS 191)

54. As indicated above (see paragraph 7), Georgia has not ratified the Additional Protocol to the Criminal Law Convention (ETS 191). However, bribery of domestic arbitrators would be covered by the provisions on bribery of domestic public officials, pursuant to Note 1 to Article 332 CC (see paragraph 12 above) which provides that "subjects of the offences foreseen by the present Chapter shall also include (…) members of arbitration". The GET was informed after the visit that the reference to "members of arbitration" would include any person satisfying the requirements of the Law on Arbitration and would thus not only cover members of a court of arbitration, but also any other arbitrator chosen by two private parties to settle their dispute. The elements of the offence and the applicable sanctions detailed under bribery of public officials thus also apply to bribery of those domestic arbitrators. To date, there have not been any court decisions concerning bribery of domestic arbitrators.

Bribery of foreign arbitrators (Article 4 of ETS 191)

55. Bribery of foreign arbitrators is only criminalised in the Georgian legal system as far as they perform "public functions for another state" (as stipulated by Article 332, paragraph 2 CC), in which case they would be equated to foreign public officials (and the elements of the offence and the applicable sanctions detailed under bribery of public officials would in those cases thus also apply to them). To date, there has been no case involving bribery of foreign arbitrators.

Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191)

56. Bribery of domestic jurors is covered pursuant to Note 3 of Article 332 CC (see paragraph 12 above), which was added in September 2010 and provides that "for the purpose of Articles 338-339[1] of the Present Criminal Code, subject of crime are also jurors (candidates for jurors), that undertake the functions pursuant to the legislation of Georgia". To date, there has been no court decision concerning bribery of domestic jurors.

Bribery of foreign jurors (Article 6 of ETS 191)

57. As before with regard to foreign arbitrators (see paragraph 55 above), bribery of foreign jurors is only criminalised in as far as they can be considered as performing a "public function for another state" (in which case they would be considered to be foreign public officials and the elements of the offence and the applicable sanctions detailed under bribery of public officials would apply).

Other questions

Participatory acts

58. Aiding and abetting the commission of all of the above-mentioned bribery and trading in influence offences is criminalised by virtue of Articles 23 to 25 CC. Accomplices are held liable pursuant to the same articles as apply to the main offenders. If the crime is not accomplished for circumstances beyond the accomplice's control, s/he is liable for preparation of a crime or for complicity in an attempt (Article 25 CC, paragraph 7).[13]

> **Article 23. Complicity**
>
> Complicity in the crime shall be an intentional joint participation of two or more persons in the perpetration of the crime.
>
> **Article 24. Types of Complicity**
>
> 1. The organizer shall be the one who organized or supervised the perpetration of a crime, as well as the one who established or supervised an organized group.
> 2. The instigator shall be the one who persuaded the other person into perpetration of a crime.
> 3. The accomplice shall be the one who aided the perpetration of a crime.
>
> **Article 25. Responsibility of Perpetrator and Accomplice**
>
> 1. Criminal liability shall be imposed upon the perpetrator and accomplice only for their own guilt on the basis of joint illegal act, in consideration of the character and quality of the part that each of them took in the perpetration of a crime.
> 2. Criminal liability of co-perpetrator shall be determined in compliance with the relevant article of this Code, without giving reference to this article.
> 3. Criminal liability of the organizer, instigator and accomplice shall be determined under the relevant article of this Code, by giving reference to this article, except those cases when they at the same time were the co-perpetrators of the crime.
> 4. If the act of the perpetrator or accomplice involves the sign characteristic for an illegal act, then this sign will be attributable to another perpetrator or accomplice whose act did not involve this sign, if he/she was aware of this sign.
> 5. The personal sign, which is characteristic for the guilt and/or the personality of one of the perpetrators or accomplices, shall be attributable to the perpetrator or accomplice whom this sign is characteristic for.
> 6. For the complicity in a crime, perpetrator of which is a special subject foreseen by the present Code, a person will be subject to the criminal responsibility as the organizer, instigator or accomplice.
> 7. If the perpetrator has not completed the crime, the accomplice shall be subject to criminal responsibility for the preparation of or complicity in the attempted crime. Criminal responsibility for the preparation of the crime will be imposed upon the one who failed, due to circumstances beyond his control, to persuade other person into perpetration of the crime.

[13] Liability for preparation of a crime is provided in the case of serious crimes (those crimes, which carry a maximum sanction between 5 and 10 years' imprisonment) and especially serious crimes (those crimes which carry a maximum sanction of more than 10 years' imprisonment, which cover passive bribery of public officials and aggravated active bribery of public officials. However, pursuant to Article 18 CC, a person can also be liable for preparation of a commercial bribery offence (Article 221 CC), an active bribery offence (paragraph 1of Article 339) and passive and active trading in influence (paragraph 1 and 2 of Article 339[1]).

Jurisdiction

59. The rules on criminal jurisdiction of Georgia are laid down in Articles 4 and 5 CC. By virtue of Article 4 CC, Georgia has established jurisdiction over (*inter alia*) all bribery and trading in influence offences committed on its territory (territoriality principle). Furthermore, Article 5 CC establishes jurisdiction over (*inter alia*) all bribery and trading in influence offences committed abroad by Georgian citizens (nationality principle), subject to dual criminality. As only Georgian nationals can be public officials in Georgia (pursuant to Article 4 of the Law on Public Service, this article thus establishes jurisdiction over offences committed abroad by Georgian public officials, subject to dual criminality. In cases where the offence is not a criminal offence in the jurisdiction where it was committed, Georgia can assume jurisdiction in case it is a serious or especially serious crime directed against the interest of Georgia (i.e. those acts which carry a maximum prison sentence of respectively between 5 and 10 and more than 10 years, which includes passive bribery of public officials, aggravated active bribery of public officials, aggravated trading in influence and aggravated passive commercial bribery) or if criminal liability is provided by an international treaty binding upon Georgia (Article 5, paragraph 3 CC).

Article 4. Applicability of Criminal Code towards crime committed on the territory of Georgia

1. The person who has committed a crime on the territory of Georgia shall be subject to the criminal responsibility as provided by the present Code.
2. The crime shall be considered as committed on the territory of Georgia if it began, continued, terminated or ended on the territory of Georgia. This Code shall also be applied to the crime committed on the continental shelf of Georgia and in the exclusive economic zone of Georgia.
3. The one who has committed a crime on or against the vessel authorized to use the national flag or identification mark of Georgia, shall be subject to the criminal responsibility under this Code unless otherwise provided by the international treaty of Georgia.
4. If the diplomatic representative of a foreign State, as well as the person enjoying diplomatic immunity has committed a crime on the territory of Georgia, the issue of their criminal responsibility will be determined in accordance with rules of international law.

Article 5. Criminal liability for crime committed abroad

1. The citizen of Georgia, as well as the stateless person permanently residing in Georgia who has committed the act prescribed by this Code, which is regarded as a crime under the legislation of State in which it was committed, shall be subject to the criminal responsibility under this Code.
2. The citizen of Georgia, as well as the stateless person permanently residing in Georgia who on the territory of a foreign State has committed the act prescribed by this Code which is not considered as a crime under the legislation of State in which it was committed, shall be subject to the criminal responsibility under this Code, if it constitutes a serious or especially serious crime directed against the interests of Georgia and/or if the criminal responsibility for this crime is provided by the international treaty of Georgia.
3. The citizen of foreign State, as well as the stateless person not permanently residing in Georgia who on the territory of a foreign State has committed the act provided by this Code shall be subject to the criminal responsibility under this Code, if it constitutes a serious or especially serious crime directed against the interests of Georgia and/or if the criminal liability for this crime is provided by the international treaty of Georgia.

60. Georgia does not extradite its nationals.

Article 6. Transfer and extradition of the offender

1. The citizen of Georgia, as well as the stateless person permanently residing in Georgia shall not be extradited to other State for criminal prosecution or for serving a sentence, unless otherwise prescribed by the international treaty of Georgia. (…)
2. (…)
3. (…)

Statute of limitations

61. Article 71 CC sets out the different limitation periods which are dependent on the type of offence
- two years for offences for which the maximum prison sentence is not more than two years;
- six years for so-called "less serious crimes" (which, pursuant to Article 12 CC, are negligent and intentional offences for which the maximum sentence is more than two but less than five years' imprisonment);
- ten years for serious crimes (which, pursuant to Article 12 CC, are negligent and intentional offences for which the maximum sentence is more than five years but less than ten years' imprisonment);
- twenty-five years for especially serious crimes (which, pursuant Article 12 CC, are negligent and intentional offences for which the maximum sentence is more than ten years' imprisonment or life imprisonment).

In addition, a special sub-paragraph was added to Article 71 CC in 2006, which provides that the limitation period for the crimes of Articles 332-342[1] CC (which are the offences related to public office, including bribery and trading in influence) is fifteen years, if they are not already to be considered especially serious crimes.

62. The limitation period for the various bribery and trading in influence offences is thus as follows:

Article CC	Type of offence	Max. sentence	Limitation period
221 (1)	Active commercial bribery	3 years	6 years
221 (2)	Active commercial bribery, by a group or repeatedly	4 years	6 years
221 (3)	Passive commercial bribery	4 years	6 years
221 (4)	Passive commercial bribery, by a group, repeatedly or through extortion	6 years	10 years
338 (1)	Passive bribery of a public official	9 years	15 years
338 (2)	Passive bribery of a public official, by a state political official, in large quantities, by "a group's conspiracy"	11 years	25 years
338 (3)	Passive bribery of a public official, by a person previously convicted of bribery, repeatedly, through extortion, by an organised group or in especially large quantities.	15 years	25 years
339 (1)	Active bribery of a public official	3 years	15 years
339 (2)	Active bribery of a public official for an illegal act	7 years	15 years
339[1] (1)	Active trading in influence	2 years	15 years
339[1] (2)	Passive trading in influence	5 years	15 years
339[1] (3)	Passive trading in influence by an organised group	7 years	15 years

63. Article 71 CC provides that the limitation period is calculated from the day of commission of the offence and ends on the day of conviction. It is only interrupted in case the offender absconds from justice and for the duration the offender enjoys immunity.

Defences

64. Articles 221, 339 and 339[1] CC on respectively commercial bribery, active bribery of public officials and trading in influence all provide (in a note to the articles) for a special defence of effective regret for the active side of the offence. In all three cases it is provided that criminal liability of the active party would be waived in case s/he voluntarily informs on the commission of the crime. The entity to which this information is to be provided differs in each situation: In the case of commercial bribery (Article 221 CC) it would appear that the briber can inform any government authority, whereas in the case of active bribery of public officials (Article 339 CC) it has to be a law enforcement agency and for active trading in influence (Article 339[1] CC) the prosecution service. The Georgian authorities state that the active parties have to come forward before authorities become aware of the offence.

65. The GET learned during the on-site visit that the defence of effective regret is mandatory in all three cases (i.e. there is no choice but to release the briber from liability) and it would not be possible to subject this to judicial review. There is no time-limit for reporting on the offence (as long as it is before the authorities learn of the offence). Furthermore, the bribe would not be returned to the bribe-giver, but would be transferred to the state. The bribe-giver would, however, be able to keep the benefit obtained by the bribe if the benefit can be considered to be lawful.[14]

66. In addition, the provisions on commercial bribery (Article 221 CC) and active bribery of public officials (Article 339 CC) also provide that if the bribe was extorted the bribe-giver may be released from liability. This release from liability is – unlike the special defence of effective regret – not mandatory. The GET was informed that if the investigating or prosecuting authorities establish in the course of their investigation that the bribe was extorted and the required standard of evidence is met, the bribe-giver will be regarded as a victim and the bribe will be returned to him/her.

> **Article 221. Commercial bribery**
> (…)
> *Note*:
> 1. The perpetrator of the crimes referred to in Paragraph 1 or 2 of this Article [*i.e. active commercial bribery*] shall be released from criminal liability if he/she was extorted of his/her property or he/she voluntarily informed a government authority thereof.
> (…)
>
> **Article 339. Bribe-Giving**
> (…)
> *Note*:
> 1. The briber shall be released from criminal liability if the bribe was extorted from him/her or s/he voluntarily informed law enforcement agencies thereof.
> (…)

[14] If someone bribed a public official to obtain a driver's license and would later on 'effectively regret' this, as provided for by the first note to Article 339, s/he would not be allowed to keep the driver's license if s/he does not know how to drive. In all other cases, for example, if s/he only bribed the public official to speed up the procedure for obtaining a license, s/he would keep the license.

Article 339[1] –Trading in influence
(…)
Note:
1. Person who has committed crime envisaged by paragraph 1 [*i.e. active trading in influence*] of present article shall be released from criminal liability if he/she voluntary informs a prosecuting body on the commission of crime.

(…)

Statistics

67. The Georgian authorities provide the following statistics regarding the number of criminal investigations and prosecutions initiated and persons convicted in the period 2008-2010.[15]

	2008	2009	2010
Article 338 CC *(passive bribery)*			
Investigations	47	72	146
Prosecutions	28	64	149
Convictions	38	59	117
Article 339 CC *(active bribery)*			
Investigations	23	64	43
Prosecutions	12	65	87
Convictions	19	58	67
Article 339[1] CC *(trading in influence)*			
Investigations	3	4	7
Prosecutions	3	3	3
Convictions	3	4	3
Article 221 CC *(commercial bribery)*			
Investigations	4	6	32
Prosecutions	3	2	4
Convictions	5	2	7
Article 340 (*acceptance of gifts*)			
Investigations	-	1	1
Prosecutions	-	-	-
Convictions	-	-	-

[15] Investigations and prosecutions refer to the number of *cases* investigated/prosecuted. Convictions refer to the number of *persons* convicted.

III. ANALYSIS

68. Over the years, commendable efforts have been made to improve the provisions on bribery and trading in influence in the Georgian Criminal Code. The provisions have been repeatedly amended to bring them into line with international standards. Important amendments in recent years include the adding of notes to the chapter on public sector offences, to ensure that bribery of all employees in the public sector as well as bribery of foreign and international public officials would be covered, the criminalisation of trading in influence and a broadening of the range of offenders to which the bribery offence in the private sector applies. The various slightly differing translations of the relevant provisions provided to the GET before and during the visit complicated the assessment thereof, but it nevertheless became clear – as will be illustrated below – that the four main provisions on bribery and trading in influence (Article 221 CC on passive and active commercial bribery, Article 338 CC on passive bribery of public officials, Article 339 CC on active bribery of public officials and Article 339[1] on passive and active trading in influence) appear to follow the wording of the relevant provisions of the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) almost verbatim. The GET therefore focused its attention during the on-site visit on assessing whether the understanding of these provisions (and their application in practice) equalled this. It noted with satisfaction that this was for the most part the case. Furthermore, the GET welcomes the fact that although some of its interlocutors expressed criticism of the handling of corruption cases, they were unanimous in their positive assessment of the corruption provisions in the Criminal Code.[16] Against this background it will hardly be surprising that the GET considers the provisions on bribery and trading in influence to be almost fully in line with the standards of the Convention: only a few specific points need to be addressed.

69. As indicated above, the provisions on bribery follow the constitutive elements of Articles 2 and 3 of the Convention almost verbatim: Article 339 CC on active bribery of public officials and Article 221, paragraph 1 CC on active commercial bribery refer to the "promising, offering or giving" and Article 338 CC on passive bribery of public officials explicitly refers to "the receipt or request" and "the acceptance of an offer or promise". However, Article 221, paragraph 3 CC on passive commercial bribery is less straightforward in that it refers to the "request or receipt of offering, promising and giving", but which is understood to mirror the active elements of the offence (thus covering the key elements of Article 3 of the Convention). The GET took good note of this level of compliance and examined during the on-site visit whether the enforcement as well as the understanding of these provisions among practitioners was in line with the meaning of the Convention, in particular as regards unilateral acts (such as the turned-down offer of, or the

[16] This criticism mainly focused on the perceived lack of independence of the judiciary and, related to this, the right to a fair trial. The GET was told that (notwithstanding positive changes made to legislation in recent years) a culture of loyalty to the executive branch continued to exist (particularly if there was a perceived government interest in a case) and lower-level judges would receive 'instructions' from heads of courts to deliver certain verdicts. As regards the right to a fair trial, concerns were also expressed as to the fairness of the plea-bargaining system in practice and an alleged lack of transparency in the application of this instrument (despite the benefits – such as alleviation of over-crowded prisons and efficiency savings – the introduction of plea-bargaining had brought about). Furthermore, the GET took note of allegations of high-level corruption. It was told that selective application of the law had led to a perception of impunity of high-level officials. Finally, criticism was expressed as regards the power given to the Minister of Justice to act as a prosecutor in relation to the President, members of Parliament, judges, members of the government, the public defender, prosecutors and high-ranking military officers and the possibility to override decisions of prosecutors in individual cases (even if that possibility has to date not been used). The perceived lack of independence of the judiciary, the power given to the Minister of Justice as regards the prosecution of certain high-level officials and the "persistent allegations of high-level corruption" have also been stressed by the Parliamentary Assembly of the Council of Europe, which at the same time welcomed "the investigations into alleged corruption of a number of high-level officials, which demonstrates the political will to counter any sense of impunity for high-level corruption in Georgia". See: Parliamentary Assembly, *Honouring of obligations and commitments by Georgia*, Res. 1801, 13 April 2011, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1801.htm

denied request for an undue advantage). The information provided and the examples given satisfied the GET that, in prosecuting bribery, the existence of a corrupt pact or agreement between the bribe-taker and bribe-giver does not need to be proven in all cases. The request for an undue advantage and the promising, offering or giving of such an advantage were seen to be autonomous and completed offences, which did not require the other party to respond positively to (or even have knowledge of) the request or offer/promise in order to be prosecutable. The GET welcomes this. Practitioners furthermore explained to the GET that the acceptance of an undue advantage (or the offer or promise of such an advantage) by the bribe-taker does not need to be explicit: if s/he did not explicitly turn down the advantage (or offer/promise thereof), s/he would be considered to have accepted it.

70. As regards the undue advantage, Articles 338 and 339 CC on bribery and Article 339[1] CC on trading in influence refer to "money, securities, property, material benefit or any other undue advantage", while Article 221 uses the same terms but excludes the word "material benefit" and instead refers to the rendering of "a property service" (which was explained to the GET as being a service with a certain monetary value, such as an exemption from paying the electricity bill or a free subscription to the gym). The reason for the small inconsistency in the wording referring to undue advantages between the public and private sector offences was not made clear to the GET, but the examples given during the on-site visit (assistance to enrol in higher education, sexual favours, promotion, honorary title etc.) left the GET in no doubt that both material and non-material advantages, irrespective of their monetary value, would be properly captured by the aforementioned terms, both in the provisions on the public sector and those on the private sector.

71. Turning more in detail to the public sector offences, Articles 338 and 339 CC (as well as 339[1] CC on trading in influence, when referring to the target of the influence to be exerted) use the phrase "public official or a person with an equal status". For the definition of a public official, the GET was referred to Article 4 of the Law on Public Service, which provides that a public official is a Georgian national, "who, (…) in accordance with the position s/he occupies, serves on a remunerated position in a state or self-governing agency", whereby Article 2 contains a list defining these state or local self-governmental agencies (referring *inter alia* to the parliament, the president's administration, ministries, courts, the prosecution service and municipal bodies). In addition, in 2009, a note was added to Article 332 CC on abuse of official authority, which extends the scope of Articles 338 and 339 CC (as well as the other articles on public sector offences in the relevant chapter of the Criminal Code) to also cover employees in the public sector who could, pursuant to the Law on Public Service, not be regarded as public officials: as such bribery of persons, "who, pursuant to the legislation of Georgia, conduct public authority" and employees of state enterprises (if they "exercise public authority"), is also criminalised. From the discussions during the on-site visit, it became clear that regardless of whether persons have a '"remunerated position" in a state or self-governmental body, as required by Article 4 of the Law on Public Service, as long as they exercise some form of public function for Georgia (even if they are not Georgian nationals), they are covered by the corruption provisions.[17] The GET is satisfied that these provisions are sufficiently broad to encompass all the different categories of functions listed in Article 1(a) and (b) of the Convention (as well as members of domestic public assemblies as required by Article 4 of the Convention). Furthermore, Articles 338 and 339 CC (as well as 339[1]) make reference to a "person with an equal status" to that of a public official which, pursuant to Note 2 of Article 332 CC, covers foreign public officials (including "any person who performs

[17] An example given during the on-site visit concerned a so-called land management commission which managed state-owned land. Members of the commission were not paid, but the court considered that the commission "conducted public authority" and its members were therefore considered to be public officials. The chairman of the commission was charged with abuse of official authority and bribery.

any public function for another state") and (because of the reference to legislative and other bodies, exercising administrative authority) members of foreign public assemblies, as well as officials of international organisations (including seconded – phrased as "designated' – personnel and contracted staff), members of international parliamentary assemblies and judges and officials of international courts. The GET is consequently satisfied that all categories of functions mentioned in Articles 5, 6, 9, 10 and 11 of the Convention are covered.

72. As regards the scope of an official's functions, Articles 338 and 339 CC criminalise bribery for acting or refraining from acting "in the course of carrying out his/her official rights and duties". During the visit on site, the GET discussed at length different situations in which an official could be bribed to do something that was not part of his/her duties, but which s/he could do because of his/her function. From these discussions it became clear that the notion of "official rights and duties" would be interpreted broadly: even if a certain action would be outside the competence of the official (and thus not fall within his/her "official rights and duties"), as long as s/he had the possibility to carry out the required acts because of his/her position, it would be covered by Article 338 and 339 CC. The GET noted in this context that Article 339 CC provides that bribe giving in exchange for an illegal act is an aggravating circumstance. It was explained to the GET that, in as far as the bribe-giver is concerned, this refers to an obviously illegal act: s/he 'should have known' that the act s/he sought was illegal. For the bribe-taker (the public official) this would, however, not be an aggravating circumstance but a concurrence of passive bribery and abuse of official authority (Article 332 CC) or – in case the act of the public official had inflicted "substantial damage to the rights of natural or legal persons" – excess of official powers (Article 333 CC).

73. Furthermore, the phrasing of Articles 338 and 339 CC and the explanations given on-site did not leave the GET with any doubt that third party beneficiaries and bribery through intermediaries were sufficiently covered (at least as far as the public sector offence is concerned: see for Article 221 CC on the private sector further below). To this end, Article 338 and 339 use the terminology of the Convention, "directly or indirectly" and "for him- or herself or for anyone else".

74. A peculiarity in the provisions on bribery in the public sector is that they also refer to bribery in "the use of his/her official position" or to "exercise official patronage". The former appears to be a special sort of bribery, akin to trading in influence, whereby a public official is bribed to use his influence over something or someone; the latter was understood to refer to (in)actions over a longer stretch of time to protect someone's interests, but was – according to the practitioners the GET met – rarely encountered in court practice (none of the practitioners interviewed by the GET had themselves ever come across a case of bribery to exercise official patronage). As these two modalities are only an addition to the articles on bribery (by use of the wording "as well as") and, as such, do not limit their scope unduly, the GET does not see any substantive reasons to issue a recommendation on these matters. Moreover, and unlike the Convention, both articles 338 and 339 CC refer to persons who benefit from the act performed or omitted by the public official: "in favour of the bribe-giver or other person". As this is interpreted broadly (i.e. as including acts and omissions which may be to the detriment of other people), the GET does not consider this addition to the provisions on public sector bribery to be a problem.

75. Turning more in detail to bribery in the private sector, the GET welcomes that in some respects Article 221 CC on commercial bribery goes beyond the requirements of the Convention in that it is not limited to bribery in the course of business activities, but also covers non-commercial entities (by referring to "commercial or *other type* of organisation").[18] As regards the range of

[18] In this regard, "commercial" was understood to refer to any type of profit-making activity; "other type of organisation" was understood to refer to non-profit organisations in the private sector.

possible offenders, Article 221 CC refers to "a person who exercises managerial, representative or other special authority in a commercial or other type of organisation or works in such an organisation" (and who acts or refrains from acting in breach of his/her duties). Even if the word '*in*' raises some doubts whether also persons working '*for*' a private sector entity would be included in this description, from the discussions during the on-site visit, it became clear that Article 221 CC would not only cover persons carrying out responsibilities within the company resulting from a contract of employment, but also those who had another type of relationship with the company (and who were not necessarily subject to a contract of employment, such as consultants, lawyers and partners). The GET is satisfied that the provision appears to apply to the full range of persons who direct or work for, in any capacity, private sector entities, as required by Articles 7 and 8 of the Convention and, in addition, that this provision adequately covers the key elements of the offence (promising, offering etc.), acts (and omissions thereof) performed by the bribe-taker, bribery committed through intermediaries and, as described in paragraph 70 above, material and non-material advantages (regardless of their value). However, in one small respect Article 221 CC falls short of the requirements of Articles 7 and 8 of the Convention: unlike the provisions on bribery in the public sector, Article 221 CC makes no reference to situations in which the recipient of the bribe is someone other than the bribe-taker. Certain interlocutors claimed that third party beneficiaries were nevertheless covered by the reference to "directly or indirectly", whereas others were of the opinion that this would be covered by the phrase "for the interest of the briber or other person". However, in the view of the GET, the former phrase clearly applies to bribery through intermediaries (as it does for the public sector offence) and does not deal with the final recipient of the bribe and the latter phrase appears to refer to the acts (or omissions) of the bribee (the passive party), which can be either in the interest of the briber (the active party) or someone else, but not apply to situations in which the undue advantage is for the benefit of someone other than the bribee (the passive party). This is underscored by the fact that the provisions on public sector bribery contain both a reference to bribery through intermediaries ("directly and indirectly") as a reference to third party beneficiaries ("for himself or herself or for anyone else"). As no case-law could be provided to clarify that, in practice, situations in which the ultimate beneficiary of the bribe is someone other than the bribee would indeed be covered and given the inconsistency between Articles 221 CC and 338/339 CC, the GET recommends **to ensure that the offence of bribery in the private sector (Article 221 CC) is construed in such a way as to unambiguously cover instances where the advantage is not intended for the bribe-taker him/herself but for a third party.**

76. Trading in influence is criminalised by Article 339[1] CC. Care has been taken by the legislator to align this provision closely to Article 12 of the Convention. The way Article 339[1] CC has been worded and the understanding of practitioners of this provision, as discussed during the on-site visit, satisfied the GET that most elements of Article 12 of the Convention are covered: promising, offering or giving and the request, receipt or acceptance of an offer or promise, direct and indirect commission of the offence, material and non-material advantages and situations in which the influence-peddler does not have the influence s/he asserts s/he has and/or in which the influence has not been exerted or does not lead to the intended result. However, despite obvious efforts to closely follow the wording of the Convention and in spite of the discussions on site (which persuaded the GET at that time that Article 339[1] CC both in its active and passive form referred to third party beneficiaries of the undue advantage), some doubt was cast after the visit on whether the paragraph on active trading in influence indeed mentioned third party beneficiaries. Paragraph 2 of Article 339[1] CC on passive trading in influence refers to "for the benefit of him- or herself or anyone else", which is understood to refer to the influence-peddler who receives/requests/accepts the undue advantage (or the offer/promise thereof) for either

him/herself or a third party, as is required by the Convention.[19] Paragraph 1 on active trading in influence uses similar terms: "for the interest of himself/herself or other person". However, as in this paragraph "himself/herself" is likely to mean the active party (i.e. the person offering/promising/giving the undue advantage to the influence-peddler), the GET ultimately concludes that this alludes to the influence (to be) exerted by the influence-peddler (which could be "for the interest" of the active party or for someone else) and not to third party beneficiaries of the undue advantage. In light of this legal situation, the GET recommends **to ensure that the offence of active trading in influence (Article 339[1], paragraph 1 CC) clearly covers instances where the advantage is not intended for the influence-peddler him/herself but for a third party.**

77. Georgia has not ratified (or signed) the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). Nevertheless, bribery of arbitrators and jurors is to some extent already covered by the existing provisions of the Criminal Code. As regards domestic arbitrators, Note 1 to Article 332 provides that "subjects of the offences foreseen by the present chapter shall also include (…) member of arbitration (…)", a slightly ambiguous reference, which is – as indicated above (see paragraph 54) – meant to cover all arbitrators who satisfy the requirements of the Law on Arbitration, regardless of whether they are members of an arbitration tribunal or not. However, foreign arbitrators are only covered if they can be considered to be foreign public officials or "perform any public function for another state" (in which case they would, pursuant to Article 332, paragraph 2 CC, be considered to be "persons with an equal status to a public official", to which consequently the provision on bribery of public officials would apply). However, in the opinion of the GET, it will not always be the case that foreign arbitrators have the status of public official in a foreign jurisdiction or are considered to perform a public function *for* another state, in particular if an arbitrator is chosen (*ad-hoc*) by two private parties to settle a private dispute, without recourse to an arbitration tribunal. As regards domestic jurors, the GET notes that jurors (as well as candidate jurors) are equated to public officials for the purpose of the corruption provisions, by virtue of Note 3 to Article 332 CC: the provisions on bribery of public officials thus also apply to bribery of domestic jurors. Foreign jurors will, similarly to foreign arbitrators, only be covered if they are foreign public officials (which is normally unlikely to be the case) or if they "perform any public function for another state". There is an obvious ambiguity in the latter terminology. While there is no denying that jurors have some form of public duty (and it can thus be argued that they perform a public function), the phrasing of this paragraph leads the GET to believe that a public function *for* another state signifies categories of persons who can be seen to be representatives of a foreign state, in the same way as foreign public officials or members of foreign public assemblies. In light of the foregoing analysis, the GET takes the view that, for the sake of legal certainty, the law needs to be amended to criminalise foreign arbitrators and foreign jurors, in an unambiguous manner. Consequently, the GET recommends **to unambiguously cover bribery of foreign arbitrators and foreign jurors, in accordance with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and to sign and ratify this instrument as soon as possible.**

78. The sanctions provided by the Criminal Code range from a maximum of two years' imprisonment for active trading in influence (Article 339[1] CC) and three years' imprisonment for basic active bribery of a public official (Article 339, paragraph 1 CC) and basic active commercial bribery (Article 221, paragraph 1) to 15 years' imprisonment for passive bribery of a public official under

[19] It should be noted that Article 339[1] CC, paragraph 2, on passive trading in influence contains another element not foreseen by the Convention: "from the person who acts for his/her interests or anyone else". The Georgian authorities stated that this referred to the influence to be exerted by the influence-peddler, which could be in the interest of the active party or someone else.

certain aggravating circumstances (Article 338, paragraph 3 CC). At the time of the on-site visit, amendments to Article 338 CC were being discussed in Parliament, which would reduce the sanction for basic passive bribery in the public sector to three to six years' imprisonment (down from six to nine years presently).[20] The rationale for these amendments is that a *minimum* sentence of six years' imprisonment was considered disproportionate in small bribery cases. The GET agrees with this line of reasoning and welcomes the fact that, as a result of these amendments, the sanctions for passive bribery will be brought closer to the sanctions for active bribery. Prison sentences can be complemented by other sanctions, such as a disqualification sanction ("deprivation of the right to occupy a position or pursue a particular activity") in the case of public officials. The GET was not provided with any information on the application of sanctions in practice, but it considers the present sanctions as having the potential of being effective, proportionate and dissuasive, as required by Article 19, paragraph 1 of the Convention. The GET did, however, note that legal persons could be liquidated or disqualified from engaging in a particular activity or fined for commercial bribery (Article 221 CC, note 2), but could only be sentenced to a fine in case of active bribery of a public official (Article 339 CC, note 2) and trading in influence (Article 339[1] CC, note 2). The Georgian authorities may wish to amend Note 2 to Articles 339 and 339[1] CC to ensure that a wider range of sanctions is available in case a public official is bribed and/or a trading in influence offence is committed for the benefit of a legal person.

79. The limitation period is related to the maximum sanction and ranges from six years for 'basic' active commercial bribery to 25 years for passive bribery of a public official under certain special aggravating circumstances. The limitation period runs from the commission of the offence to the day of conviction (but cannot, however, be interrupted – other than for the period that an offender has immunity or escapes from justice – or restarted). The GET noted that as a result of a recent amendment to Article 71 CC, the limitation period for all public sector bribery and trading in influence offences has been raised to 15 years (if these offences cannot already be considered especially serious crimes, to which a limitation period of 25 years applies).[21] In the view of the GET the calculation of the limitation period is unlikely to pose an obstacle for the prosecution and adjudication of these offences since the time limit is at least 15 years. The GET welcomes this state of affairs.

80. The Georgian Criminal Code provides for a defence of effective regret in a note to the provisions dealing with active commercial bribery (Article 221 CC), active bribery of public officials (Article 339 CC) and active trading in influence (Article 339[1] CC). As explained in the descriptive part (see paragraphs 64 and 65 above), pursuant to these provisions the active party cannot be held liable for giving (or promising/offering) a bribe, if s/he voluntarily reports ('effectively regrets') the offence to a law enforcement agency (Article 339 CC), the prosecution service (Article 339[1] CC) or any government authority (Article 221 CC). Even though the usefulness of this defence was questioned by some officials met by the GET and was virtually unknown to civil society representatives, the GET heard during the on-site visit estimates that approximately 70 to 80 percent of passive bribery cases were discovered because of this mechanism (for the most part these, however, involved cases of petty corruption). The GET learned furthermore that in order for effective regret to apply two conditions were to be met. First of all, even though this is not

[20] Furthermore, the *minimum* sentence for passive bribery under aggravating circumstances (i.e. by a state official with political status, in respect of a large amount or by a group) will – if the draft is adopted as foreseen – be reduced to six years' imprisonment (down from seven years) and reduced to ten years' imprisonment (down from eleven) if committed by someone previously convicted of bribery, by a repeat offender, through extortion, by an organised group or in respect of an especially large amount.

[21] Without this amendment the limitation period would be two years for 'basic' active trading in influence, six years for passive trading in influence and active bribery of a public official and ten years for 'basic passive bribery of a public official, active bribery of a public official for an illegal act and passive trading in influence by an organised group.

mentioned in the relevant provisions, the offence needs to be reported before it is discovered (i.e. before the law enforcement authorities get the '*notitia criminis*' from another source). Secondly, the facts reported by the bribe-giver must be sufficient to build a '*prima facie*' case of bribery. Once these conditions are met, the bribe-giver must be released from criminal liability: there would be no room for discretion on the side of the prosecution and there would be no requirement upon the active party to further co-operate with authorities. No formal decision (in writing) would be taken that the active party would not be prosecuted, because – as indicated by the Georgian authorities – the release from criminal liability was a mandatory effect provided directly by law. The bribe would, so was the GET told, not be returned to the bribe-giver, but transferred to the state. The bribe-giver would be allowed to keep the benefit obtained by the act (or omission) of the passive party in return for the bribe, if this would be a 'legitimate' benefit.[22] The GET has concerns about the fact that (subject to the two conditions mentioned above: the reporting before discovery and the existence of a *prima facie* case of bribery) the defence is automatic and mandatory. As such it may be open to misuse: it appears to rely on the idea that the briber is a victim of the bribee due to an unequal distribution of power between the two (why otherwise not give bribe-takers the same opportunities to voluntarily report and enjoy impunity?), thus coming close to the 'extortion' mechanism mentioned below, ignoring the fact that the bribe-giver may have well been the instigator of the crime. At the very least, for the sake of legal certainty, in the opinion of the GET, a formal decision on the release from criminal liability would need to be taken (which, if need be, can be contested or made subject to judicial review). Furthermore, the relevant provisions do not specify a time frame for the reporting of the offence, which means that information may only become available long after it is of use to law enforcement authorities for investigating the briber. Consequently, while not denying the usefulness of this defence in the Georgian legal context, the GET finds that further safeguards against the misuse of the defence need to be taken (e.g. immediate reporting of the offence, limiting the release from liability to situations in which the bribe-giver has been solicited, and requiring a formal decision on the release from criminal liability).Therefore, the GET recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment in cases of effective regret.**

81. In addition, Articles 221 CC and 339 CC allow the release from liability of the bribe-giver when the bribe was extorted from him/her. Unlike 'effective regret', this defence (if one can call it a defence) is not (necessarily) invoked by the bribe-giver: s/he does not have to report the offence and the release from liability is not mandatory. The GET learned that, in practice, if in the course of giving testimony or being interrogated, the bribe-giver provides information that s/he has been a victim of extortion and that information can be sufficiently corroborated by evidence, s/he would be regarded as a victim of a crime and released from criminal liability, whereby the bribe would be returned to him/her.

82. As explained in paragraph 59 above, Article 4 CC establishes jurisdiction of Georgia over offences which have commenced, continued or ended on the territory of Georgia, regardless of the nationality of the offender, which satisfies the requirements of Article 17, paragraph 1(a) of the Convention. Secondly, Article 17, paragraph 1(b) of the Convention requires Georgia to establish jurisdiction over all bribery and trading in influence offences committed by its nationals, public officials and members of domestic public assemblies (whether at home or abroad). The GET notes that Article 5, paragraph 1 CC makes jurisdiction by Georgia over offences committed abroad by its citizens (which reportedly includes offences committed by its public officials and members of domestic public assemblies, as only Georgian nationals can be Georgian public officials and/or members of a Georgian public assembly), subject to dual criminality. However, in

[22] See footnote 14 above.

case the dual criminality requirement is not met, Article 5, paragraph 2 CC also allows Georgia to assume jurisdiction over offences committed abroad by one of its citizens (including its public officials), if it concerns 'serious crimes' (which includes passive bribery of public officials and passive trading in influence) or 'especially serious crimes'[23] directed against the interests of Georgia or if criminal liability is provided for by an international treaty binding upon Georgia. Thirdly, Article 17, paragraph 1(c) of the Convention also requires Georgia to establish jurisdiction over all bribery and trading in influence committed abroad by a foreign citizen, *involving* one of its public officials (including members of its public assemblies), Georgian officials of international organisations, Georgian members of international parliamentary assemblies and Georgian judges and officials of international courts. Similar to the previous situation, Article 5, paragraph 3 CC allows Georgia to assume jurisdiction over an offence committed abroad by a foreign citizen, if the offence concerns a 'serious' or 'especially serious crime' directed against the interests of Georgia or if criminal liability is provided for by an international treaty binding upon Georgia.

83. The question of whether Georgia meets the requirements of Article 17, paragraph 1 (b) and (c) of the Convention, in cases where the offence cannot be regarded as a 'serious' or 'especially serious' crime directed against the interests of Georgia, rests thus on the assumption that the Convention would in the Georgian legal context be a treaty providing for criminal liability for bribery and trading in influence offence. In the opinion of the GET, however, the Convention is not a 'self-executing' treaty (i.e. no direct applicability) and as such does not "provide" for "criminal responsibility" (an uncertainty that was indeed raised by one of the officials interviewed by the GET), as required by Article 5, paragraphs 2 and 3 CC. A further problem as regards jurisdiction over the acts committed by or involving Georgian officials, is that although only Georgian citizens can be Georgian public officials, foreigners can be employed in the public sector (for example, as advisors), to which the provisions on bribery and trading in influence apply, by virtue of the first note of Article 332 CC.[24] However, they do not appear to be considered to be public officials for the purpose of the jurisdiction clauses. It is therefore necessary to ensure that Georgia may assume jurisdiction over such persons who work for Georgia, if they commit or are involved in a bribery or trading in influence offence abroad in a capacity similar to that of a Georgian public official. Consequently, the GET recommends **to (i) abolish the dual criminality requirement for the prosecution of bribery and trading in influence offences committed abroad by its nationals, public officials (including non-nationals working in a similar capacity for Georgia) or members of domestic public assemblies, in cases in which the offence is not a 'serious' or 'especially serious' crime directed against the interests of Georgia and (ii) establish jurisdiction over acts of corruption committed abroad by non-nationals, involving Georgian public officials (including non-nationals working in a similar capacity for Georgia), members of a Georgian public assembly, Georgian officials of international organisations, Georgian members of international parliamentary assemblies and Georgian judges or officials of international courts.**

[23] Pursuant to Article 12 CC, serious crimes are those crimes for which a maximum sentence of between five and ten years' imprisonment can be imposed; especially serious crimes are those crimes for which a maximum sentence of more than ten years' imprisonment (or life imprisonment) can be imposed.

[24] See paragraph 12 above: "Subjects of the offences foreseen by the present Chapter also include (…) any other person, who pursuant to the legislation of Georgia conducts public authority".

IV. CONCLUSIONS

84. Over the years, Georgia has made commendable efforts to improve the provisions on bribery and trading in influence in its Criminal Code. Following the amendments in recent years, provisions on bribery and trading in influence now provide a sound basis for the investigation, prosecution and adjudication of corruption offences and are almost fully in line with the standards of the Criminal Law Convention on Corruption (ETS 173) and its Additional Protocol (ETS 191). Nevertheless a few specific points need to be addressed. First, Georgia should as soon as possible become a party to the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and unambiguously cover bribery of foreign arbitrators and foreign jurors. Second, as regards bribery in the private sector, it needs to be ensured that situations in which someone other than the bribe-taker benefits from the bribe are adequately covered by Article 221 of the Criminal Code. Third, even though this may be a useful tool in uncovering bribery and trading in influence offences, the existing mechanism concerning 'effective regret' is a source of concern, given the limited safeguards in place to prevent possible abuse by bribe-givers. Fourth, it needs to be ensured that third party beneficiaries of the undue advantage are covered in the provision on active trading in influence (Article 339[1] CC). Finally, the provisions on jurisdiction in the Criminal Code need to be revised, to ensure Georgia can assume jurisdiction over all bribery and trading in influence offences committed abroad by its nationals and public officials (including members of its domestic assemblies) as well as those offences committed by foreigners where they involve Georgian public officials (including members of its domestic assemblies), Georgian officials of international organisations, Georgian members of international parliamentary assemblies, Georgian judges or officials of international courts.

85. In view of the above, GRECO addresses the following recommendations to Georgia:

i. **to ensure that the offence of bribery in the private sector (Article 221 CC) is construed in such a way as to unambiguously cover instances where the advantage is not intended for the bribe-taker him/herself but for a third party** (paragraph 75);

ii. **to ensure that the offence of active trading in influence (Article 339[1], paragraph 1 CC) clearly covers instances where the advantage is not intended for the influence-peddler him/herself but for a third party** (paragraph 76);

iii. **to unambiguously cover bribery of foreign arbitrators and foreign jurors, in accordance with Articles 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and to sign and ratify this instrument as soon as possible** (paragraph 77);

iv. **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment in cases of effective regret** (paragraph 80);

v. **to (i) abolish the dual criminality requirement for the prosecution of bribery and trading in influence offences committed abroad by its nationals, public officials (including non-nationals working in a similar capacity for Georgia) or members of domestic public assemblies, in cases in which the offence is not a 'serious' or 'especially serious' crime directed against the interests of Georgia and (ii) establish jurisdiction over acts of corruption committed abroad by non-nationals, involving Georgian public officials (including non-nationals working in a similar capacity for Georgia), members of a Georgian public assembly, Georgian officials of**

international organisations, Georgian members of international parliamentary assemblies and Georgian judges or officials of international courts (paragraph 83).

86. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Georgian authorities to present a report on the implementation of the above-mentioned recommendations by 30 November 2012.

87. Finally, GRECO invites the authorities of Georgia to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.