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Group of States against corruption

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I. INTRODUCTION

1. Georgia is the 39th GRECO member to be examined in the Second Evaluation Round. The GRECO Evaluation Team (hereafter referred to as the "GET") was composed of Mr Juris JURISS, Prosecutor, Prosecutor's Office for Organised Crime and Other Special Crimes (Latvia), Dr Maria GAVOUNELI, Lecturer in International Law at the University of Athens and Advisor to the Minister of Justice (Greece) and Dr Manfred MÖHRENSCHLAGER, formerly Senior Ministerial Counsellor, Ministry of Justice (Germany). This GET, accompanied by two members of the Council of Europe Secretariat, visited Georgia from 3 to 7 July 2006. Prior to the visit the GET experts were provided with replies to the Evaluation questionnaire (Greco Eval II (2006) 2E) as well as copies of relevant legislation and other relevant documentation.

2. The GET met with the State Minister on Reforms Co-ordination, Members of Parliament, the Chairman of the Court of Appeals, the Deputy Prosecutor General, the Ombudsman and the Deputy Ministers of Justice, Finance, Internal Affairs and Reforms Co-ordination, and with officials from the following governmental organisations: the Ministry on Reforms Co-ordination, the Prosecutor General's Office, the Ministry of Internal Affairs, the Ministry of Finance, the Ministry of Justice, the Financial Monitoring Service of Georgia, the Chamber of Control, the State Chancellery, the Public Service Bureau and the municipality of Tbilisi. The GET also met representatives of ABA-CEELI, the Chamber of Commerce, the media, the Accountants and Auditors Federation, the United Trade Unions of Georgia, Transparency International, the Young Lawyers Association and the Liberty Institute.

3. It is recalled that GRECO agreed, at its 10th Plenary meeting (July 2002), that, in accordance with Article 10.3 of its Statute, the 2nd Evaluation Round would deal with the following themes:

   - **Theme I - Proceeds of corruption:** Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS No. 173), by Articles 19 paragraph 3, 13 and 23 of the Convention;
   - **Theme II - Public administration and corruption:** Guiding Principles 9 (public administration) and 10 (public officials);
   - **Theme III - Legal persons and corruption:** Guiding Principles 5 (legal persons) and 8 (fiscal legislation), as completed, for members having ratified the Criminal Law Convention on Corruption (ETS No. 173), by Articles 14, 18 and 19, paragraph 2 of the Convention.

4. The present report 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 effectiveness of measures adopted by the authorities of Georgia in order to comply with the requirements deriving from the provisions indicated in paragraph 3. In this respect, it should be noted that Georgia has not yet ratified the Criminal Law Convention on Corruption (ETS No. 173). 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.

II. THEME I – PROCEEDS OF CORRUPTION

a. Description of the situation

Confiscation and other deprivation of instrumentalities and proceeds of crime

5. Georgian law provides for two types of confiscation: criminal confiscation and administrative confiscation. Criminal confiscation is of a general nature and deals with deprivation of instrumentalities and proceeds from crime, while the latter is specifically aimed at recovering illegal acquired property and unexplained wealth of officials. Although called 'administrative confiscation' this type of confiscation relates to proceeds from crime in that the official concerned must have been charged with one or more specified offences; the proceedings are however regulated by the Administrative Procedures Code of the Georgia.

Criminal confiscation

6. The relatively new[1] Article 52, paragraph 1, of the Criminal Code (hereafter: CC) defines criminal confiscation of the proceeds and instrumentalities of crime: "Confiscation of property means the deprivation of an object and/or instrumentalities of crime, objects intended for the commission of a crime and/or proceeds of crime". Article 52, paragraph 3, CC refers to the confiscation of the proceeds of crime by providing that property[2], income from property as well as property of equivalent value can be confiscated from a person who has been convicted of an intentional crime, when it has been proven that this property was obtained through the commission of a crime. Pursuant to Article 52, paragraph 2, CC the court can order confiscation of the instrumentalities[3] of crime, if it deems such confiscation to be in the interest of the State or the public, necessary to protect a certain person's rights and freedoms or to avoid a new crime being committed. Confiscation of either the proceeds or the instrumentalities of crime on the basis of Article 52 is an additional sanction, which will reportedly not affect the main sanction. Confiscation may be imposed for any crime defined in the Criminal Code that has been committed with intent, including all corruption offences.

7. As outlined above, confiscation of indirect proceeds is possible on the basis of Article 52, paragraph 3, CC which explicitly allows for confiscation of income from property. This same paragraph furthermore provides for value confiscation. The value of the property is to be assessed by an expert, who is obliged to give testimony of his/her assessment of the value of the property in court (Article 97 of the Code of Criminal Procedure – hereafter CCP). As regards third party confiscation, if the proceeds have been transferred to a third party who is in bad faith (in that s/he knew that the property was transferred to him/her to avoid it being confiscated from the offender), the transfer will reportedly not be an obstacle for confiscation by the court as the third party will not be considered the rightful owner and the property will be treated as still belonging to the offender.[4] If the third party acted in good faith, the property cannot be confiscated from him/her and the provisions on confiscation of property of equivalent value, as mentioned before, will have to be applied by the court.

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[1] These provisions date from 28 December 2005.

[2] According to Article 52, paragraph 3, CC property is to include "any object and non-material property, as well as legal documents granting property rights".

[3] Instrumentalities have been defined in Article 52, paragraph 2, CC as "objects and/or weapons used in a crime or intended to be used in a crime, which are in the ownership or legal possession of a suspected, accused or convicted person and which were used or intended to be used for the commission of a crime".

[4] Both the third party and the offender can be prosecuted for concealing or disposing of property subject to a confiscation order, which carries a sanction of a fine, 180 to 240 hours community service or 2 to 5 years' imprisonment (Article 377 CCP).

8. The burden of proof with regard to the proceeds of the crime lies with the prosecution and cannot be reversed, nor is it possible to lower the standard of proof with regard to the origin of the proceeds: the criminal origin of the proceeds has to be proven beyond a reasonable doubt. In the course of criminal proceedings, the court can order confiscation on the basis of Article 52, paragraph 2, CC without a prior criminal conviction with regard to specifically the instrumentalities (but not proceeds of crime) which are in the hands of a person who is either suspected or accused of a crime, when it deems it to be in the interest of the State or the public, necessary to protect a certain person's rights and freedoms or to prevent a new crime being committed.

9. Criminal confiscation has a discretionary character, and is imposed by the court acting *ex officio* or upon request of the public prosecutor.

10. In general, confiscated property (both proceeds and instrumentalities of crime) accrues to the State. Nevertheless, a natural person who has suffered material, physical or so-called 'moral' damage (or material or 'moral' damage when it concerns a legal person) as a result of the crime in question, can – pursuant to Article 30 CCP - claim compensation for this damage, which may affect the amount that accrues to the State. To this end the victim (or the prosecutor on behalf of the victim) can bring a civil claim in the criminal proceedings against the offender, or against the state if the victim only learns of the proceedings after the offender has been convicted and the property has been transferred to the state[5].

Administrative confiscation

11. Article 37.1 CCP and Articles 21.4 to 21.11 of the Administrative Procedures Code (hereafter APC) of Georgia provide for the possibility of so-called administrative confiscation of illegal property and unexplained wealth of officials[6] (as well as their family members, close relatives and so-called 'connected persons') without a prior criminal conviction of the official concerned. It should be noted however that although a criminal conviction is not necessary and although it is called 'administrative confiscation', this type of confiscation can only be initiated if an official has been charged with (but not necessarily convicted of) offences, committed during their term in office, against the interests of public service, the enterprise or organisation concerned (which includes corruption), or accused of one of the following offences: money laundering, extortion, misappropriation, embezzlement, tax evasion or violations of custom regulations, regardless of whether the official in question is still in office or not. In this case, by virtue of Article 37.1 CCP the prosecutor may apply to the court for the confiscation of the illegal property and unexplained wealth in the possession of an official if this property (including income from property and stocks/shares in the property) is suspected to derive, directly or indirectly, from the proceeds of crime. Once the prosecution has presented its claim to the court that the property concerned is illegal or 'unjustified', the burden of proof shifts to the defendant. The court orders confiscation of the property, if in the course of the proceedings, it concludes that there is reasonable doubt as to the legal origin of the property and if the defender fails to present the court with documents

[5] This claim must however be brought within 10 years after conviction of the offender.

[6] For the purpose of these provisions, officials are the categories of persons as defined by the Law on Conflicts of Interest and Corruption in Public Service (see for this list footnote 14, Theme II below), as well as public servants, heads and deputy heads of legal persons subject to public law and persons having managerial or representative authority in enterprises (in which the state has more than 50% of the shares), who are being charged with an offence committed during their term in office which is against the interests of public service, the enterprise or other organisation concerned or who are accused of money laundering, extortion, misappropriation or embezzlement, tax evasion or violation of customs rules, irrespective of whether they have been dismissed from office or not.

proving that the property (or the financial resources for the purchase of the property) was legally acquired or fails to demonstrate that taxes on the property have been paid.

12. Property transferred to certain third parties - namely family members or close relatives of the official, but also so-called 'connected persons', which are persons who possess property which is suspected to have been acquired by an official or has been used or disposed by an official – can also be confiscated. Value confiscation is furthermore also possible: Article 21.8, paragraph 3, APC provides that, if the property ordered to be confiscated cannot be transferred to the State in the original form, the defender is obliged to pay the State the value of the property.

13. If the administrative proceedings regarding the confiscation of the unexplained wealth or illegal property of an official bring to light indications that a criminal offence has been committed, the prosecutor is required to initiate criminal proceedings against the official concerned (Article 21.9 APC). The GET was however also informed that, as regards the property of an official if administrative confiscation would converge with criminal confiscation, the former, as a *lex specialis,* would take precedence over criminal confiscation.

14. The property confiscated in these administrative proceedings is to be transferred to its legitimate owner, after satisfying the legal claims of third parties on the property. If the legitimate owner cannot be determined the property accrues to the State.

Interim measures

15. Chapter 24 (Articles 190-201) of the CCP regulates the seizure of instrumentalities and proceeds of crime in criminal proceedings. A court can order the seizure of property - including bank accounts - on application of a prosecutor (or an investigator with the consent of a prosecutor) to secure a civil action, coercive measure or the execution of a future confiscation order under the Criminal Code, if there are sufficient grounds to suspect that property may be concealed or sold or that it represents the proceeds of crime (Articles 192 and 190 CCP). If the suspect, accused or person on trial is an official, the prosecutor is obligated to petition the court to seize the property of the official, including his/her bank accounts, and to suspend implementation of any obligations defined in contracts concluded by the official in question on behalf of the State (Article 190, paragraph 2, CCP). In case of urgency, when there are sufficient grounds to suppose that the property may be concealed or destroyed, a prosecutor (or an investigator with the consent of a prosecutor) may order the seizure of property without a court order (Article 195 CCP). The prosecutor or investigator in question will subsequently have to report this within 24 hours of the seizure order being made to the court, which will decide if there is sufficient legal basis for the emergency seizure order.

16. With regard to seizure to secure an administrative confiscation order, the prosecutor may also request the court to seize or freeze the property (including bank accounts) of an official (or his/her family members, close relatives or 'connected persons') on the basis of Article 21.7 APC, if there are indications that this property will be concealed, spent or otherwise disposed of.

17. As regards the management of seized assets, precious stones and metals, foreign currency and securities will, pursuant to Article 198 CCP, be kept in storage in a state banking institution; bonds and lottery tickets will be kept in a savings bank. Cash will be deposited on the account of the court in whose jurisdiction the criminal case falls. Other objects will be sealed and stored with the entity which applied to the court for seizure of the property, or will be stored with (a

representative of) a local self-governmental entity. Large and immovable objects will be sealed[7] and left with the proprietor, owner or family member of the accused, who shall be informed of his/her criminal liability for any damage done to the property. Embezzling, disposing, concealing or illegally transferring seized property (or carrying out a bank transaction with the frozen funds by a financial institution) is punishable with a fine, 180 to 240 hours' community service or two to five years' imprisonment (Article 377 CCP).

18. There is no obligation to conduct special investigations aimed at identifying, tracing and freezing proceeds of crime when certain serious crimes are detected.

Statistics

19. No general statistics on the number of corruption cases in which interim measures were taken were available. The GET was informed that a new system to electronically submit statistics was launched on 13 February 2006; the database in which these statistics will be collected is expected to become operational towards the end of 2006.

20. Regarding statistics on confiscation the authorities of Georgia reported that the provisions on criminal confiscation (Article 52 CC) had only entered into force very recently and that therefore no statistics were available. As regards administrative confiscation of illegal property and unexplained wealth of officials, the authorities of Georgia reported that, from August 2004 to August 2005, the Office of the Prosecutor General had initiated more than 30 claims for administrative confiscation against 200 persons (officials, their family, relatives and 'connected persons'). The property thus confiscated had a total value of approximately 100 million Georgian Lari (approximately €44 million).

International co-operation for interim measures and confiscation

21. Georgia has ratified the Civil Law Convention on Corruption (ETS No. 174), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) and the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)[8], but not the Criminal Law Convention on Corruption (ETS No. 173).[9] In addition, a number of multilateral and bilateral agreements with a view to facilitating mutual legal assistance have been concluded, such as the Convention on the Legal Co-operation and Relationships in Civil, Family and Criminal Matters among CIS Countries of 1993. These international and bilateral agreements are directly applicable for the provision of legal assistance. In the absence of a treaty, legal assistance can also be provided on the basis of a special agreement between the Prosecutor General (with regard to legal assistance in criminal matters, at the pre-trial stage) or the Minister

[7] The seizure of large and immovable property is recorded in the Public Registry of the Ministry of Justice to prevent the sale of the property.

[8] Georgia declared, in respect of Article 2 of this Convention, that legal assistance may be refused, in the following cases:
(a) if criminal proceedings have been instituted in Georgia for the offence in respect of which assistance is requested;
(b) if the offence in respect of which assistance is requested has already been tried by a court of law and the judgment has entered into force.

In addition, Georgia reserved the right under Article 5 of the Convention to make the execution of letters rogatory for search or seizure of property dependent on the following conditions:
(a) that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of Georgia;
(b) that the offence motivating the letters rogatory is an extraditable offence in Georgia;
(c) that execution of the letters rogatory is consistent with the law of Georgia.

[9] The Action Plan for the Implementation of the National Anti-Corruption Strategy stipulated however that this Convention was to be ratified by April 2006 (point 16.2 of the Action Plan).

of Justice (with regard to legal assistance in criminal matters, at the trial stage, and concerning family, civil and commercial law) and officials of the foreign state.

22. At the national level, Articles 248-260 of the CCP establish the legal framework for mutual legal assistance in criminal matters concerning interim measures and confiscation of proceeds of crime, including but not specifically dealing with corruption-related offences. The provisions of the CCP apply when there are no treaty provisions applicable to the specific request for assistance, for example in situations when no treaty on mutual legal assistance has been concluded with the requested or requesting state. In all other cases, the relevant treaty takes precedence over the provisions on mutual legal assistance in the CCP.

23. When Georgia is the requesting state, Articles 248, 249 and 250 provide the legal basis for requests for assistance by investigators, prosecutors or courts to foreign authorities, if a multilateral or bilateral agreement does not provide otherwise. Requests for assistance at the pre-trial stage (including seizure ordered at the pre-trial stage) are to be sent via the Office of the Prosecutor General, requests for assistance at the trial stage and authorised by a court are to be sent via the Ministry of Justice. Requests for assistance can never be made directly, but will always have to go through the Office of the Prosecutor General or Ministry of Justice. Information received or acts, such as seizure of assets, undertaken on the basis of a request for legal assistance can be used in Georgian criminal proceedings if the information was obtained or the acts were undertaken in compliance with the laws of the requested country or the laws of Georgia.

24. With respect to requests to Georgia to take interim measures, the Office of the Prosecutor General can commission a prosecutor or investigator (under whose authority such an act would be taken if it were a Georgian case) to execute the requested act. As regards the request to enforce foreign confiscation orders, it is the Ministry of Justice which will arrange for the execution of such an order. In executing the request for assistance, the provisions of the Criminal Procedure Code are followed unless the international agreement provides that the procedural rules of the foreign jurisdiction are to be followed. A request for assistance will be denied if its execution would affect the national interests, sovereignty or security of Georgia (Article 251, paragraph 7). Asset sharing is possible on the basis of a treaty concluded for this purpose. The GET was however informed that it was common practice to return confiscated (moveable) property to the requesting country without asking compensation (other than storage costs if the property was stored for longer than 45 days).

25. The GET was informed that the Office of the Prosecutor General was in the process of drafting a new law on international legal co-operation, which would include new provisions on mutual legal assistance, extradition and possibly also asset-sharing.

Money laundering

26. Article 194 CC criminalises money laundering and provides that "legalisation of illicit income[10] – i.e. to give a legal appearance (to acquire, possess, use, converse, transfer or other act) to property obtained through the commission of a crime, with the purpose of concealing its illegal origin and also of concealing its nature, source, location, transfer, circulation or ownership or other related rights on the property – is punishable with 2 to 4 years' imprisonment." Certain circumstances, such as the commission of the money laundering offence by a group of persons,

[10] Income obtained through the commission of fiscal crimes or income of less than 5,000 Georgian Lari is not considered to be 'illicit income' within the meaning of this article.

repeatedly or involving a large amount of illicit income (30,000 – 50,000 Georgian Lari; approximately €13,000 - €22,000) allow for an increase in the sanction to 4 to 7 years' imprisonment. Further aggravating circumstances, i.e. the commission of the offence by a criminal organisation, by abuse of one's official position or involving an especially large amount of illicit income (more than 50,000 Georgian Lari; approximately €22,000), allow for a further increase in the sanction to 7 to 12 years' imprisonment.

27. Tax offences and offences resulting in proceeds of less than 5,000 Georgian Lari are not considered to be predicate offences to money laundering. Corruption offences – also when committed abroad – are thus predicate offences to money laundering if they result in illicit income of 5,000 Georgian Lari (approximately €2,200) or more.

28. Commercial banks, currency exchange bureaus, non-banking depository institutions, broker companies and so-called security registrars (i.e. legal persons which register all transactions relating to financial securities), insurance companies, non-state pension schemes, entities organising lotteries and other commercial games, entities dealing in antiquities, precious metals, stones and related products, customs authorities, charitable organisations, notaries and postal services are required to report suspicious transactions to the Financial Monitoring Service (FMS). Supervision of the reporting requirements is carried out by authorities that already have some supervisory tasks on the basis of other legislation, such as the National Bank of Georgia, the Commission of Securities, the Ministry of Finance and the Ministry of Justice. Failure by banks to report a suspicious transaction can, by virtue of the Order of the President of the National Bank of Georgia #304, be punished with a fine of up to 5,000 Georgian Lari (approximately €2,200); it is not clear whether similar provisions exist for other reporting entities.

29. The FMS is situated in the National Bank of Georgia and became operational on 1 January 2004. The FMS is a member of the Egmont Group. It has a staff of 41. It does not conduct criminal investigations, but analyses the suspicious transaction reports it receives. In 2005 it received 27,845 suspicious transaction reports, of which it forwarded 559 reports for further investigation to a specialised department within the Office of the Prosecutor General: the Special Service for the Criminal Prosecution of Legalisation of Illegal Income within the Office of the Prosecutor General established on 10 October 2003). This special department consists of 8 persons (5 of which are prosecutors) and has investigative and prosecutorial jurisdiction over all money laundering offences and their predicate offences. It is assisted in its investigations by the Special Operative Unit against Money Laundering of the Ministry of Internal Affairs, which was established in 2005.

30. The Special Service for the Criminal Prosecution of Legalisation of Illegal Income within the Office of the Prosecutor General started investigations in 10 cases in 2004, 45 cases in 2005 and 8 in 2006 (until July 2006); 21 persons have been prosecuted or are being prosecuted, 6 of which have been convicted so far. There has however not been any investigation, prosecution or conviction for the offence of money laundering where the predicate offence was corruption.

b. Analysis

31. In the past few years Georgia has adopted a vast array of new legislation, among other things on seizure and confiscation of the instrumentalities and proceeds of crime, including corruption, and the laundering of these proceeds. The introduction of an administrative confiscation scheme in 2004, specifically directed at illegally acquired property and unexplained wealth of officials, gave law enforcement authorities an effective tool to deprive officials, as well as their relatives and so-called connected persons, of the benefits of their crimes. Administrative confiscation requires no

prior conviction, it explicitly allows for confiscation from third parties as well as of assets of equivalent value and requires a relatively low standard of proof, by providing that once the prosecutor has presented his/her claim to the court that the defendant's property is illegal or cannot be explained, the burden of proof shifts to the defendant to show that this property (or the financial resources required for acquiring the property) has been legally obtained. The GET was told that so far property with a value of more than €40 million had been reclaimed, which illustrates the commitment of the Georgian authorities not to let officials benefit from crimes committed during their term in office. However, the GET also heard that there have been some concerns about the arbitrariness of the administrative confiscation regime, in that, allegedly, only proponents of the previous administration were being targeted. There was also concern about the lack of transparency in the destination of confiscated property, in that it was unclear to whom this property was being transferred (in case of existence of a legitimate owner of the property) or sold (in case of transfer to the State) and as to whether anyone, other than the State, stood to benefit from it. The Georgian authorities however informed the GET after the visit that the perceived lack of transparency in the destination of the confiscated property had been addressed, *inter alia* by abolishing the special state fund to which this property was allegedly transferred, and that the value of the property confiscated was reflected in the State budget. Although the GET was not in a position to assess whether the aforementioned concerns are still prevalent, it considers that any doubt about the legitimate use of administrative confiscation must be avoided. *The GET therefore observes that the Georgian authorities should ensure the utmost transparency in the use of administrative confiscation, to avoid any impression that this mechanism is being misused.*

32. In December 2005 new (amended) provisions were introduced in the Criminal Code to make confiscation of instrumentalities and proceeds of crime possible, also with regard to other persons than officials. The new article in the Criminal Code (Article 52) is of a general nature, making confiscation as an additional sanction possible in respect of all corruption offences, allowing for value confiscation, third party confiscation and confiscation of indirect proceeds. The provisions on seizure were amended at the same time to allow for the seizing of assets at the early stages of an investigation, if necessary without a court order in case of urgency, to secure the execution of a possible confiscation order. In this regard, the GET noted with interest that in cases where the suspect or accused is an official, Article 190 CCP requires the prosecutor to petition the court for a seizure order, which also suspends the execution of certain agreements concluded by the official in question on behalf of the State. Practice with regard to these new provisions is understandably limited (and appeared to be even non-existent at the time of the visit). However, with the legal framework as regards confiscation and seizure in place, attention could now focus on practical measures to promote the use of this legislation in practice. Considering that the standard of proof is considerably higher in criminal confiscation cases than it is with regard to administrative confiscation, a sound financial investigation becomes all the more important. The GET was not convinced that enough attention was paid at the beginning of investigations to the financial aspects of proceeds-generating crimes such as corruption, in order to identify the proceeds with a view to obtaining a provisional order swiftly, thus preventing dispersion of the assets to be confiscated. In fact, the GET was informed that there was little experience in Georgia with financial investigations. The GET is therefore of the opinion that it would be advisable that any practical measures (such as training) to promote the use of the new legislation do not just focus on the legal provisions as such but also deal with the practicalities of conducting financial investigations (i.e. how to trace defendants' assets and obtain the required evidence that these represent the proceeds of crime). It would furthermore be useful if this training would not be limited to entry-level courses for new recruits in law enforcement bodies and the prosecution service. For these reasons, **the GET recommends to establish guidelines and thorough training for those officials (law enforcement officials and prosecutors) who**

are required to apply the new rules on confiscation and seizure, paying particular attention to financial investigations.

33. Also in December 2005, a new provision on money laundering (Article 194 CC) entered into force (and was subsequently amended in April 2006). In the view of the GET, the main problem with this provision is that if the underlying offence generates proceeds of less than 5,000 GEL (approximately €2,200) the money laundering offence cannot be prosecuted. Furthermore, tax evasion is also excluded as predicate offences to money laundering. The GET heard no convincing arguments for excluding either tax evasion or offences below the threshold of 5,000 GEL as predicate offences to money laundering. Although the GET prefers an all-crimes approach to money laundering and would thus advise not to exclude tax evasion from the list of predicate offences, this - strictly speaking – falls outside the scope of this evaluation. However with regard to the threshold of 5,000 GEL, the GET considers that, in the Georgian context and especially with regard to bribes, this represents a substantial amount of money and could thus have a significant impact on money laundering prosecutions where the predicate offence is a corruption offence. **The GET therefore recommends to abolish, or at least substantially lower, the threshold of 5,000 Georgian Lari, with regard to corruption as predicate offence to money laundering.**

34. The Financial Monitoring Service (FMS), the Georgian FIU, began functioning within the National Bank of Georgia on 1 January 2004. In the opinion of the GET, the FMS has a well-trained and highly-motivated staff. Although not vested with investigatory powers (it collects data and analyses suspicious transaction reports), it plays a crucial role in money laundering prosecutions in Georgia. Most, if not all, prosecutions for money laundering - referred to in the descriptive part above - seem to derive from information provided by the FMS. This again indicates that there is a need to generate money laundering investigations outside the suspicious transactions regime, based on police or prosecutorial[11] intelligence, by conducting financial investigations together with investigations into proceeds-generating crimes (as already referred to in paragraph 32 above) and by timely involving investigators in work done on the identification of money obtained through corruption offences. It however also points to the importance of the FIU having access to all relevant databases and other (reliable) data sources. The GET merely notes that the FMS currently does not have access to tax and customs information. The GET was also provided with examples of situations in which the information received by the prosecution office from the FMS was not complete and the General Prosecutor's Office had to request additional information, which hampered the timely freezing and seizure of assets. **Consequently, the GET recommends to improve possibilities for information gathering by the Financial Monitoring Service (FMS), *inter alia* by improving its access to relevant databases.**

35. The GET was furthermore informed that sometimes the data received by the FMS was not reliable, leading the GET to conclude that the knowledge of reporting entities about their obligations was insufficient. *The GET therefore observes that the Georgian authorities should improve guidance to reporting entities on their obligation to report suspicious transactions.*

[11] The investigation into corruption offences, with the exception of commercial bribery, money laundering and trading in influence falls within the investigative remit of the prosecution service; commercial bribery will be investigated by the Financial Police (Article 62, paragraph 2, CPC). The prosecution service also supervises the investigations of other investigative bodies, including those of the Financial Police

III. THEME II – PUBLIC ADMINISTRATION AND CORRUPTION

a. Description of the situation

Definitions and legal framework

36. There is no legal definition of the term "public administration". The term is however commonly identified with the executive power performed by the Government, ministries and other administrative offices at central and local level. The Public Service Law # 1022 (hereafter PSL) provides that "public service is service in public or local self-governing – public administration – bodies". Apart from the PSL, the functioning of administration is further regulated by the General Administrative Code, the Administrative Procedures Code and the Law on Conflicts of Interest and Corruption in Public Service. The GET was informed that a new law on public service was under consideration by government.

37. By virtue of Article 4 PSL, *public servants* are all paid employees in public or local self-governing bodies.[12] Public servants at the central level are considered to be *civil servants*[13]. The Law on Conflicts of Interest and Corruption in Public Service furthermore uses the term *official*, which refers to a specified category of elected and appointed persons, including the President, Members of Parliament, judges and prosecutors[14]. The definition of *official* in the Administrative Procedures Code (and the Criminal Code) encompasses the officials mentioned in Article 2 of the Law on Conflicts of Interest and Corruption in Public Service, as well as public servants, head or deputy heads of legal persons subject to public law and persons with administrative and representative authority in enterprises in which the State has a share of 50% or more. In this chapter the term *official* refers to the category of high-ranking elected and appointed persons as defined in Article 2 of the Law on Conflicts of Interest in Public Service, unless explicitly stated otherwise.

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[12] The PSL does not apply to persons employed by the police, financial police, tax administration, customs, intelligence service, military and diplomatic service, judges, prosecutors, members of the National Securities Commission and officials elected, appointed and approved on the basis of the Constitution or fundamental laws of the Autonomous Republics of Abkhazia and Adjaria, unless special legislation states otherwise.

[13] Civil servants are further sub-divided into state-political officials, servants, technical servants and part-time servants (Article 5 PSL).

[14] Pursuant to Article 2 of this law, officials are the following persons: the President, Members of Parliament, Ministers and their deputies, the head of the State Chancellery and his/her deputy, the chairman of the State Department, the head of the State Inspection and their deputies, heads of the State Bureau and Department and their replacements / persons in a comparable position, the head of the subdivision of the State Chancellery and his/her replacements / persons in a comparable position, heads and their deputies of the Departments and Bureau of the Ministry of Interior Affairs, Security and Defence, as well as their replacements / persons in a comparable position, heads and their deputies of the Customs and Tax Department and head of the city district tax and custom services, the head and his/her deputy of the state anti-monopoly service, the Military Commissar, the Military Commissars of the regions, cities (Tbilisi, Batumi, Rusatvi, Sokhumi, Poti, Kutaisi and Tskhinvali) and city districts, the chairman, his/her deputy and members of the Presidium of the Chamber of Control, the President and members of the Council of the National Bank, members of the Advisory Board, members of the National Energy Regulatory Commission, chairmen of the administrations of railway transport, marine transport and civil aviation; the chairman, his/her deputy and secretary of the Central Elections, state representatives of the President and their deputies, the head of the local representative agency of the regions, cities (Tbilisi, Batumi, Rustavi, Sokhumi, Poti, Kutaisi and Tskhinvali) and city districts, the heads of local executive agencies of the aforementioned cities and regions and the heads and their first deputies of local executive agencies of city districts, judges, the Prosecutor-General and his/her deputy, the head of the department of the Prosecutor-General, the Prosecutors of the regions, cities (Tbilisi, Batumi, Rustavi, Sokhumi, Poti, Kutaisi and Tskhinvali) and city districts, other bodies elected, appointed or approved by the Parliament. In addition, heads and deputies of the Supreme Representative Bodies of the Autonomous Republics of Abkhazia and Adjaria and head and deputies of the Supreme Executive Bodies of the Autonomous Republics of Abkhazia and Adjaria are also considered to be officials.

Anti-Corruption Policy

38. The National Anti-Corruption Strategy was adopted by Presidential Decree #550 of 25 June 2005. The pillars of this Strategy are the reform of the public service (by *inter alia* developing human resource policies, increasing transparency, enhancing control of public administration and reform of public procurement regulations), the creation of a competitive business environment (*inter alia* by simplifying the rules for licenses and permits) and institutional reform of the judiciary and law enforcement bodies. The Strategy also foresees further developments in anti-corruption legislation and highlights international co-operation and the role of the public in carrying out the strategy. The government is to report to the President on the implementation of the Strategy bi-annually, and is required to publish an annual public report on the progress achieved. Furthermore, by Presidential Decree #155 an Action Plan for the Implementation of the Anti-Corruption Strategy was formally adopted on 28 March 2006. The Action Plan sets deadlines and identifies the agencies responsible for the implementation of the measures contained therein. Most measures are foreseen to be implemented in 2006 and 2007 and some are scheduled to be carried out in 2008. The Action Plan will be updated every year. The State Minister on Reform Co-ordination is responsible for the co-ordination and monitoring of the implementation of the measures in the Action Plan. Representatives of the various agencies mentioned in the Action Plan take part in a so-called 'Co-ordination Group' - under chairmanship of the Ministry on Reform Co-ordination – in which they report on the progress made in carrying out their internal work programme for the implementation of the Action Plan.

Transparency

39. Access to information is a constitutional right: "everyone has the right to freely receive and impart information" (Article 24, paragraph 1, of the Constitution). This right may, according to Article 24, paragraph 4 of the Constitution only be restricted by law if necessary "in a democratic society in the interests of ensuring state security, territorial integrity or public safety, for preventing crime, for the protection of the rights and dignity of others, for prevention of the disclosure of information acknowledged as confidential or for ensuring the independence and impartiality of justice". Article 10 of the General Administrative Code of Georgia #2181 further stipulates that everyone may have "access to official documents kept by an administrative agency, and obtain a copy thereof, unless such documents contain state, professional, commercial or private secrets." Requests for information are pursuant to Article 37 of the General Administrative Code to be made in writing. There is no application fee for access to information, but the public institution may charge for copying expenses. The public institution concerned (including legal persons of private law in as far as they are funded by the state or local government budget, but only as regards activities within the scope of that funding) is to provide the public information immediately and, if the information is not readily available, not later than 10 days after receiving the request. If the request for information is denied, the public body is to inform the applicant immediately and shall also provide the applicant with information on filing a complaint within three days of rejecting the request for information. Article 47 of the General Administrative Code provides that a person may challenge the decision to deny access to public information[15] before a court and may claim material or non-material damages. The burden of proof rests with the public body or public servant, to show that the requirements of the General Administrative Code on access to information have not been violated.

[15] As well as "the creation and processing of incorrect public information; the illegal collection, processing, storage and dissemination of personal data, or the illegal provision of personal data to another person or public body; and the violation of other requirements [on public information] by a public agency or public servant" (Article 47, paragraph 1, General Administrative Code).

40. There is no obligation in Georgia to use public consultation. The Georgian authorities have however reported that in practice consultation on draft laws and amendments to laws which affect different groups of citizens often takes place with various interested non-governmental and other public organisations.

Control of Public Administration[16]

41. Pursuant to the General Administrative Code, an administrative act[17], or *de facto* activity of an administrative body, may be challenged by the party concerned through an administrative complaint to a higher public servant or higher authority, or before an administrative court. The filing of the administrative complaint suspends the application of the administrative act against which a complaint was filed (unless otherwise provided by the law). No fees may be charged for filing the complaint and the administrative complaint is to be reviewed in oral proceedings within one month of the complaint having been filed.

42. Control of public administration is also exercised by the Public Defender (Ombudsman), in conformity with the Law on the Public Defender of Georgia of 16 May 1996. The Ombudsman is elected by the Parliament and reports to it bi-annually. The Ombudsman's office can lodge investigations *ex officio* or on the basis of complaints by individuals and non-governmental organisations regarding violations of human rights and freedoms enshrined in the Constitution, the laws and international treaties of Georgia, by public authorities (at the national and local level), public or private organisations, institutions, enterprises, public servants and officials as well as legal persons. Although corruption is not explicitly mentioned, corruption issues are considered to fall within the mandate of the Ombudsman's office. If the Ombudsman comes across any indication of the commission of a corruption offence, he is authorised to forward all materials to the competent authorities with a recommendation to institute criminal proceedings. The Ombudsman has also been involved in the drawing up of the Anti-Corruption Strategy and Action Plan. On the basis of his investigations, the Ombudsman can *inter alia* propose improvements to legislation, issue non-binding recommendations to rectify situations in which human rights and freedoms have found to be violated, propose to initiate disciplinary or administrative measures, address recommendations to relevant judicial bodies to examine the legality of court decisions, inform the media, or appeal to the President and/or Parliament.

43. Further financial and economic control of public administration is carried out by the Chamber of Control, which supervises the legality, purpose and effectiveness of the use of state property and financial resources, including the use of state funds by local government bodies. According to Article 7, the Chamber of Control has the right to inspect any activities of natural and legal persons in as far as they concern the receipt, transfer or use of funds allocated to the state budget or special funds of the State, or if they are connected with the use or management of state property. If the Chamber of Control in carrying out its operational controls, all-round audits, inspections or examinations comes across any violations of the requirements within its sphere of competence, it can issue binding instructions to rectify the situation (Article 51). Pursuant to Article 48 of the Law on the Chamber of Control, the Chamber of Control is to immediately inform the appropriate law enforcement authorities if it comes across any indication that an offence has

[16] GRECO already stressed the importance of internal and external monitoring in its First Evaluation Round Report (Greco Eval I Rep (2001) 5E), which resulted in the adoption of a number of recommendations (vii, xi, and xii). See also GRECO's First Round Compliance Report (Greco RC-I (2003) 12E) and the aforementioned Final Overall Assessment of Information provided by the Delegation of Georgia pursuant to Rule 32, para 2, al. (i) of GRECO's Rules of Procedure (Greco EVAL I (2005) 4E Final) of 23 June 2006.

[17] With the exception of a normative act, which can be challenged before an administrative court (but not through an administrative complaint).

been committed. The GET was informed that in 2005 the Chamber of Control sent 378 reports of irregularities to the Prosecutor General's office. The Chamber of Control is independent and reports to Parliament, bi-annually (a preliminary and final report) on government expenditure and annually on its own activities. In its final report on government expenditures, the Chamber of Control comments on the state budget report, as submitted by the government to the Parliament not more than 30 days earlier, and also reflects on the performance of local budgets.

44. As regards internal control of the activities of the various state bodies, there are internal control mechanisms, inspection and audit units in all ministries and some other state bodies and local governments. The rules regulating the establishment and activities of these units are set by different legal acts. However, the Georgian authorities have supplied the GET with a draft of the Law on General Inspections, which intends to regulate and harmonise the activities of the different internal control units, to be called Offices of the Inspector General, and to envisage the establishment of such Offices of the Inspector General where no internal inspection mechanism exists. The functions with which these offices are, according to the draft seen by the GET, to be entrusted are *inter alia* control of official misconduct and other wrongful acts, inspection into such conduct, supervision of the management of financial resources of the state body concerned and protection of the rights of employees. An Office of the Inspector General may carry out inspections on the basis of complaints of citizens, judicial decrees, information from other governmental entities, the mass media or uncovered in the course of activities of the Office of the Inspector General. The tasks and scope of activities of each Office are to be further defined in the regulations of the institution in conformity with the requirements of the Law on General Inspections.

Recruitment[18]

45. According to Article 29 PSL, "a person can be appointed to a position [in public service] on the basis of competition results". If an open competition is organised special 'competition-attestation commissions' are to be set up (Article 33 PSL). The head of such a commission is appointed by the head of the Public Service Bureau, a special unit set up within the State Chancellery for the development of policies on public service. By virtue of Article 30 PSL, public servants appointed or elected by the President or Parliament, deputy ministers, ministers' assistants and advisors, temporary personnel and so-called 'acting public servants' (i.e. employees on vacant positions, which are to be filled through a competition) can be appointed without a competition.

46. As regards the requirements for a position in the public service, Article 17 PSL stipulates (in addition to certain requirements regarding health, legal capacity and citizenship), that persons applying for a position in the public service cannot have a previous conviction for an intentional crime (except for cases where this conviction has been struck off his/her criminal record), be under preliminary investigation or be imprisoned, be disqualified by a court from holding a certain position or – once taking up office – be in a position to directly supervise or be supervised by a parent, spouse, sibling, child, sibling-in-law or parent-in-law. In order to ensure that these requirements are met each person applying for a position is to provide an excerpt of his/her criminal record, issued by the Ministry of Internal Affairs. As regards a disqualification sanction, the GET was told that the Probation Service would make a note of this sanction in the employment record of the employee to ensure that the person would not be employed in a

[18] The need to establish selection criteria and vetting checks was also emphasised by GRECO in its First Evaluation Round Report (Greco Eval I Rep (2001) 5E) and resulted in the adoption of a recommendation (viii). Cf. as well GRECO's First Round Compliance Report (Greco RC-I (2003) 12E) and the subsequent Final Overall Assessment (Greco Eval I (2005) 4E Final).

position from which s/he had been disqualified (Article 14 of the Law on Enforcement of Non-Custodial Sentences and Probation).[19]

47. In addition, upon acceptance in the public service (and on a yearly basis thereafter), a *public servant* is required to submit to the tax authorities a declaration of his/her income and assets and of those of his/her family members (see further below on declaration of income/assets).

Training

48. The GET was not made aware of any ethics, anti-corruption or integrity training being provided to public servants, other than training on ethical behaviour that was included as part of the general curriculum for prosecutors and employees of the Ministry of Internal Affairs (Police).

Conflicts of interest[20]

49. Articles 60 and 63 PSL provide for certain safeguards to prevent conflicts of interest by prescribing that a *public servant* cannot be a manager, director or member of an entity that controls, supervises or audits a legal person, or otherwise engage in business activities (other than owning stocks or shares). Further safeguards against conflicts of interest are prescribed by the Law on Conflicts of Interest and Corruption in Public Service #982, which applies to *officials* (the aforementioned category of high-ranking elected and appointed persons), including prohibitions on the carrying out of work for an entity over which the official or his/her office exercises control, on owning stocks and shares in such entities, on holding a post in commercial legal persons and on the appointment of relatives of the official in positions where they are to be supervised by the official (unless the relative was appointed on the basis of a competition).[21] Officials, and in relevant cases their family members, are to give up activities that are defined in the law as being incompatible with their office within 10 days from taking up their official position and to provide the state body concerned with evidence that these activities have been terminated.

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[19] The GET was also informed that the court would periodically check the performance of the convict, as per paragraph 2, of this same article, and the Probation Service would be allowed to reprimand, warn or petition for criminal prosecution if the disqualified person would be found in violation of his/her disqualification sentence.

[20] Cf. in this connection GRECO's First Round Evaluation Report (Greco Eval I Rep (2001) 5E) (recommendation vi), the First Round Compliance Report (Greco RC-I (2003) 12E) and subsequent Final Overall Assessment (Greco Eval I (2005) 4E Final).

[21] Article 13 of this law, defines the following incompatibilities:

- officials do not have the right to perform any kind of paid work, other than scientific, pedagogical or creative activities, to hold a post in any other public institution, or to hold a post in an state body in a foreign country;
- officials (or members of his/her family) do not have the right to hold a post or perform any work for an entity registered in Georgia, when control over the activities of this entity is performed by the official or his/her office;
- officials do not have the right to hold any post in an enterprise;
- officials (or members of his/her family) do not have the right to own stocks or shares in the charter capital of an entity, when control over the activities of this entity is performed by the official or his/her office;
- officials do not have the right to act as a legal representative of a natural or legal person, or to represent or defend such persons in criminal, civil or administrative proceedings before or against a public institution, except for situations in which the official is the legal guardian of the natural person;
- close relatives of officials cannot be appointed as public servants in position where are they to be supervised by the official in question, except for cases in which the relative is appointed on the basis of a competition.

In addition, pursuant to Article 10 of this law, an official does not have the right to make a property deal with the agency where s/he holds a position, or with their own relatives or their representatives in their position as public servant. Any deal made in violation of this rule is void. Furthermore, pursuant to Article 11 an official whose obligation it is "within the board agency to make a decision regarding property or private interests, is obliged to inform other members of the board or his direct supervisor" or in case it falls within his/her sole responsibility to make such a decision has to refuse to participate in the decision-making and inform his/her supervisor in writing, who has to make an appropriate decision or entrust another official of this decision. This last requirement does not apply to the President, Members of Parliament, heads and deputies of the supreme representative executive agencies of the Autonomous Republics of Adjaria and Abkhazia.

Failure to comply with these incompatibility rules may lead to termination of the employment relationship on the basis of Article 13 of the Law on Conflicts of Interest and Corruption in Public Service.

50. As already mentioned above, upon entering the public service and on an annual basis thereafter, *public servants* are required to submit a declaration to the tax authorities on their financial situation and income (as well as that of his/her family members), pursuant to Article 18 PSL. This declaration is to contain information regarding property (whether shared or not), including securities, bank deposits, enterprise dividends and moveable and immoveable property. Furthermore, Article 14 of the Law on Conflicts of Interest and Corruption in Public Service provides that an *official* cannot be appointed to his/her post before s/he has submitted a so-called property declaration[22] to the Informational Bureau of Property and Financial Status of Public Officials, which is situated within the Ministry of Justice. After appointment to his/her post an official is required to submit a financial declaration[23] annually, until a year after his/her retirement. Violation of the requirement gives rise to criminal and administrative liability - in as far as this also violates provisions in other (criminal and administrative) legislation - or disciplinary liability. The Law on Conflicts of Interest and Corruption does not provide the Bureau with the power to investigate these declarations, but Article 19 of the law provides that anyone, including law enforcement authorities, may request and receive a copy of the property or financial declaration of an official. Information contained in the financial declaration of an official or a public servant may be used as evidence in criminal proceedings or proceedings to confiscate the unexplained wealth of officials and public servants (see Theme I above).

51. There is no system of regular, periodic rotation of staff. Nevertheless, some sectors of public administration, such as customs, apply a rotation system in practice.

52. Article 65 PSL regulates situations of *civil servants* moving to the private sector by providing that a civil servant who leaves the civil service "has no right to work in the organisation or enterprise, from the day that s/he was released from the job until three years thereafter, if this organisation or enterprise had been in a contractual relationship under his/her supervision at any time in the three years before his/her release in public service." In this period, the (former) civil servant does not have any right to receive an income from such an enterprise or organisation. Currently, there are no measures in place to enforce this provision.

Gifts

53. The main rule on receiving gifts is to be found in Article 12 of the Law on Conflicts of Interest and Corruption in Public Service, which provides that *officials* and their family members have the right to receive gifts if the total value of the gifts received in one year does not exceed five times the level of subsistence[24]. In addition this law provides that officials and their family members are

[22] Pursuant to Article 15 of the Law on Conflicts of Interest in Public Service this property declaration is to contain information on the value of moveable and immoveable property and securities owned by, accounts in the name of and cash sums at the disposal the official and his/her family members, as well as involvement in business and paid activities of the official and his/her family members and agreements concluded by him/her or a member of his/her family in which the contractual amount exceeds 15 times the subsistence minimum.

[23] Pursuant to Article 16 of the same law, a financial declaration is to contain information on the official's (and his/her family members') moveable and immoveable property that have been bought or received as a gift, if the value of this exceeds 15 times the subsistence minimum, securities that have been bought or received as a gift, deposits made and/or accounts opened, involvement in business activities, paid activities, any gifts received, agreements concluded in amounts exceeding 15 times the subsistence minimum, and other income or expenditures exceeding 15 times the subsistence minimum.

[24] The level of subsistence is 100 GEL (approximately €45). Five times the level of subsistence is consequently approximately €225.

prohibited from receiving gifts from (representatives of) state bodies (both domestic and foreign), local governmental bodies, international organisations, if the value of the gift exceeds half the amount of the subsistence level. An official (or family member of such an official) who has received such a gift with a value exceeding the aforementioned amount is to hand over this gift to the State Treasury 72 hours after receiving it or from the moment s/he has become aware of its value. Information on the handing over of this gift is to be entered into a public register. Furthermore, if an official or a member of his/her family receives gifts from a close relative, the total value of which within a year is ten-fold the subsistence level, the official concerned is to inform the Informational Bureau of Property and Financial Status of Public Officials on these gifts, their value and the person who gave them. The authorities of Georgia have reported that acceptance of a gift in violation of these provisions can give rise to criminal liability, pursuant to Article 340 of the Criminal Code (accepting illegal presents)[25] and disciplinary liability. It should be noted that the provision in the Criminal Code on accepting illegal gifts is not just applicable to officials, but also to public servants. However, in absence of any further regulations on gifts for this latter category of employees in the public sector it is unclear what would constitute the illegality of such a gift as regards public servants.

Codes of conduct/ethics

54. There is no general code of conduct or code of ethics for employees in the public sector.[26] However, some bodies, such as the prosecution service, have adopted their own code of ethics.[27]

Reporting corruption

55. There is no general duty to report suspicions of corruption. Article 376 of the Criminal Code provides that non-reporting of knowledge of the preparation of an especially grave crime (an intentional crime punishable with imprisonment of a term of 10 years or more) can be punished with 2 to 4 years' imprisonment, but the significance of this provision as regards the reporting of corruption is limited (i.e. only certain, very specific cases of bribery under aggravated circumstances would qualify as especially grave crimes). Legislation and internal regulations of some specific sections of the public sector, such as the prosecution service and the Chamber of Control, do however contain obligations and guidelines for the reporting of misconduct and criminal offences.[28] Article 7, paragraph 1k, of the draft Law on General Inspections furthermore gives the Office of the Inspector General the obligation to inform law enforcement authorities of indications that a crime has been committed by an employee of the public body in question.

[25] Article 340 of the Criminal Code provides: "Accepting an illegal present by an official [i.e. those officials mentioned in Article 2 of the Law on Conflicts of Interest and Public Service, as well as public servants, heads and deputy heads of legal persons of public law, persons with administrative and representative authority in enterprises in which the state has a share of 50% or more], or a person equal thereto, is punishable with a fine or 100 to 300 hours of community service or deprivation of the right to occupy a certain position or engage in certain activities for a period up to three years". If this offence is committed repeatedly, it is punishable by a fine or 200 to 400 hours of community service or deprivation of the right to occupy a certain position or engage in certain activities for a period up to three years.

[26] GRECO already pointed to the importance of the adoption of a code of ethics in its First Evaluation Round Report (Greco Eval I Rep (2001) 5E), which resulted in the adoption of recommendation x. See in this regard also GRECO's First Round Compliance Report (Greco RC-I (2003) 12E) and subsequent Final Overall Assessment (Greco Eval I (2005) 4E Final).

[27] This code was adopted on 19 June 2006, by order #5 of the Prosecutor General. A code of ethics for the police is being elaborated in co-operation with the Prosecutor General's Office, Georgian NGOs and Council of Europe experts.

[28] For example, prosecutors are obliged, by virtue of Order No. 33 of the Prosecutor General of 21 March 2005, to report crimes and administrative offences committed by other employees to the General Inspectorate of the prosecution service; non-reporting can lead to the imposition of disciplinary measures. As mentioned in the paragraph on the Chamber of Control above, the Chamber of Control is obliged to inform law enforcement authorities by virtue of Article 48 of the Law on the Chamber of Control. This legal obligation is reiterated in the internal guidelines for employees of the Chamber of Control.

Article 9 of the same draft law furthermore contains an obligation for *officials* to inform the General Inspectorate of misconduct and other violations conducted by an employee under their supervision.

56. There are no legal measures in place to ensure confidentiality and to protect employees in public service, who report corruption, from retaliation. The Georgian authorities have however informed the GET that a draft law on whistleblowers (and their protection) is being prepared.

Disciplinary proceedings

57. All ministries have their own internal control units, which conduct investigations into alleged misconduct by public servants. "Culpable neglect, poor performance of official duties, causing property damage to the institution concerned, breaching moral norms or discrediting the institution concerned" can give rise to disciplinary liability (Article 78 PSL). "The person entitled to hire the public servant" can apply one of the following disciplinary measures: reprimand, warning, cut in salary for a period of up to 10 days, suspension from public service for a period of up to 10 days (and a corresponding cut in salary), demotion for a period of up to 1 year or dismissal from public service (Article 79 PSL). The application of a disciplinary measure is recorded in the employment record of a public servant. A decision on the application of a disciplinary measure can be challenged before an administrative court. Should an internal investigation into misconduct of a public servant reveal that an offence has been committed, the official conducting the investigation must transfer the investigation to the prosecution service.

b. Analysis

58. Combating corruption is a central theme in the activities of the current administration. The GET commends the Georgian authorities for the vigour with which the fight against corruption is carried out. Rigorous, but necessary, measures have been taken to combat institutionalised corruption in the most affected parts of the public sector. The GET was, for example, told that the entire traffic police had been dismissed and replaced by new recruits. Repressive measures such as these (i.e. dismissing and prosecuting corrupt officials and public servants), which also seek to counter the perception of impunity, combined with preventive measures such as increasing the pay of employees in the public sector to a decent level, are likely in the long term to be the key measures in transforming the public sector and restoring the public trust in governmental institutions. As the measures that have been taken so far are rather new, it is too early to assess what their impact over a longer period of time will be. The GET considers that the situation in Georgia certainly merits optimism but also needs to be closely monitored. In this regard, the GET notes that the Anti-Corruption Strategy and the Action Plan for its implementation contain further measures for the prevention of and fight against corruption, and also provide for a mechanism by which the implementation of these measures is to be assessed (i.e. internal work programmes in the various state bodies, regular meetings of the co-ordinating working group, bi-annual reports to the president and annual public reports). Some components of the Strategy and the Action Plan, such as the reform of the licensing system, have already been implemented and others are underway. Some measures are however delayed. *The GET observes that the Georgian authorities should closely monitor the implementation of the Anti-Corruption Strategy and Action Plan, to assess whether the measures are being implemented in practice as foreseen, within the given deadlines, and to appraise their effectiveness .*

59. Many of Georgia's improvements as regards the fight against corruption since the Rose revolution have been credited to the strong leadership in the country.[29] Considering this strong leadership, an efficient system of control is all the more important. Some of this control can be exercised by an Ombudsman's office. The GET was pleased to note that Georgia has a very active Ombudsman. Although the Ombudsman's office has limited powers (i.e. monitoring, obtaining information and issuing non-binding recommendations), it is doing much to enhance the transparency and accountability of Georgian public administration. Further checks upon the government are exercised by the Chamber of Control. The Chamber of Control is an independent body, which reports directly to Parliament on the legality, purpose and effectiveness of the use of state property. The control exercised by the Chamber of Control is *post facto* and the GET was told that criminal cases are regularly reported to the public prosecutor. Audits are also carried out by internal audit units within the different state bodies. However, there are no general audit standards (whether for performance or financial audits) and consequently each authority conducts audits following different standards. Audits of local government accounts, an area which is especially corruption-sensitive, appears to be particularly problematic in this regard. Furthermore, the audit of state enterprises, including enterprises in which the State has a controlling share of 50%, by the Chamber of Control seems to be contested, although according to the law, the Chamber of Control does appear to have the right to audit these enterprises. As the Chamber of Control can in many cases only verify existing audits, the multiplicity of standards prevents any effective, substantive control. **The GET recommends to (i) develop and implement a common methodology and standards for carrying out audits in respect of the public sector, bearing in mind the particularities of its various components; (ii) strengthen the auditing of local authorities, and (iii) ensure effective auditing of state enterprises.**

60. The existence of a comprehensive system of recruitment in the public sector is a strong anti-corruption tool. Recent recruitment drives in the prosecution service, the Ministry of Finance (Financial Police) and the Ministry of Internal Affairs (including the traffic police) are, in this respect, commendable[30]; however, recruitment in other sections of the executive and judiciary branches leaves much room for improvement. Currently, open competitions for recruitment purposes do not appear to be a very strict requirement under the Public Service Law, and hiring practices consequently vary widely between the different ministries. In addition, it seems that a number of categories of persons can be appointed on the basis of existing legislation without holding a competition or other type of objective and transparent recruiting method. The GET finds it understandable that certain persons are appointed without a competition (for example, ministers, their deputies and their special advisors). However, the categories of persons who can be appointed without a competition include assistants and temporary personnel. In addition, persons can be appointed as 'acting public servants' on vacant positions for indefinite periods of time. The GET has some concerns that the positions in the public service to which persons can be appointed without competitive recruitment procedures do not appear to be very well defined and the procedures by which appointments take place do not seem to be very transparent. Another problem encountered by the GET as regards employment in the public sector was the system of appraisal. There do not seem to be any clear standards for appraisal and promotion. In this regard, the GET was told that unfair favouritism was common in certain ministries – a statement which the government contests -, fuelling concerns about patronage and nepotism. The Public Service Bureau is however working towards a new Public Service Law, which reportedly will include provisions on unified procedures for recruitment and staff appraisal

[29] See for example, World Bank, "Anticorruption in Transition 3—Who is Succeeding … And Why?" (2006).

[30] Selection in the prosecution office is a two-stage process: a special written exam and an interview with a panel, which includes representatives from civil society and governmental bodies. Recruitment in the Ministry of Internal Affairs (Police) involves a series of written and physical tests, including a (recorded) interview by a panel. All recruits to the police undergo a six week training course before assuming their duties.

throughout the public sector. **The GET recommends to implement uniform rules for the transparent, impartial recruitment and promotion of public servants and to take measures to ensure their fair and impartial appraisal.**

61. Regarding the recruitment of judges, the GET noted that the judiciary is in the process of being restructured. Recruitment will be regulated in the future by a new legal career law currently under consideration. The new School of Magistrates, offering 14-months' training to trainee judges, will graduate its first class in September 2007. However, in the meantime the President of Georgia retains his discretionary power to appoint judges, at the proposal of the High Council of Justice. The High Council of Justice is a mixed body of 19 persons (the Minister of Justice, 10 judges, the head of the Legal Committee of the Parliament, 5 further persons appointed by Parliament – of whom 4 are Members of Parliament – and 2 further appointees by the President). Members of this High Council of Justice also exercise disciplinary powers through a panel of 6 of its members: 3 judges and 3 non-judge members. The GET is concerned about the influence of the political realm over the functioning of justice, especially considering that disciplinary proceedings can be used for violations of the law in hearing a case. Although in other jurisdictions the top of the judicial power is often also appointed by the executive branch, the GET considers that the present composition and functioning of the High Council of Justice allows for a more direct engagement with the every-day administration of justice. The GET was informed that amendments to legislation, including to the Constitution, aimed at enhancing the independence of the judiciary, *inter alia* by changing the status of the High Council of Justice and the functioning of its disciplinary panel, were being prepared; this is thought to also have an impact on the current procedures for recruitment and the imposition of disciplinary measures. The GET welcomes these developments. **The GET recommends to implement measures to limit the influence of political personnel over the recruitment of and disciplinary proceedings against judges, in the interest of formal and substantive judicial independence.**

62. Transparency of public administration is an important factor in the prevention of corruption and contributes to public confidence in public administration. The GET was informed that all citizens could require information through specially designated persons in state bodies. Problems nevertheless existed in that some institutions funded by the state budget systematically did not give out information or would not do so immediately, as required by the law[31]. **The GET recommends to assess the implementation in practice of the provisions of the General Administrative Code on access to information to ensure that the public's right to access information is not unduly limited, and to provide training to those public servants designated to respond to requests for information.**

63. As regards rules on conflicts of interest, the Public Service Law contains a provision on engagement in entrepreneurial activities for public servants and on post-public service employment with an entity which used to be in a contractual relationship supervised by the civil servant. The extent to which these provisions can be and are enforced is unclear. A new Public Service Law is currently being developed, which may address issues relating to conflicts of interest in greater detail.[32] The Law on Conflicts of Interest and Corruption in Public Service contains a longer list of incompatibilities than the Public Service Law, but this law is applicable to

[31] The administrative entity, the public institution concerned (including legal persons of private law in as far as they are funded by the state or local government budget, but only as regards activities within the scope of that funding) is to provide the public information immediately and, if the information is not readily available, not later than 10 days after receiving the request. The GET was told that information was not always given out immediately.

[32] In this connection, the GET heard of plans to include in the new Public Service Law a prohibition on double employment; however, it also learned that the recently adopted Labour Code allows for labour contracts in the private sector to be concluded orally, thereby providing a loophole for uncontrolled secondary employment.

officials (i.e. high-ranking elected and appointed persons) only. The GET was informed that a human resources management information system linked to the payroll is currently being developed with the assistance of the World Bank. This system is expected to become a powerful tool for identifying conflicts of interest. All public servants are furthermore required to submit a declaration of their income and assets to the tax authorities upon taking up employment in the public service; officials are required to submit a declaration of assets and certain interests upon taking up office and annually thereafter to the Informational Bureau of Property and Financial Status of Public Officials. The GET was informed that at least the information contained in the declarations of officials was publicly accessible and regularly published in the media and that information contained in the declarations of public servants was accessible to law enforcement officials. Both types of financial declarations (i.e. of public servants and officials) could be used as evidence in criminal proceedings and/or in proceedings to confiscate unexplained wealth (see Theme I above). Finally, there are quite detailed provisions on the acceptance of gifts by officials. However, regarding public servants the situation is less regulated. The GET was made aware of a provision in the Criminal Code (Article 340) on accepting illegal presents, which also applies to public servants, but the GET was not informed what would actually constitute the illegality of such presents. **The GET recommends to establish clear rules for all employees in the public sector on receiving gifts and actual and potential conflicts of interest, and to provide for an appropriate mechanism for the enforcement of these rules.**

64. No general code of conduct is currently available for the public service. The government is planning to introduce such a code in the near future. Meanwhile, several segments of the public sector (the Ministry of Internal Affairs, prosecutors and judges) have developed or are in the process of developing their own code of conduct (in co-operation with the Public Service Bureau). The GET is of the opinion that a uniform code of conduct (or codes of conduct tailored to the specific needs of certain branches of public administration) would be especially valuable in the Georgian context, considering the comments the GET heard about public servants' fear to do something wrong or something that would be perceived as misconduct, which led to situations in which all decisions were deferred to a higher authority. A code of conduct would be useful in that it would explain in simple terms what the rights and obligations of employees in the public sector (as contained in various pieces of legislation) are and what sort of conduct is expected of them. It would thus complement existing legislation (on, for example, conflicts of interest as referred to above) and would further raise awareness among employees in the public sector. **The GET therefore recommends to take measures to have code(s) of conduct adopted for all employees in the public sector, both at local and state level, in order to clarify and complement the rules on *inter alia* conflicts of interests, gifts and reporting of corruption.**

65. As regards training, the GET was informed that several training centres exist, at the Ministry of Justice, Finance and Internal Affairs and that ethics training formed part of the general training curriculum for employees at the Ministry of Internal Affairs. The GET was not made aware of any entry-level training on the required ethical conduct in other parts of the public sector, nor of any follow-up training at later stages in the career of employees in the public sector. The GET finds it advisable that certain categories of public servants (i.e. those working in sectors most vulnerable to corruption) receive regular mandatory anti-corruption, ethics and integrity training throughout their career in the public service. *The GET therefore observes that the Georgian authorities should provide mandatory anti-corruption, ethics and integrity training tailored to the various categories of employees in the public sector.*

66. Under the Criminal Code (Article 376) there is an obligation to report knowledge of the preparation of especially grave crimes to law enforcement authorities. The significance of this obligation is rather limited as regards corruption and the GET found awareness of this obligation

at best unequal. **The GET recommends to introduce clear rules requiring all employees in the public sector to report suspicions of corruption in public administration and to ensure that those who report such suspicions in good faith are adequately protected from adverse consequences.**

67. Finally, as indicated above, the GET is of the opinion that in a number of areas of the public administration significant progress as regards the fight against corruption has been made. The efforts to combat corruption in some other areas could be further enhanced. In this regard the GET found that customs was still very vulnerable to corruption. The GET heard, for example, that there are problems with the registration of customs transactions. The system in place at the moment allows for too much discretion. There is no mandatory registration of customs transactions at time of entry into the customs area and information was at times only registered after intense negotiations as to the value to be recorded. The GET learned however that a new Customs Code has been adopted, which is expected to simplify and strengthen the system, further reducing possibilities for corruption. *The GET observes that the Georgian authorities should implement measures which seek to remove opportunities for corruption in customs.*

IV. THEME III – LEGAL PERSONS AND CORRUPTION

a. Description of the situation

Definition of legal persons and establishment

68. Article 24 of the Civil Code provides for the following definition of a legal person: "A legal person is an organised entity, founded for achieving a definite objective, which has its own property and is independently liable for its obligations with that property, may in its own name acquire rights and obligations, and appear as a plaintiff or a defendant in court. A legal person may be corporately organised, based on membership, dependent or independent upon the status of its members, and engage or not engage in entrepreneurial activities."

69. Georgian law makes a distinction between legal persons of public law and legal persons of private law (Article 24 of the Civil Code). The former are established on the basis of a law, a presidential decree or another governmental act to perform certain services and can only carry out activities as prescribed by law or as provided for in their founding documents (Article 25 of the Civil Code and Article 5 of the Law on a Legal Person of Public Law). A legal person of private law, on the other hand, can engage in any kind of activity not prohibited by law, regardless of whether its charter mentions this or not (Article 25 of the Civil Code).

70. Legal persons of private law can be divided in commercial legal persons and non-commercial legal persons (Article 29 and 30 of the Civil Code). Commercial legal persons can be subdivided into five subcategories: joint liability companies[33], limited partnerships[34], limited liability companies[35], joint stock companies[36] and co-operatives[37] (Article 2 of the Law on

[33] Joint liability partnerships can be founded by more than one natural person to conduct entrepreneurial activity jointly, regularly, independently and under a single company name. The partners are jointly liable for the obligations of the partnership with all their property (Article 20 of the Law on Entrepreneurs).

[34] Limited partnerships can be founded by more than one natural person to conduct entrepreneurial activities jointly, regularly, independently and under single company name. General partners (*Complementar)* are liable for the obligations of the partnership with all their property; the limited partners (*Commandit*) are liable only to the extent of their participation in the partnership (Article 34 of the Law on Entrepreneurs).

[35] Limited liability companies can be founded by one or more legal or natural person(s). A limited liability company is a stock company. The founders / shareholders are not liable for the obligations of the company; the company's third-party liability is

Entrepreneurs). In addition, the Law on Entrepreneurs mentions individual enterprises as a possible legal form. Individual enterprises however fulfil their rights and obligations in business relations as natural persons. Non-commercial legal persons of private law can be established in the form of a union[38] or a foundation[39] (Article 30 of the Civil Code). Both unions and foundations may engage in commercial activities, but only to the extent that these activities are of an auxiliary nature and serve the common aim. Distribution of profit received through commercial activities among members of a union or contributors to a foundation is prohibited.

Registration and transparency

71. Registration is mandatory for all commercial legal persons[40] and individual enterprises. Only when a commercial legal person is officially registered does it exist properly and have the capacity to acquire rights and obligations (Article 2 of the Law on Entrepreneurs). After incorporation a commercial legal person can make an application for registration to the local tax administration in the district where the enterprise is to be located. The application for registration is to include information on the name of the company, its legal status, its address, the start and end of its economic year, the authority of its representative and the full name, date of birth, place of birth and address of each partner (or if one of the founding partners is a legal person, the corporate name of this legal person and registration details). Persons representing the commercial legal person are furthermore required to submit a sample of their signature. Additional information to be submitted is dependent upon the type of company involved.[41] The application and all appended documents, including information on the identity of all the persons involved (founders of the legal person, partners, persons providing the capital etc.), are required to be certified by a public notary (Article 5 of the Law on Entrepreneurs). The notary checks if the application and information provided is correct and in conformity with the legal requirements.

72. The information submitted to the local tax authority is entered in the Entrepreneurial Register. The tax authority is obliged to register a commercial legal person within the prescribed time span of three working days[42]. If the tax authority does not register a commercial legal person within three working days and fails to notify the applicant of non-registration or any obstacle to

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limited to its own property. The share is not a freely transferable security and therefore the limited liability company is not admitted to the stock exchange. The minimum charter capital is 200 Georgian Lari (Article 44 of the Law on Entrepreneurs)

[36] Joint stock companies can be founded by more than one legal or natural person(s). The charter capital of a joint stock company is divided in shares of equal nominal value. Its liability is limited to its own property. Shareholders are not liable for the obligations of the company. A company, with the exception of a co-operative, with more than 50 partners or members can only be established in the form of a joint stock company. The minimum charter capital of a joint stock company is 15,000 Georgian Lari (Article 51 of the Law on Entrepreneurs).

[37] Co-operatives can be founded by more than one natural or legal person on a membership basis to either conduct entrepreneurial activities together or to enhance the revenue of each member through joint activities. The primary goal of a co-operative is to serve the common interests of its members rather that to make profit itself. There is no minimum charter capital. The members are not liable for the co-operative's obligations (Article 60 of the Law on Entrepreneurs).

[38] Union (association) is a legal entity set up by at least five persons to achieve a common objective. Its existence is independent of any changes in membership (Article 30 of the Civil Code).

[39] A foundation is a legal entity without membership founded by one or more persons, who have transferred certain property to the ownership of an independent entity to serve a useful, common and public purpose (Article 30 of the Civil Code).

[40] The registration of non-commercial legal persons of private law (unions and foundations) is also mandatory. It is also conducted by the respective local tax authority. As with commercial legal persons, the registration period is 3 days.(Article 31 of the Civil Code).

[41] For example, for a limited partnership information on the share of each partner is to be submitted and the actually contributed amount is to be submitted. Limited liability companies, joint stock companies and co-operatives are to submit information on the amount of the charter capital and the actually contributed amount, as well as the full name, date and place of birth and residence of each director and, if applicable, each member of its board (Article 5 of the Law on Entrepreneurs).

[42] An individual enterprise is to be registered within 1 working day (Article 5.1 of the Law on Entrepreneurs)

registration, the legal person is considered to be registered. In this case the tax authority is required to provide the legal person with a registration certificate and a tax payer's certificate immediately upon request by the applicant (Article 5.2 of the Law on Entrepreneurs).

73. To ensure transparency all the information held in the Entrepreneurial Register is public: anyone may access this information and obtain extracts from the Register. In addition, the tax authorities are required to publish the information entered in the Entrepreneurial Register on a monthly basis. The central Entrepreneurial Register is maintained by the Tax Department of the Ministry of Finance (Article 4 of the Law on Entrepreneurs).

74. Other measures to ensure transparency include notifications of the ownership of shares in other enterprises located on Georgian territory (which information shall also be published by the Entrepreneurial Register), a prohibition on bilateral participation of more than 5% in the charter capital of a company, and registration of branches (Article 16 and 17 of the Law on Entrepreneurs). There are no restrictions on the number of bank accounts a commercial legal person may hold.

75. To avoid conflicts of interest the Law on Entrepreneurs prescribes certain restrictions for managers with regard to participating in activities of other companies as a partner or director and with regard to conducting entrepreneurial activities similar to the activities the company itself is involved in (Article 9 of the Law on Entrepreneurs). Violation of this rule may entail the compensation of damage caused and having the manager in question relinquish his/her claims for remuneration.

Limitation on exercising functions in legal persons

76. Article 43 of the Criminal Code provides for the possibility to impose as a sanction deprivation of the right to hold a certain post in the public service or to engage in certain professional or other type of activities. If the sanction is used as a main penalty it can be imposed for a term of 1 to 5 years or if it is an accessory penalty for a term of 6 months to 3 years. It may be applied as an accessory penalty, even if the relevant article defining the offence does not list this as a possible sanction, if given the nature of the offence and the offender, the court finds it unacceptable that the offender continues to enjoy the right to occupy a certain post or pursue a certain type of activity. The GET was however informed that a sanction of this type had hardly ever been imposed on persons engaged in entrepreneurial activities. As regards its enforcement, the Georgian authorities reported that, by virtue of Article 14 of the law on Enforcement of Non-Custodial Sentences and Probation the sanction would be entered into the employment record of the person against whom a sanction of this type had been imposed and the court would periodically check upon the convicted offender.[43] This article however seemed to be more pertinent with regard to deprivation of the right to occupy a public position, than with regard to disqualification of exercising a function in a legal person.

Liability of legal persons and sanctions

77. At the time of the visit, legal persons were not subject to any form of liability for criminal offences. However, during the visit the GET was presented with a draft law amending the Criminal Code, which would provide for criminal liability of legal persons. A slightly different version of this law

[43] If a person was found in violation of the disqualification sanction s/he could be reprimanded, warned or criminally prosecuted.

entered into force on 10 July 2006[44], a few days after the visit of the GET. The new Article 107.1 CC now provides for criminal liability of legal persons, both commercial and non-commercial[45], and their successors, for the offences of, *inter alia,* money laundering (Article 194 CC), commercial bribery (Article 221 CC), active bribery (Article 339 CC) and trading in influence (Article 339.1 CC). By virtue of Article 107.1 CC a legal person can be held criminally liable if one of the specified offences has been committed on behalf of the legal person, through the legal person and/or by a so-called "responsible individual" for the benefit of the legal person. A responsible individual is considered to be any person entrusted with the management, representation of or decision-making in the legal person or a person who is a member of the supervisory, control, consultative or auditing board of the legal person. The criminal liability of a legal person does not rule out the criminal liability of a natural person for the same offence. Furthermore, if the criminal liability of the so-called responsible individual cannot be established this does not automatically result in a dismissal of the proceedings against the legal person. The legal person bears criminal liability for offences committed on its behalf (or through it) regardless of whether the natural person who has committed the offence can be identified.

78. According to Article 107.3 CC, the sanctions which can be imposed on legal persons are liquidation, deprivation of a legal person's licence to do business for a term of 1 to 10 years, a fine of a minimum of fifty times the amount applicable to natural persons in Article 42 CC[46], and confiscation of property. Liquidation and deprivation of a business licence can only be imposed as main sanctions; by contrast, fines can be applied as main or additional sanctions and confiscation of property can only be applied as an additional sanction. By virtue of Article 107.6 CC a fine cannot be imposed on the same legal person twice in three years.

79. As the law only entered into force very recently, no legal person has yet been convicted of money laundering, commercial bribery, bribe-taking or other offences.

Tax deductibility and fiscal authorities

80. Although the Tax Code does not explicitly mention that bribes or other expenses related to corruption are not tax deductible, it provides an exhaustive list of deductible expenses which does not include bribes or other expenses related to corruption offences.

81. As regards reporting of corruption by fiscal authorities, Article 121, paragraph 5, of the Tax Code provides that "if signs of a crime are revealed in a tax document, subsequent materials should be delivered to the relevant law enforcement authorities, according to hierarchy."[47] The GET was told, during the visit, that tax inspectors would inform the Financial Police of their suspicions, who – if these suspicions were confirmed - would inform the prosecution. Apart from reporting to the Financial Police on suspicions of a crime encountered in tax documents, the tax authorities may only disclose information on tax payers to law enforcement agencies on the basis of a court order, issued in the context of a prosecution for a tax offence (Article 122, paragraph 2b, of the Tax Code).

[44] On the same date amendments to the Code of Criminal Procedure entered into force to allow for the application of criminal liability of legal persons.
[45] This includes state enterprises, as they also are legal persons of private law.
[46] The minimum fine applicable to natural persons in Article 42 CC is 2,000 GEL (approximately €900). Consequently, the minimum fine applicable to legal persons is 100,000 GEL (approximately €45,000).
[47] If this however relates to a tax crime and the "principal amount of tax liabilities and sanctions is covered in the period of 15 days after receiving the notification for the payment of taxes on the basis of the tax audit, criminal prosecution will not be initiated and the relevant information will not be sent for investigation" (Article 121, paragraph 5, of the Tax Code).

82. As indicated in Theme I above, investigations into corruption offences (and money laundering), with the exception of commercial bribery, fall within the investigative remit of the prosecution service (Article 62, paragraph 2, CPC, amended in March 2005), which also supervises the investigations of other investigative bodies, including those of the Financial Police. The GET heard that if in conducting an investigation into tax crimes the Financial Police would come across indications that a corruption offence had been committed, it would have to inform the prosecution within 24 hours. With the permission of the prosecution, it can continue its investigation into the corruption offence.

Accounting Rules

83. Pursuant to Articles 41 and 93 of the Tax Code all legal persons are required to keep accounting records for a period of at least 6 years. The GET was furthermore informed that "incorrect composition of documents" was also an offence under the Tax Code, but it was not provided with full information on this. In addition, the GET was told that some accounting offences would also be covered by Article 341 of the Criminal Code on fraud committed by an official[48], which provides that "Official fraud – i.e. making a false note or written statement in an official document, and/or issuing false documents, as well as falsification of an official or private document in an enterprise, organisation or administration committed by an official or person equal thereto with a private interest or motivation – is punishable with the deprivation of liberty from 2 to 4 years".

Role of accountants, auditors and legal professions

84. Joint stock companies and co-operatives are by virtue of Articles 58 and 67 of the Law on Entrepreneurs required to have their accounting records, annual report and proceedings[49] annually audited by an independent auditor. No similar requirements seem to exist for other commercial legal persons, most notably not for limited liability companies.

85. Auditors are required to perform their audits in accordance with international standards, pursuant to the Law on the Regulation of Accounting and Financial Reporting. A draft law on financial accounting and auditing, which will provide for the implementation of the amended International Financial Reporting Standards (IFRS), has been submitted to parliament. Simplified financial reporting standards apply to individual enterprises and non-commercial legal persons.

86. There are no specific measures aimed at involving accountants, auditors and other advising professions in detecting offences or reporting suspicions of offences. Moreover, accountants, auditors and other legal professionals are not obliged under the current anti-money laundering regime to report suspicious transactions at their own initiative, with the exception of notaries who have been designated to do so under Article 3 of the Law of Georgia on Facilitating the Prevention of Illegal Income Legalisation. The aforementioned professions, besides notaries, are only required to forward information, whether relating to money laundering or other offences, to law enforcement authorities on the basis of a court order. The Union of accountants and auditors has however developed a code of conduct, which obliges accountants and auditors to notify the management of a legal person if they detect an irregularity or are being forced to commit a

[48] Officials in this context are those mentioned in Article 2 of the Law on Conflicts of Interest and Corruption in Public Service (see footnote 14 above: the President, Member of Parliament, ministers etc.), as well as public servants, head or deputy heads of legal persons subject to public law and persons with administrative and representative authority in enterprises in which the State has a share of 50% or more.

[49] Proceedings reportedly refer to the legal obligations placed upon a company by the Tax Code, the Law on Procurement, the Anti-Money Laundering Law, the "Instruction on Cash Desk" and other laws, directives and instructions.

violation of the relevant rules. In case the management of a legal person forces the auditor or accountant to violate the relevant rules, s/he must notify the union.

b. Analysis

87. Georgia has developed a satisfactory legal framework for dealing with legal persons and their different types. It starts with the distinction between legal persons of public law and those of private law. The latter are subdivided into commercial and non-commercial (foundations and unions) ones. The necessary flexible adaptation to modern standards in commercial life led to the development of five categories of commercial legal persons. The statement made during the visit that a large number of new companies have been set up recently, thereby showing a fast growth of Georgian economy, is promising. The GET welcomes the recent reforms that have been introduced in the field of legal persons, such as the restructuring of the licensing system which reduced both the number of licenses required and the range of authorities involved with issuing them, thereby greatly reducing opportunities for corruption.

88. The GET noted that all forms of companies are compelled to register with the tax authorities. Before applying for registration, the information to be submitted to the tax authorities - including information on the identity of all persons involved in the company – is checked and certified by notaries as to their correctness and their conformity with legal requirements. The information submitted to the tax authorities is entered into the Entrepreneurial Register, which is accessible to the public, thereby furthering transparency, an important factor in preventing illegal and criminal activities. The GET learned that the Tax Department of the Ministry of Finance (which administers the central Entrepreneurial Register) does not have a unified (electronic) database on companies at its disposal, making the checking of data rather difficult, in particular as regards double entries in the register. However, the GET was informed that such a database was in the process of being set up.

89. As regards disqualification, Article 43 CC provides for the possibility to deprive a person of the right to engage in certain professional or other type of activities. The GET is of the opinion that this Article does not adequately specify under which conditions and to what extent this deprivation of rights or disqualification is possible.[50] The authorities of Georgia however assured the GET that this sanction could be applied as an additional sanction for all corruption offences (even though it was not mentioned as a possible sanction in the provisions on active bribery in Article 339 CC), and as a main (or additional) sanction for commercial bribery (Article 221 CC). The GET was informed that a sanction of this type had hardly ever (if ever) been imposed on persons engaged in entrepreneurial activities. In this regard, the GET also considers that, as the registration process does not appear to provide for the screening of the criminal records of the partners or other persons involved with a company, the enforcement of such a disqualification sanction seems to be problematic. Although the GET was informed that this sanction would be recorded in the employment record of a person on whom a disqualification sanction had been imposed, this seemed more pertinent with regard to deprivation of the right to hold public office than as regards a ban on the carrying out of entrepreneurial activities, especially as the employment record of a person is not likely to be checked upon registration of the company. The enforcement of this sanction could very well be even more problematic with respect to already existing companies. The tax authorities responsible for registration acknowledged this problem to

[50] The GET noted that an old version of the Criminal Procedure Code (1999/2002) included a chapter on "The Removal of Accused from Office/Work" (Chapter 23, Articles 183-189), which clarified in which situations and to what extent a provisional removal from work or office was possible. These provisions were thus more comprehensive than Article 43 CC. It should be emphasised however that this Article in the CPC only referred to *provisional* disqualifications and not to disqualification sanctions. It is not clear to the GET if this Article is still in force.

the GET, and expressed an interest to learn from the practice in other jurisdictions in this regard. Therefore, in light of the preceding paragraphs, **the GET recommends to take appropriate measures to promote the wider use of disqualification sanctions in respect of persons acting in a leading position in a legal person (for instance, by providing training on this issue to judges and prosecutors), and to establish a suitable mechanism for the enforcement of such disqualification sanctions.**

90. With regard to corporate liability, in addition to acknowledging civil law claims and administrative sanctions (in specific legislation) in cases of illegal activities committed by natural persons on behalf of legal persons, Georgian law now also provides for corporate criminal liability. The GET welcomes the recent amendments to the Criminal Code and Code of Criminal Procedure on corporate liability, but nevertheless noted a short-coming in these provisions. In cases where management failure in supervision and control contributes to crimes being committed by subordinate employees appear not to be fully covered by the new provisions on corporate liability in the CC. It is clear that a legal person can be held liable if management (i.e. the so-called "responsible individual") committed a crime for the benefit of a legal person, but this appears not to be the case if this crime was committed by a subordinate employee and made possible by lack of supervision or control of the "responsible individual". In addition, the GET also has some concerns about the provision on fines (Article 107.6 CC). First of all, it finds that a minimum fine of €45,000 may be disproportionately high in cases where the legal person (or the so-called responsible individual for the benefit of the legal person) commits a relatively minor offence. Furthermore, a similar concern can be expressed with regard to the provision not to impose a fine on the same legal person more than once within three years. In case of recidivism, the only sanctions available would be liquidation of the legal person or deprivation of the business license. Again, this may be disproportionately high in cases where the second offence is of a relatively minor nature. However, as yet, there is no practice as regards the new provisions on criminal liability of legal persons. It could therefore turn out that the provision on fines does not pose any problems in practice. On a slightly different topic, the GET was not made aware of any training planned for or already provided to judges and prosecutors on the application of the new provisions on corporate criminal liability. In light of this and of the intention of the authorities of Georgia to shortly ratify the Criminal Law Convention on Corruption, **the GET recommends (i) to amend the provisions on corporate liability in the Criminal Code to ensure that legal persons can be held liable in cases where lack of supervision or control by a natural person has made possible the commission of active bribery, money laundering or trading in influence and (ii) to provide appropriate training on criminal liability of legal persons to all officials concerned with a view to ensuring that full use of these provisions is made in cases of active bribery, trading in influence and money laundering.**

91. Although Georgian legislation does not expressly prohibit companies from deducting expenses associated with various forms of corruption, the GET was informed that bribes or other expenses related to corruption are in fact not deductible under the current provisions of the Tax Code, as only 'legal' expenses can be deducted. The GET has nevertheless some concerns about the ability of tax authorities to detect hidden bribes. The tax authorities indeed acknowledged the difficulties in detecting indications of bribes in tax declarations, especially if they are hidden as commissions or fees. Guidelines, such as those contained in the OECD Bribery Awareness Handbook for Tax Examiners, and further training would be useful in this respect. Consequently, **the GET recommends to develop guidelines and effective training to improve the ability of tax inspectors to detect corruption offences, in particular as regards bribes concealed as legitimate expenses.**

92. It appears – in the absence of other relevant information on accounting offences - that the requirements of Article 14 of the Criminal Law Convention on Corruption (ETS No. 173) are not fully met by relevant article in the Criminal Code (Article 341 of the Criminal Code, which deals with fraud committed by officials) and additional provisions in the Tax Code. In the light of Georgia's intention to ratify the Criminal Law Convention on Corruption, **the GET recommends to revise the existing legal provisions on accounting offences and sanctions to ensure that the creation or use of invoices or other accounting documents containing false or incomplete information or unlawfully omitting to make records of payments, in order to commit, conceal or disguise corruption and trading in influence, are liable to criminal or other sanctions.**

V. CONCLUSIONS

93. In recent years, Georgia has carried out a vast array of reforms in all three themes under evaluation by GRECO. With regard to the proceeds of corruption, new legal provisions on money laundering and seizure and confiscation of the instrumentalities and proceeds of crime have been adopted, complementing the existing provisions for the (administrative) confiscation of unexplained wealth of officials which have proven to be very effective in depriving officials of the benefits of their crimes. In the area of public administration, commendable efforts have been made to combat institutionalised corruption in the most affected parts of the public sector, for example by replacing the entire traffic police by new recruits. Key policy documents, such as the Anti-Corruption Strategy and the Action Plan for its implementation, have been adopted. As regards legal persons, welcome reforms have been made to restructure the licensing system and to introduce corporate liability. The measures that have been taken so far are rather new, making it difficult to assess their impact over a longer time period. Therefore, while the situation in Georgia certainly merits optimism, it also needs to be closely monitored.

94. In addition to measures which have been or are in the process of being carried out, further improvements are recommended. First, the success of existing efforts could be enhanced by ensuring the effective implementation of already existing or just recently adopted legislation. In this regard, the need to implement requirements for transparent and impartial recruitment of employees in the public sector is stressed. In addition, it is recommended to take practical measures - such as the provision of training and guidelines - for the different categories of officials and public servants required to apply new and existing legal provisions in the area of confiscation and seizure of proceeds of crime, access to information, as regards possibilities to detect corruption offences in tax inspections, on disqualification sanctions and corporate liability, in order to ensure that these provisions are fully and correctly implemented. Secondly, it is recommended to complement existing measures by amending shortcomings in the legislation and by adopting new rules in areas of concern. In this regard, the provisions on money laundering should be amended to ensure that money laundering cases where the predicate corruption offence results in proceeds of less than 5,000 Georgian Lari can also be prosecuted. Furthermore, the introduction of corporate liability is commendable, but amendments need to be made to the current provision to ensure that situations in which the commission of an offence is made possible by lack of supervision or control of a natural person are also covered. Amendments should also be made to the legal provisions on accounting offences to ensure that certain acts, such as the use of false invoices, to conceal a corruption offence, give rise to criminal or other liability. Finally, in addition to these amendments to existing legislation, new rules should be adopted in the area of public administration, to address situations in which public servants' private interests could conflict with their professional interests, on the receipt of gifts by public servants, on procedures for reporting suspicions of corruption and protection of so-called whistleblowers, and to provide for ethical guidance for public sector employees.

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

i. **to establish guidelines and thorough training for those officials (law enforcement officials and prosecutors) who are required to apply the new rules on confiscation and seizure, paying particular attention to financial investigations** (paragraph 32);

ii. **to abolish, or at least substantially lower, the threshold of 5,000 Georgian Lari, with regard to corruption as predicate offence to money laundering** (paragraph 33);

iii. **to improve possibilities for information gathering by the Financial Monitoring Service (FMS), *inter alia* by improving its access to relevant databases** (paragraph 34);

iv. **to (i) develop and implement a common methodology and standards for carrying out audits in respect of the public sector, bearing in mind the particularities of its various components; (ii) strengthen the auditing of local authorities, and (iii) ensure effective auditing of state enterprises** (paragraph 59);

v. **to implement uniform rules for the transparent, impartial recruitment and promotion of public servants and to take measures to ensure their fair and impartial appraisal** (paragraph 60);

vi. **to implement measures to limit the influence of political personnel over the recruitment of and disciplinary proceedings against judges, in the interest of formal and substantive judicial independence** (paragraph 61);

vii. **to assess the implementation in practice of the provisions of the General Administrative Code on access to information to ensure that the public's right to access information is not unduly limited, and to provide training to those public servants designated to respond to requests for information** (paragraph 62);

viii. **to establish clear rules for all employees in the public sector on receiving gifts and actual and potential conflicts of interest, and to provide for an appropriate mechanism for the enforcement of these rules** (paragraph 63);

ix. **to take measures to have code(s) of conduct adopted for all employees in the public sector, both at local and state level, in order to clarify and complement the rules on *inter alia* conflicts of interests, gifts and reporting of corruption** (paragraph 64);

x. **to introduce clear rules requiring all employees in the public sector to report suspicions of corruption in public administration and to ensure that those who report such suspicions in good faith are adequately protected from adverse consequences** (paragraph 66);

xi. **to take appropriate measures to promote the wider use of disqualification sanctions in respect of persons acting in a leading position in a legal person (for instance, by providing training on this issue to judges and prosecutors), and to establish a suitable mechanism for the enforcement of such disqualification sanctions** (paragraph 89);

xii. **(i) to amend the provisions on corporate liability in the Criminal Code to ensure that legal persons can be held liable in cases where lack of supervision or control by a natural person has made possible the commission of active bribery, money laundering or trading in influence and (ii) to provide appropriate training on criminal liability of legal persons to all officials concerned with a view to ensuring that full use of these provisions is made in cases of active bribery, trading in influence and money laundering** (paragraph 90);

xiii. **to develop guidelines and effective training to improve the ability of tax inspectors to detect corruption offences, in particular as regards bribes concealed as legitimate expenses** (paragraph 91);

xiv. **to revise the existing legal provisions on accounting offences and sanctions to ensure that the creation or use of invoices or other accounting documents containing false or incomplete information or unlawfully omitting to make records of payments, in order to commit, conceal or disguise corruption and trading in influence, are liable to criminal or other sanctions** (paragraph 92).

96. Moreover, GRECO invites the authorities of Georgia to take account of the *observations* (paragraphs 31, 35, 58, 65 and 67) made in the analytical part of this report.

97. Finally, in conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the authorities of Georgia to present a report on the implementation of the above-mentioned recommendations by 30 June 2008.