Economic Crime Division
Directorate of Co-operation
Directorate General of Human Rights and Legal Affairs
May 2009

"SUPPORT TO THE ANTI-CORRUPTION STRATEGY OF GEORGIA" (GEPAC)

TECHNICAL PAPER: EXPERT OPINION ON THE POLITICAL PARTY FINANCE PROVISIONS OF THE ORGANIC LAW OF GEORGIA ON POLITICAL UNIONS OF CITIZENS, AND ELECTION CAMPAIGN FINANCE PROVISIONS OF THE UNIFIED ELECTORAL CODE OF GEORGIA

COE PROJECT NO.2007/DGI/VC/779

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PC-TC(2009)22

Table of Contents

Executive Summary

This opinion provides comments on and recommendations on the political party financing provisions of the Organic Law of Georgia on Political Unions of Citizens (hereafter PPL) and the election campaign financing provisions of the Unified Electoral Code of Georgia (Electoral Code).

The expert feels it necessary to mention that the translation provided of the provisions of the Election Code was of a very low standard, and the meaning of certain provisions (46.2, 48.5, 48.6, 48.8, and 48.10) was insufficiently clear to provide a full commentary on their substance.

The main findings of this opinion are the following:

- The existence of two laws regulating political finance creates some confusion and is not optimal unless the two laws are designed to clearly complement one another.

- The PPL and Election Code fail to provide sufficiently clear and inclusive definitions of 'donation', 'contribution', and 'campaigning'. This creates major gaps in the regulation of party and election campaign finance – in particular a failure to regulate loans to parties.

- The two laws do not establish clear duties of parties to appoint an official responsible for all party finances.

- The provisions on the duties of parties to disclose their finances are too strict in requiring the disclosure of all donations, while being too vague in defining the degree of detail required in declarations of expenditure.

- The system of state subsidies for political parties and electoral subjects could be improved to encourage greater transparency and also to encourage the solicitation of small donations by parties and electoral subjects.

- The requirements for audit of party finances are unclear, while the authority of the Central Election Commission to conduct real oversight of party finances or deal with complaints concerning violations of political finance regulations is not clearly established.

- Sanctions for violations of election campaign finance disclosure requirements are not sufficiently defined.

1 GENERAL: TWO LAWS REGULATING PARTY FINANCE

The existence of two different laws regulating political party finance – one for finances in general and one for election campaigns – is not optimal, and in the Georgian case creates a number of unclear issues. For example, parties are subject to a dual reporting regime – one for sources of election campaign finance and one for annual income and spending, including election spending. Likewise, the Electoral Code requires the appointment of a manager and accountant responsible for electoral finances, while the PPL does not (see Section 3).

In the opinion of the expert it would be optimal to regulate all issues of political finance – that is, the financing of political parties and of election campaigns in one legal act. At a minimum, the two laws should be screened carefully to ensure that they complement each other rather than establishing overlapping or varying duties.

2 DEFINITIONS AND TERMINOLOGY: CONTRIBUTIONS, DONATIONS AND CAMPAIGNING

A key problem of the two laws under review is the lack of clear terminology for, and a lack of adequate definitions of key terms, in particular 'contribution', 'donation' and 'campaigning'. Precise definitions of these concepts are essential for the provisions of the laws regulating donations and campaigning to be applicable and enforceable - for the provision of Article 28 of the PPL stating that financial and material donations received in violation of the law must be handed over to the state treasury within one month.

A clear definition of campaigning in the Electoral Code is also important if the provisions on election campaign financing are to be applicable unambiguously: Article 46 of the Code states that the election fund of an election subject is the sum of monetary resources and also goods and services provided free of charge for election campaigning – a definition that can not be applied if the law does not define what is meant by 'campaigning'.

2.1 Contributions: donations and loans

The PPL fails to clearly define 'donation' or 'contribution'. Donations by natural persons and legal entities are listed as one of the permissible sources of 'party property' in Article 25, without closer specification of what is to be regarded as a donation. Article 26.1 then states from which entities parties are forbidden to accept 'physical and material contributions'. Article 27 establishes financial limits on the total 'financial and material donations' received by a party in one year, adding that the limits apply to "all kinds of donations, including the services provided for the party purposes and on party's behalf".

These provisions are confusing and insufficient to clarify what, for the purposes of the law, is to be understood as a donation or contribution to a party. In addition, Article 3 of the Election Code defines "electoral donations to the election campaign fund" as "money resources transferred to the account number of election campaign fund by individuals and legal entities, also all types of goods and services obtained free of

charge, except the free air time obtained in accordance with the rule established by this law."

From these provisions it appears that the intention of the law is to define as donations as i) financial contributions and also ii) contributions in kind (provision of goods or services). While financial contributions are relatively uncomplicated, the law fails to adequately address the issue of in-kind contributions, defining them (at least in the Electoral Code) as goods and services obtained free of charge. This does not seem to allow for situations where such goods and services are received not free-of-charge but under market price.

Second, neither the PPL nor Electoral Code regulates loans provided to political parties or electoral subjects. This is a key gap in the law and in theory allows entirely unregulated financing of political parties and electoral campaigns through loans.

Third, Article 25 of the PPL allows membership fees as a separate category of party income. If 'contribution' is not defined clearly, this appears to open a clear loophole, whereby donations can be disguised as membership fees, on which there appear to be no limits.

The following amendments to both laws are therefore strongly recommended.

- Terminology should be unified both within the PPL and between the PPL and Electoral Code. For example, the provisions of the law should apply to 'contributions', which should in turn be defined to include 'donations' and 'loans'.

- Donations should be defined clearly as 'financial or in-kind contributions' – including membership fees.

- In-kind contributions should be defined as the value of goods and services provided on other than commercial terms – so that for example if a party buys equipment from a company with a 50% discount, the value of the discount is counted as a donation. The General Election Commission should issue guidelines on the determination of 'market price' so that parties are able to observe the provision.

- It is particularly important that he provisions of the law that apply to donations also apply to loans – including limits on the size of contributions and disclosure duties.

2.2 Campaigning

In the opinion of the expert, the Electoral Code does not define 'campaigning' (or 'agitation' as it is described in some paragraphs) sufficiently clearly. Article 73.6 states that

"Election agitation may be carried out through the mass media, through holding of mass events (assemblies and meetings with citizens, public debates and discussions, rallies and manifestations), publication and dissemination of printed agitation materials, use of public address systems, or in other ways, in accordance with the rules established by Georgian legislation."

This paragraph states only through what means campaigning may be conducted, but does not define what campaigning is – for example as "any activity conducted by or on behalf of a registered political party, electoral subject or candidate in order to promote the party, electoral subject or candidate or damage the prospects of another party, electoral subject or candidate." There are at least two important reasons why a definition must be supplied. First, if there is no definition then the law implies that conduct that is not conducted through the means listed in the citation from the Electoral Code above is by definition not campaigning. Second, Article 73.5 lists persons who are prohibited from campaigning, while Article 73.10 lists premises where campaigning is prohibited. The law as it stands opens huge loopholes, allowing for example:

- television news to be biased in favour of particular candidates without being definable as 'campaigning';

- events that are not defined as one of the activities listed in Article 73.6, yet promote a particular party or candidate, to be held without them being classified as campaigning – inter alia in public premises.

The expert therefore strongly recommends that the law is amended to make it clear what campaigning means – for example by adopting the definition suggested above - rather than stating by what mechanisms it may be conducted. If mechanisms of campaigning are to be mentioned this is more appropriate where particular mechanisms are to be restricted or prohibited.

3 PERSONS RESPONSIBLE FOR PARTY FINANCES

The PPL requires parties to establish an auditing commission as one of their statutory bodies. The law does not however require parties to appoint an officer who is specifically responsible for party finances. The Electoral Code by contrast requires parties and electoral subjects to appoint "a manager and accountant of the election campaign fund" – though it is not clear from the translation whether these are suppsed to be the same person or two persons. It is of vital importance that responsibilities are consistent and clear for all party finances, as general party finances and election finances are not entirely separate issues – for example, the Electoral Code permits one source of election funds to be a party's own funds (i.e. those acquired under the regime of the PPL). It is therefore recommended that the PPL requires the appointment of a financial officer with sole responsibility for party finances including election finances.

4 RESTRICTIONS ON DONATIONS

The restrictions on donations in the PPL and Electoral Code appear to be reasonable. However, if the comments in Section 1 of this opinion are correct, the restrictions should be on contributions as properly defined (i.e. including donations, loans and in-kind contributions).

5 DISCLOSURE REQUIREMENTS

Political Parties Law

Article 26.6 of the PPL establishes that information on all donations to a political party – including the name, address, number ID card or passport "and personal numbers' – shall be public. Article 32 elaborates on this provision, stating that every party must publish in the press (and within 10 days submit to the Central Election Commission and local tax authority) its financial declaration. The declaration is to show:

- yearly income including memberships fees, amount of donations, data on individuals and legal entities who donated, state subsidies;
- expenditure "on elections, financing of various activities, remuneration, official trips and other expenditures";
- a report on assets held by the party.

Income and expenditure on elections must be shown separately. Parties who fail to publish in a timely manner its financial declaration are disqualified from receiving state funding for one year.

Electoral Code

The Electoral Code states that parties must submit a monthly report to the Central Election Commission on the "source and amount of contributions [to its election campaign fund] and date of receipt". Within one month of election day each party must submit to the CEC "a report on the funds used for elections" and an auditor's report. The report must include "a statement of the source of funds deposited to the election campaign fund". The form of the report is to be determined by the CEC.

In the opinion of the expert, the provisions on disclosure of party finances are problematic for several reasons, and these together with recommendations are listed below.

- Both the PPL and Electoral Code require parties to disclose every single donation, however small, including the identity and personal data of the donor. The experience of other countries indicates that such a requirement creates an excessive burden of disclosure and oversight, as well as discouraging small donors – a vital source of donations in a democracy - from making contributions. It is recommended to establish a threshold size of donation, above which donations and their sources must be disclosed.
- The PPL requires disclosure of spending, but does not establish a clear duty to report the exact breakdown of expenditure – for example, it requires the disclosure of spending on 'elections', but with no provision for a duty to provide more detailed information on the breakdown of election expenditure into media advertising, election events, etc. This is unusually vague, makes it much more difficult for an auditor or the election authorities to audit party accounts properly, and in the opinion of the expert is inadequate in view of the fact that a significant if not large proportion of the money that parties spend is provided by the state. It is therefore recommended that the PPL either establishes – or the

CEC is required to establish in a reporting template – a requirement to report the breakdown of spending in more detail.

- As stated in Section 1, the establishment of disclosure requirements by two different laws is not optimal. Given the difficulties of merging two major laws in the Georgian context, it is recommended that the regime for reporting party and election finances are regulated only by the PPL, and the Electoral Code should refer to the PPL as necessary.

- Article 48.11 of the Electoral Code states that all information concerning election contributions is open, public and available and that the "CEC is also obliged to ensure the publication of the following information on its web page within 2 days of its adoption". However, the Article (indeed Chapter) of the Law ends at this point, with no list of information required for publication on the web page provided.

6 STATE FINANCING OF POLITICAL PARTIES

The provisions in the PPL on the provision of state financing to political parties and non-governmental organizations appear to be relatively advanced, and in the absence of more detailed knowledge of the structure and dynamics of the party system the expert has no significant criticism of the rules allocating funds to parties for their ordinary activities.

However, regarding the financing of election campaigns Article 29 of the PPL states that the rules of allocation of state funds for parties' election campaigns are provided in the Electoral Code; however, no such provisions are to be found in the Electoral Code.

In addition, the expert feels that the Georgian legal framework establishing state subsidies for parties and electoral subjects misses an opportunity to create positive incentives for parties to do two things, namely attract small donations and disclose their finances properly. The law establishes sanctions for violations of rules on acceptance of donations, and also for failure to report finances in a timely manner, in the form of the subsequent withdrawal of state subsidies (PPL Article 28 and 34, Electoral Code. The expert has the following comments and recommendations concerning these provisions:

- The lack of detailed requirements for reporting of expenditure (see Section 5 above) reduces the leverage of state subsidies in encouraging financial transparency, and the expert wishes to therefore reiterate the need for more detailed requirements on reporting expenditure, especially of funds provided by the state.

- The expert feels it would be more effective to make the transfer of state subsidies conditional on the filing in advance of financial reports (rather than the withdrawal of future state subsidies being the punishment for not filing), to create a more direct prior incentive to file.

- International experience indicates that state subsidies can be a useful way of encouraging parties to attract a larger number of small donations rather than a small number of large donations, if a part of the state contributions is provided as matching subsidies. These are subsidies that equal the private donations provided to a party for donations up to a certain size, and up to a maximum total amount of subsidy per party. It is recommended that such a system or similar

system is considered also for Georgia.

7 AUDIT REQUIREMENTS AND OVERSIGHT

Article 33 of the PPL states that a party shall conduct an annual financial audit of its activities, that for this purpose it is "entitled to address any independent auditor", and that "[t]he conclusion of an independent auditor on the financial status of a party shall be submitted to the Central Election Commission". Article 32.4 states that the party must send its financial declaration "and the auditor's (auditing firm's) conclusion" to the CEC and local tax authority.

The Electoral Code does not contain any clear provisions regarding the audit of election campaign finance. Article 10 appears to be key, stating the following:

"Within 5 days after the appointment of the election date, based on an ordinance of CEC, for the monitoring of fund account used by electorate subjects for elections with group of social representative, lawyers and licensed financial audits is created that studies an information and holdings presented at election commissions during election period. The statute of financial monitoring group is established by the CEC that is presented by the same group no later than 5 day of the creation of the group."

The expert has the following comments/recommendations concerning these provisions.

- The provisions of the PPL – at least in the translation provided – do not make it clear whether parties are required to commission an independent audit of their finances or not. It is imperative – especially given the large amounts of public funding parties receive – that such a duty is made clear.

- It is also recommended that the term 'independent auditor' is clarified by including at least basic conflict of interest provisions – for example prohibiting the conducting of the audit of a party's finances by persons connected to the party or who have a direct personal interest in the conclusion of the audit.

- The laws contain a number of prohibitions and restrictions – for example on the acceptance of anonymous donations or on donations exceeding certain amounts – for which important sanctions are established, in particular the withdrawal of state financing or exclusion from election results. The expert is concerned however that the authorities (i.e. the CEC) will not have the mechanisms or capacity to conduct any real oversight of the observance of the law by parties and electoral subject. In particular, the PPL does not establish any mechanism by which the CEC may conduct monitoring or audits of party finances itself, or commission such monitoring/audit. This leaves the CEC solely reliant on the audits conducted or commissioned by parties themselves. It is important – and therefore recommended - that the law gives the CEC the possibility to initiate audits if proper oversight is to be possible.

- Article 10 of the Electoral Code is incomprehensible in translation. It is vital that the Electoral Code establishes mechanisms by which the CEC can audit parties' election finances effectively, including through comparison of financial declarations with monitored campaign activities. It is also recommended that the CEC has clear authority to use information such as results of monitoring of election campaign finance by NGOs, as well as complaints concerning violations (see Section 8 below).

8 ENFORCEMENT AND SANCTIONS

While the expert did not have sufficient time to probe deeply into all possible legal provisions relating to enforcement and sanctions, the following problems appeared to be evident.

- Article 29.v of the Electoral Code states that the Central Election Commission "[s]hall, in the manner established by this law, consider election-related applications and complaints and take the appropriate decisions within the limits of their authority." However, Article 77, which lays out in detail which electoral commissions have authority to deal with which types of complaints, does not explicitly establish any mechanism for addressing complaints about election campaign finance regulations, with the exception (in Article 77^{1}.15-16) of violations of provisions on providing benefits to voters for free, use of private or election campaign funds to perform functions of government bodies, and on the provision of free and paid advertising space by media to parties and electoral subjects. It is therefore strongly recommended that Article 77 also establishes clearly the authority of the CEC (or if appropriate lower election commissions for single mandate constituencies) to address complaints about all violations of campaign finance regulations (for example including the violation of provisions limiting the size of donations electoral subjects may receive).

- Article 48.8 of the Electoral Code establishes procedures by which district election commissions (DEC's) or the CEC should address violations of key election campaign financing provisions, including the duty to submit a report on the funds used for elections. However, for cases where a report is submitted containing inaccurate information, the article states that "[T]he responsibility of the election subject and the managers of the election campaign fund shall be determined in accordance with the legislation of Georgia." This provision leaves it entirely unclear what sanctions may be applied in such cases, and the expert recommends that such sanctions are stated clearly in the Electoral Code.

Although the expert does not possess sufficient knowledge of the Georgian context, the Electoral Code appears to raise the danger of the Central Election Commission (and therefore lower commissions as well) being dominated by a single incumbent political force. Six members of the CEC are appointed by Parliament from candidates proposed by the President, and the other seven are nominated by parties in order of the strength of their performance in the previous election. Where the political party of the President also holds a majority in Parliament, this would seem to ensure a majority on the CEC for that party. The expert wishes to stress that the independence of the CEC is vital, given its power to withdraw state financing from parties.