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OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
AND
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JOINT OPINION

ON THE REVISED DRAFT LAW ON FINANCING POLITICAL ACTIVITIES

OF THE REPUBLIC OF SERBIA

by
the Venice Commission
and the OSCE/ODIHR

Adopted by the Venice Commission
at its 86th Plenary Session
(Venice, 25-26 March 2011)

On the basis of comments by

Mr James HAMILTON (Substitute Member, Ireland)
and OSCE/ODIHR experts

I. INTRODUCTION

1. By letter dated 28 February, 2011 the Ministry of Justice of the Republic of Serbia requested the Venice Commission, through the Permanent Representation of Serbia to the Council of Europe as well as the OSCE/ODIHR to review the up-dated version of the Draft Law of the Republic of Serbia on Financing Political Activities (Document CDL- REF(2011)011, hereinafter referred to as the "Draft Law on Financing Political Parties" or the "Draft Law"). Also, in early March 2011, OSCE/ODIHR attended roundtable discussions on the draft Law in Belgrade, where a number of issues and recommendations of the Venice Commission and OSCE/ODIHR were discussed. A working version of the Draft Law was received at the said roundtable which contained some differences to the Draft Law (CDL- REF (2011)011) subject to assessment herein.

2. In response to the abovementioned request the Venice Commission and OSCE/ODIHR therefore undertook the assessment jointly.

3. The Venice Commission and OSCE/ODIHR prepared an opinion on the previous version of the Draft Law of the Republic of Serbia on Financing Political Activities (CDL-AD(2010)048), which was adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

4. The present opinion was prepared on the basis of the said joint Opinion of December 2010 (CDL-AD(2010)048), and is based on comments by Mr James Hamilton, member of the Venice Commission and OSCE/ODIHR experts. It was adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

II. THE SCOPE OF THE REVIEW

5. The draft submitted for opinion by the authorities on 28 February 2011 was reviewed in light of the recommendations of the opinion adopted in December 2010 (CDL-AD(2010)048), mentioned above.

6. The political financing scheme has not been amended in any major way from the previous draft which the Venice Commission and OSCE/ODIHR assessed in December 2010. The Draft Law has, however, addressed a number of the recommendations for improvement made in the opinion of December, which is welcomed by the Venice Commission and OSCE/ODIHR.

III. EXECUTIVE SUMMARY

7. The Joint Opinion of December 2010, referred to above, already noted that the then assessed Draft Law constituted a step forward in creating a modern and comprehensive political financing system in Serbia, while providing for a number of recommendations which would further improve regulation in this area. As already mentioned, it is welcomed that a number of these recommendations were taken into account in the present Draft Law, nevertheless, some of the recommendations made in the 2010 opinion remain valid, notably:

KEY RECOMMENDATIONS:

a. *The Draft Law would benefit from adjustment of the provisions to focus more on prevention of possible abuse, infringements and violations, rather than the imposition of sanctions following their occurrence;*

b. *The Draft Law should address the issue of provision of in-kind services by qualifying and quantifying them in detail;*
c. *The system of political financing could be used to create incentives for improving participation of women in political parties as well as fostering greater political participation;*
d. *Some of the provisions on the keeping of accounts (itemisation and listing of contributions) and the content of all reports required from political actors needs clarification and greater detail;*
e. *Sanctions provided in the Draft Law would benefit from some further revision to ensure that they are proportionate and also, the sanctioning regime should be completed.*

ADDITIONAL RECOMMENDATIONS:

f. *Membership fees should constitute a part of the sum of total contributions permissible;*
g. *The prohibition of monetary funds from foreign political associations may be reconsidered;*
h. *The prohibition on donations through third parties needs to be supplemented with appropriate sanctions;*
i. *The Draft Law should address the funding of election campaigns through other than solely monetary benefits;*
j. *The Draft Law should provide for a closed list of what may be defined as election campaign expenditures;*
k. *The Draft Law should re-consider the exclusion of the public from proceedings in front of the Anti-corruption Agency.*

IV. ANALYSIS OF THE ARTICLES OF THE NEW DRAFT AND RECOMMENDATIONS

8. On the basis of the previous opinion and its recommendations, the following comments can be made on concrete amendments:

9. In Article 7 of the Draft Law it is now made clear that the duty is on the political actor to register a donation made to a political actor.

10. The amount of funding provided from public sources (Article 14 of the Draft Law) has been increased from 0.15% of the State budget to 0.3% and the amount provided by the autonomous province and local government units has been increased from 0.1% to 0.2%. Funds granted to cover election campaign expenditures have also been doubled from 0.05% of the State budget to 0.1% and a new provision provides that the level of electoral funding from the autonomous province and local self-government is to be 0.05%[1]. The Joint Opinion from December 2010, in its paragraphs 26 and 33[2] made mention that the allocated percentage of the State budget was already a sizeable amount. It was then noted that what must be borne in mind when providing public funding is that while it must be set at a meaningful level, it must also be ensured that it does not create an over-dependence of political parties and actors on state support. It appears from the Draft Law assessed herein, that the level has been increased two-fold rather than decreased[3]. It is therefore recommended that this increase be reconsidered.

[1] The working draft received by the OSCE/ODIHR in March 2011 does not include such increase, with the percentage figures of the budget allocated remaining the same as in the version of the draft Law subject to the Joint Opinion on December 2010.

[2] CDL-AD(2010)048

[3] The working draft referred to in footnote number 1 above, does not provide for any increase from the draft examined by the Joint Opinion of December 2010.

11. The Draft Law provides in Article 19 for the situation where more than 20 electoral lists or candidates are nominated as well as where there are less than 20, but not for the situation of exactly 20. Article 18 states that " every submitter of electoral list or candidate receives the twentieth part of funds" which necessarily implies the possibility of exactly 20 candidates. Nevertheless it would be better to improve the language of Article 19, unless this is only a mistranslation in the English text.

12. There is a slight amendment to the definition of election campaign expenditures contained in Article 21 of the Draft Law which now includes also certification of signatures of supporting voters. Nevertheless, the Draft Law may benefit from considering the recommendation made in the Joint Opinion of December 2010, which proposed that the list of allowable expenditures be closed, and non-exhaustive, in particular given the envisioned sanctions for breach[4].

13. Following the recommendations of the previous joint Venice Commission OSCE/ODIHR opinion[5], the obligation to keep books of income and expenditure and records of donations has been extended to all registered political parties as well as to political actors with representatives in the legislature (Article 25).

14. The duty to provide documents and information to the anti-corruption agency has been removed from Article 26. However, this obligation still exists in Article 30 and it seems that its removal from Article 26 is simply for reason of avoidance of duplication.

15. In a number of places the text now refers to the autonomous province and local self-government units as well as to the State budget.

16. There is a new provision in Article 29 requiring the person who was nominated as the responsible person to provide accounting data to the Anti-corruption agency.

17. In its opinion of December 2010, the Venice Commission and OSCE/ODIHR drew attention to the omission of a number of violations of the draft law, which ought to be addressed in the provision creating a number of misdemeanours. This appears to have been remedied in the new draft. The provisions relating to penalties for unlawful donations have also been tightened up. There has also been an amendment to Article 37 of the Draft Law, which now states that if a political party and/or coalition or responsible officer in another political entity is punished for misdemeanour stipulated in paragraphs 1 and 2 of this article, the political party, coalition or another political entity shall lose the right to funding from public sources in the amount of 10 to 100% of such funds in the coming calendar year. While this is considered an improvement, it does not fully take into account the recommendations made in the Joint Opinion of December 2010, where the disproportionately damaging nature of the criminal sanctions was noted as requiring reconsideration[6].

[4] CDL-AD(2010)048, paragraph 36 states that: “However, the use of the word “notably” and the expression “other related activities” in the first paragraph of the provision implies that the list of items which may fall under the category of election campaign expenditures is not exhaustive and, thus, may be open for interpretation and dispute about what does and what does not constitute an election campaign expenditure. Therefore, also since a breach of the provision entails liability under Article 36 of the Draft Law, it is recommended for the list to be clarified and closed.”

[5] CDL-AD(2010)048, paragraph 41.

[6] CDL-AD(2010)048, paragraph 50, second sentence.

18. The previous opinion recommended that "*The role of the Anti-corruption Agency should be strengthened to allow for the fulfilling of their supervisory function (i.e. through vesting it with greater powers to obtain requested information and explanations, oversight of ordinary operations of political actors), and allowing a strengthening of their capacity through training, while their role in adjudication and imposition of sanctions could be re-considered as a role for the court."*[7] Publication of reports on the internet has been stipulated in article 26 para. 2. The enumeration of violations by political entities in article 37 has been extended to include several of the recommendations in the Opinion (article 37, points 13-16), and violations of articles 11 (illicit collection of funds) and 13 (return of unlawfully required funds) are now enumerated. The proposed changes are welcomed. However, violations of article 9, regarding ownership of real property (as recommended in paragraph 19 of the previous opinion) and article 12, are still not among the list of violations in art. 37. It is recommended to consider for the article to include the omitted violations.

19.Furthermore, the third para. of article 37 now contains what used to be regulated in article 41, that is, the possibility to suspend funds in the year following the year in which the violation took place.

20. Under a new procedure (Article 40) when misdemeanour proceedings are instituted the Ministry of Finance or the competent authority in the autonomous province or local self-government unit can temporarily suspend the transfer of public funds to a political actor until the final decision of the competent misdemeanour court is issued. It is now clear that this provision stipulates interim suspension, however, the provision is somewhat weak as it leaves much room for discretion of the relevant political authority to decide whether to suspend the funding or not.

21. The Opinion of the Venice Commission and OSCE/ODIHR from December 2010, suggested that services rendered, credit, loans, debt cancellations etc. should be quantified and assessed as a form of contribution[8] and that financing of campaigns through other than monetary benefits should be addressed[9] have not resulted in any changes in the examined Draft Law. It is recommended to consider these recommendations prior to finalization of the Draft Law.

22. The Draft Law should reconsider whether the public should be excluded in all proceedings before the Ant-Corruption Agency, as stipulated in Article 33. While it is reasonable that there would be justification for some proceedings to be held in camera, the general rule is proposed to be proceedings which are open to the public.

[7] Idem, par 5.G.

[8] CDL-AD(2010)048, paragraph 17 and 19

[9] CDL-AD(2010)048, paragraph 34