Support to the anti-corruption strategy of Azerbaijan
(AZPAC)

Technical Paper: Expert Opinion on Regulation of Lobbying in the Republic of Azerbaijan

Prepared by:

Quentin REED, United Kingdom
Long-term Advisor, AZPAC Project

PC –TC (2009) 33

For more information, please contact:

Technical Co-operation Department *Directorate General of Human Rights and Legal Affairs* *Council of Europe* *67075 Strasbourg CEDEX* *France*	*Tel: + 33 3 88 41 29 76* *Fax: + 33 3 90 21 56 50* *Email: lado.lalicic@coe.int*

This document has been produced with the financial support of the USAID. The views expressed herein can in no way be taken to reflect the official opinions of the Council of Europe.

Table of Contents

I Executive Summary

This Technical Paper provides the opinion of the international expert/AZPAC Long-term Advisor on an opinion provided by the local Azerbaijan expert about whether and how lobbying should be regulated in Azerbaijan, and presents the international expert's own recommendations on how Azerbaijan should address the issue fo lobbying. The opinion has also been informed by relevant Azeri legal acts (particularly the Law on Normative Legal Acts) and the opinions of Eldar Gojayev, an expert of Development Alternatives Inc (DAI) on the rules of parliamentary procedures, presented at a Roundtable Discussion on Improving Efficiency and Transparency in the Legislative Process organized by the AZPAC Project, Milli Majlis (Parliament) and Commission on Combating Corruption of Azerbaijan and held on 11 February 2009.

The main findings of this opinion are the following:

- Lobbying appears to be understood in the local context in an almost unequivocally negative manner as a form of corruption of the legislative process. This understanding may encourage an approach to the legislative process that holds any external influence on the content of laws to be suspicious. However, access of non-state actors to the legislative process and their influence upon the content of draft laws is a vital component of any democratic system: the challenge is how to regulate such access properly, not how to prevent it.

- Regulation of lobbying appears to be understood in Azerbaijan primarily as *regulation of lobbyists* (for example through their registration). However, such an approach is rarely used internationally and has been of questionable value where it has been implemented.

- Lobbying should be understood as specific attempts to influence decisions of state actors, be they in the executive or legislative branch – the focus of this paper being decisions concerning draft laws. This Technical Paper strongly urges a different approach to regulating lobbying based on a wider concept of well-regulated access to the legislative process. This approach should comprise two main components:

    - a well-designed legislative process that will ensure proper regulated access of interested parties to the legislative process, through measures to institutionalise consultation and maximise transparency as well as a number of other important principles;

    - regulation of elected and appointed officials involved in the elaboration and/or approval of draft laws, particularly through provisions to prevent and/or address situations of conflict of interest.

- Regarding both components of this approach, there are serious shortcomings in the Azerbaijan regulatory framework - in particular, a legislative process that requires important reforms if its integrity is to be ensured, and missing regulation of conflict of interest and ethics.

II Comments on the Opinion of the Local Expert

The local expert (Mr Alimammad Nuriyev) submitted an opinion on "Regulation of lobbying in the legislative process of Azerbaijan: acquired lessons and recommendations from international experience" in October 2008. The opinion rightly identifies lobbying as a means of expressing and representing interests in governing institutions, and as an essential component of the relationship

between state and society. The opinion underlines the prevailing perception of lobbying in Azerbaijan as illegal/corrupt.

However, the opinion lacks clarity on the concepts under discussion. It introduces a distinction between 'legal lobbying' and 'corruption', implying that i) corruption is the only problem to be addressed by regulating lobbying, and ii) that corruption is necessary an illegal activity. This distinction unfortunately is of limited help in clarifying the issues of key importance.

First, the problems of lobbying in practice will often involve practices that may not be illegal yet amount to undesirable influence by interest groups – for example where an MP holds an interest in a company and secures advantages for that company in a draft law under discussion.

Second, this opinion argues that the problem of lobbying in the legislative process is not simply a problem of possible corruption or illicit influence, but rather reflects broader problems in the design of the process by which legal acts are elaborated and approved – for example a lack of transparency or proper consultation during the elaboration of draft laws. Such problems may facilitate corruption, but even if they do not they are likely to result in poorer quality laws.

Lobbying is an inevitable phenomenon, and the key question is whether the processes at which lobbying is directed are designed and regulated in such a way as to make the impact of lobbying positive rather than negative. From this perspective, the most important mechanism for regulating lobbying in the legislative process is the optimal design of that process itself (see Section 2.3).

III Three Approaches to Regulating Lobbying

In terms of the possibilities for regulating lobbying in Azerbaijan, the opinion of the local expert appears in its recommendations to advocate legislation that would regulate lobbying by imposing obligation upon entities that lobby – that is, by regulating lobbyists, for example through compulsory accreditation and registration of lobbyists, or by defining the responsibilities of lobbyists.

However, regulation of lobbyists is only one of three main types of mechanism for regulating lobbying. Moreover, it is employed only rarely in advanced democracies, which for important reasons rely much more on regulation of the persons and processes that are likely to be subjected to lobbying.

Regulating lobbyists

Legal regulations imposing duties on lobbyists – most often registration - are relatively rare. The United States is a notable exception, and the only country in the European Union with such regulations is Germany – and there only for the national Parliament (Bundestag). As an authoritative study on the subject has noted[1], regulation of lobbyists faces major difficulties in defining what constitutes a lobbyist. Such difficulties were a major reason why Australia repealed a law to regulate lobbyists 13 years after its introduction in 1983. While the European Parliament has a system based on self-identification by lobbyists, in return for which they gain access to its premises in return for signing a code of conduct and signing a public register of visits, it is not clear whether the system brings any clear positive impact.

[1] Institute of Public Administration, *Regulation of Lobbyists in Developed Countries: Current Rules and Practices*, http://www.environ.ie/en/Publications/LocalGovernment/Administration/FileDownLoad,2048,en.pdf

Legal provisions on registration of lobbyists are naturally suited to contexts where lobbying is conducted by specialised professionals or companies – i.e. professional lobbyists. Where such professional lobbyists are not common, it becomes particularly difficult to define what is a 'lobbyist' – for example, whether a company that contacts an MP in connection with a draft law on one occasion should be so classified or not.

In light of these issues, the author believes that to focus in Azerbaijan on the option of regulating lobbyists is likely to have limited or no impact, and that other regulatory options are more important.

Regulating the lobbied

A second and much more widely-used way of regulating lobbying is by imposing obligations on persons and entities that are likely to be the subject of lobbying efforts – in the context of the focus of this opinion, persons and entities/institutions involved in the drafting and approval of legal acts. The most common forms of such regulations are codes of conduct and other rules for defining required conduct of elected or non-elected officials, such as conflict of interest regulations. Such regulations are also required under the United Nations Convention against Corruption. To these might also be added regulations on political finance – that is, of political parties and election campaigns – that attempt to prevent undue influence on parties and elected officials by private interests through financial and other contributions.

Regulating the lobbied is widely regarded as a more effective approach to tackle lobbying than regulating lobbyists, as it concentrates primarily on the clearly definable circle of public officials or entities which may be subject to lobbying.

Regulating lobbied processes

The first two types of regulation focus on persons or entities – in the first case lobbyists or potential lobbyists, in the second those who are or may be targets of lobbying. A third perspective on tackling lobbying takes a broader perspective an focuses on the *processes* which may be targeted by lobbyists – or within which lobbyists have to operate. In the context of this Technical Opinion, the process of most relevance is the legislative process – that is, the procedures and rules under which legal acts are elaborated and approved.

A major point that the author of this opinion wishes to stress is that, while the forms of regulation outlined above may be of importance, they are likely to have limited impact unless the processes (in this case the legislative process) in which the actors regulated by them operate are well designed. The author has developed ideas advocating the systematic design of the legislative process to maximize its integrity, efficiency and legitimacy, based on the pursuit of six broad principles listed below. It is important to note that the legislative process encompasses not only approval by Parliament, but also all stages involving the Executive branch, from the initial draft by a line ministry to submission of a draft to the Parliament (for example by the Government or Presidential Administration), and these principles should be implemented at all stages of this process.

Institutionalisation (consistent and predictable set of rules and procedures that are observed in practice)

Professionalism (engagement of professional lawyers and expert staff at all stages of legislative drafting)

Collective decision-making (decisions taken by collective bodies – e.g. legislative department or parliamentary committee rather than individuals)

Justification (legal requirement to explain rationale for legal act)

Consultation (targeted and open consultation to prevent unrestricted influence of special interests)

Transparency (publication of drafts, decisions and inputs to legislative process at all stages)

This approach was outlined in a paper by the expert on "Curbing Corruption by maximizing Integrity and Efficiency in the Legislative Process: an Overview of the Issues" (attached to this opinion) and advocated at the Roundtable Discussion held in February. As a means of tackling lobbying, the key to this approach is that it aims to prevent undesirable influence on legislation not by imposing negative restrictions upon individuals (what they may or *should not* do) but rather by establishing a set of positive requirements (how the legislative process *should* look).

IV Addressing the Problem of Lobbying in Azerbaijan

For the reasons already outlined in Section 2.1, the author believes that the advisability of regulating lobbyists is questionable in general. In general the other forms of regulation outlined in Section 2 are of more importance, and in both of these areas Azerbaijan needs important reforms.

Regulating the lobbied: codes of ethics/conduct and conflict of interest regulation

In order to regulate the conduct of public officials who may be subject to lobbying pressures or influence, codes of ethics/conduct and other legal provisions to prevent or address conflict of interest situations are of crucial importance in advanced democracies. This is true for both the executive and legislative branches. In Azerbaijan a Law on Rules of Ethical Conduct of Civil Servants has been in effect since 2007, which defines the required standards of conduct for civil servants. However, even within the Executive Branch the law does not apply in particular to "the President of the Republic of Azerbaijan, deputies of the National Assembly of the Republic of Azerbaijan, Prime Minister and deputies to Prime Minister of the Republic of Azerbaijan, judges of courts of the Republic of Azerbaijan, the Attorney of the Republic of Azerbaijan for Human Rights (Ombudsman), heads and deputy heads of central executive power bodies of the Republic of Azerbaijan, chairman, deputy chairman, secretary and members of the Central Election Commission of the Republic of Azerbaijan, chairman, deputy chairman and auditors of the Chamber of Accounts of the Republic of Azerbaijan, officials (heads) of local executive power bodies, deputies of the Supreme Assembly of the Nakhchivan Autonomous Republic, Prime Minister and deputies to Prime Minister of the Nakhchivan Autonomous Republic, heads of central executive power bodies of the Nakhchivan Autonomous Republic, as well as to the military." These exceptions are important in the context of this opinion, as a number of these categories of persons (for example ministers) can be key targets for those wishing to influence draft legal acts.

Concerning the legislative branch, the Milli Majlis (Parliament) of Azerbaijan does not have any code of conduct or ethics at all – effectively leaving deputies of the National Assembly with no definition of the standards of conduct required. This is a serious gap in the framework of rules of the legislature, especially given the widely acknowledged business interests held by MPs.

In addition, there are no specific regulations for either the Executive Branch or Parliament on conflict of interest, although a draft law has been in circulation since 2007. The author has submitted two expert opinions on the draft law in 2007 and 2008.

Reforming the legislative process

The main legal provisions governing the legislative process are contained in the Law on Normative Legal Acts. In addition, the Rules of Procedure of the Milli Majlis (Parliament) also regulate the legislative procedure within the legislature. While this paper does not provide an in-depth analysis of the legislative process in Azerbaijan, it does identify areas of the process that in the author's opinion require attention if the process is to be made to fulfil the principles outlined in the Section 3.3.

The Law on Normative Legal Acts

As noted by the representative of the Commission on Combating Corruption at the February event, the Law on Normative Legal Acts contains important rules on the drafting and screening of legal acts – including on the establishment by executive bodies of commissions for such drafting, on the inclusion of external experts and representatives of NGOs, and on publication of draft laws. While the law goes a long way towards providing the basis of a well-organized legislative process, the expert has concerns about the fact that a number of desirable rules are stated not as obligations but as options for executive bodies. The expert has the following specific comments on particular provisions of the Law.

Article 9.2 states that "The rules for evaluation, adoption and affirmation of normative legal acts of relevant executive bodies shall be determined by the relevant executive body". It is not clear to the consultant whether there is a problem of translation, but this provision appears to conflict with the other provisions in the Act that impose rules on such executive bodies. It is important that such duties laid down in the Act do indeed apply to state bodies involved in drafting legislation.

Article 15 states that "[a] Body which drafts normative legal act, as a rule, shall establish a commission composed of officials of this body, specialists and scientists in order to draw the draft", and that "[o]fficials of scientific institutions, interested state and non-governmental institutions may be involved in the drafting process". These provisions are of absolutely key importance in establishing a process of collective decision-making and consultation. However, it is apparent from the wording that neither of them is obligatory. Article 35 states that "Opinions of experts on the draft law shall be examined in permanent commission [the commission mentioned in Article 15] before their discussion at the Milli Majlis of the Republic of Azerbaijan." However, if the establishment of such a commission is not obligatory, then the examination of expert comments is by implication also not obligatory. Moreover, Article 16 states that "Preparation of the preliminary draft of normative legal act, including preparation of alternative drafts may be assigned to state bodies, scientific institutions, non-governmental organizations, to individual scientists or specialists or to their associations, or may be ordered on contractual basis, as well as a tender may be launched for the best draft." Taken together, these provisions appear to give an executive body responsible for drafting legislation virtual *carte blanche* to do this as it sees fit, with no real obligation to engage in consultation with experts, relevant organizations or interests. In addition, even if the provisions were compulsory, they would not constitute an adequate basis for a proper process of consultation, which should have clear procedures for both *when* consultation should be engaged in, and *in what manner* it should be facilitated/made possible.

Regarding transparency, according to Article 18, "Draft normative legal acts from the moment of the submission for agreement or approval shall be disclosed on the internet information resources of the drafting body." This provision is also of key importance and is a very positive step. However, it is not entirely clear from the English version of the Act what is meant by 'the moment

of submission for agreement of approval'. If this means the moment that the Act is submitted to the Milli Majlis (Parliament) then this is obviously too late, as the most extensive (or at least a substantial) proportion of the drafting process will have already been completed. This appears to be the intended meaning of the provision in the lights of Articles 10.1.7.1-2 of the Law on Access to Public Information, according to which executive bodies must disclose proactively "draft laws and draft decrees produced by the central executive authorities, accompanied with explanatory notes, effective from the time of sending to the President of the Azerbaijan Republic", as they must similarly for draft Presidential decrees or Cabinet of Ministers resolutions.

Article 21 is a crucial provision, stating that "Drafts of the normative legal acts shall be submitted for examination and approval, together with motivated comments on the necessity of such draft, purposes, main provisions and hierarchy of the future acts in the existing legislative system, broad characterization of their expected social-economic and other consequences, as well as drafts of the amendments to the existing legislation as a result of the adoption of the present draft. Additionally, shall be indicated collectives and persons who participated and whose agreement received in the drafting process, disagreements in the process and motivated comments thereto. In cases where the implementation of the draft will require additional materials and other expenses, financial-economic motivation shall be attached to the draft." The first part of this Article establishes the obligation to justify a draft law; in addition, Article 23.5 states that "The normative act may begin with introductory part (preamble) that will describe the purpose and reasons of its adoption and main purposes." It is clear from these provisions that it is not an *obligation* to provide such a justification as a preamble to the draft law itself, however. In addition, the obligation to indicate individuals or entities consulted does not itself, again, constitute an obligation to engage in such consultation.

Article 23.6 adds that "If necessary, an article may be included in the normative legal act to explain terms and definitions used therein." It is vital that any terms and definitions introduced in a draft legal act *must be* explained in the draft, not just *may be*; the absence of such explanations will otherwise inevitably result in legal uncertainty, and may be an important factor facilitating corruption by enabling officials to interpret legal provisions arbitrarily.

Parliamentary Rules of Procedure

The internal rules of the Azerbaijan Milli Majlis (National Assembly or Parliament) are established with the status of law (The Rules of Procedure). At the February 2009 Roundtable Discussion the representative of DAI presented important comments of particular relevance to the issue of the transparency and integrity of the legislative process. The comments of particular relevance to this opinion are summarized below.

- While Article 3 of the Rules states that the Milli Majlis's meetings shall be held in open and transparent conditions, the Rules do not specify what this means exactly and in terms of practical implementation – for example regarding observation of parliamentary sessions by the public, publication of the materials from Milli Majlis sessions of committee meetings, or the public availability of the voting records of MPs.

- Article 9 stipulates parliamentary ethics, but the Milli Majlis does not have any code of ethics.

- The Rules lack clear requirements for draft laws presented in the parliamentary sessions to contain a clear statement of purpose (justification), the impact of the law, its conformity with international obligations, which experts have been consulted during its preparation, and how it will be enforced.

- Parliament lacks an internal department that would take responsibility for legal research.

The legislative process in practice

The absence of clear and binding procedures for the preparation of draft laws in the Law on Normative Acts appears to be reflected in a legislative process that is insufficiently institutionalized in clear and predictable procedures, and lacks systematic consultation or sufficient transparency. The importance of putting into operation the principles outlined by the expert was underlined by participants at the February Roundtable Discussion. According to several participants (including members and professional staff of the Milli Majlis) ministries often influence or attempt to influence draft laws to suit their own interests (for example by maximise the discretionary powers of their own officials) or certain corporate interests. Moreover, the Milli Majlis only has the power to suggest changes in draft laws, which must secure agreement from the executive body responsible for drafting the law to be accepted. This underlines the importance of paying particular attention to the legislative process in the Executive Branch.

The discussion at the Roundtable also revealed a significant tendency in Azerbaijan to assume that any input or attempted input on a draft law by a particular interest (for example a company or individual affected by the law) must by definition be against the public interest. However, it is vitally important to distinguish two things – the identity of an individual or entity expressing an opinion, and the opinion itself. A well-functioning legislative process will be designed to produce high-quality laws, and a necessary condition for laws to be of high quality is the consultation of interests affected by them as well as experts. Opinions expressed on a draft law are therefore desirable and necessary, and – most important - should be judged on their merits and not on the basis of the identity of those who offered them.

The expert's impression from interlocutors and also from personal observation (for example of the progress of the draft Education law during 2008) is that, first, there does not appear to be in place any clear system of consultation, either with selected interests and experts or with the public as a whole. Second, it is common for laws in Azerbaijan to be drafted without a clear statement of purpose, justification or impact – an example being the draft Conflict of Interest Law on which the expert submitted comments through Council of Europe assistance in January 2007. Third, in practice draft laws are not necessarily made public in the way the Law on Normative Legal Acts requires (or at least suggests) they should be. An example of failure to implement these principles is again the draft Conflict of Interest Law. The Law is handled by the Commission on Combating Corruption, which claims to aim for maximum transparency in its handling of draft legislation. However, the expert comments on the draft Law were not posted publicly, no response was received or published prior to a second opinion provided as a part of the AZPAC Project in November 2008, nor were any significant comments reflected in any changes in the draft.

V Recommendations

In light of the observations and arguments presented in this opinion, the author makes the following recommendations. Those relating to the Rules of Parliamentary Procedure follow closely the recommendations of DAI presented at the Roundtable Discussion held in February 2009.

The Law on Normative Legal Acts

Either the Law on Legal Normative Acts should be amended, or an executive decree issued to establish the following:

- Stages of the drafting process should be defined more clearly. In particular it is recommended that an initial stage – such as a White Paper in the UK or at the European Commission – takes place before the drafting of a paragraphed draft legal act. This stage would outline the intention of the government to pass a law, describing the rationale and purpose of the intended law, its main intended parts and the envisaged impact. In advanced democracies such a stage usually presages a process of consultation prior to detailed legal drafting.

- Consultation should be made a clear obligation for executive bodies drafting legal acts, and the manner in which it is conducted should be specified. First, the establishment of commissions for the purpose of drafting a legal act should be made compulsory. Second, consultation should be both targeted – through the inclusion of governmental and non-governmental experts, including NGO representatives in these commissions – and open, whereby draft laws are displayed for a sufficient period of time on the executive body's website and members of the public may submit comments or recommendations to a clearly defined and publicized location (e.g. the website).

- In keeping with best practices regarding transparency – and suggestions by the representative of the Commission on Combating Corruption at the February Roundtable that transparency should be increased at all stages of the legislative process - all stages of draft laws should published on the Internet, including all comments and input received in any process of consultation, together with any assessments of such comments by the drafting body.

- In order that citizens or NGOs are able to pursue their right to view draft legal acts, the Law on Access to Public Information should be implemented properly, in particular through the establishment of the Commission for Access and Protection of Information.

The Milli Majlis

The Rules of Procedure of the Milli Majlis should be amended (or other regulations altered as necessary) to establish the following.

- Clear rules to ensure that the public can observe parliamentary sessions (in person and/or on television) should be established.

- Materials from Milli Majlis sessions and committee meetings should be published on the Milli Majlis's website without delay.

- The voting records of MPs should be made public on the Milli Majlis website without delay following parliamentary votes.

- The Rules (or the Law on Normative Legal Acts) should establish clear requirements for draft laws presented in the parliamentary sessions to contain a clear statement of purpose (justification), the impact of the law, its conformity with international obligations, which experts have been consulted during its preparation, and how it will be enforced.

In addition:

- The structure of the Milli Majlis should be altered to establish a department responsible for legal research to assist the development and approval of draft laws.

- As part of its activities, the department should be responsible for screening draft laws for provisions that unnecessarily facilitate corruption. Such screening might be conducted using for example the suggested 'Typology of corruption risk factors in legal regulations or draft legal regulations', based on work conducted by the expert in Russia and Moldova, attached to this opinion.

Codes of conduct/ethics and conflict of interest

- Steps should be taken to ensure that officials with important powers or authority – including participation in or influence on draft laws – are subject to rules of ethical conduct as are currently other civil servants.

- The draft Conflict of Interest Law should be passed after a proper process of consultation and taking into account the comments of both national and international experts.

- The Milli Majlis should establish a Code of Ethics or Code of Conduct that will define standards of required behaviour by MPs, including the relationship between their public and private interests. It is recommended that MPs also impose upon themselves obligations to declare relevant interests, both in general (for example to a Register of Member's Interests) and in particular cases where such interests might be sent to affect their conduct as MPs.