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**Department of Information Society
and Action against Crime
Directorate General of
Human Rights and Legal Affairs**

**Technical Paper: Expert Opinion on the Government of the Republic of
Azerbaijan
“Regulation on the Implementation of the List of Natural and Legal Persons
Designated by the United Nations Security Council Resolutions”**

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The views expressed herein can in no way be taken to reflect the official opinions of the Council of Europe

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1. Introduction

This opinion was drafted upon the request of the Council of Europe in May 2010.

The expert was asked to provide his opinion on the draft Regulation on the Implementation of the List of Natural and Legal Persons Designated by the United Nations Security Council Resolutions.

The opinion was prepared based on an English translation of the draft ordinance provided by the Council of Europe.

The opinion assessed whether the provisions of the draft regulation are in line with FATF Special Recommendation III, UN Security Council Resolutions 1267 (1999) and 1373 (2000) and other international instruments as well as international practice.

2. Background

A mutual evaluation report released by MONEYVAL in December 2008 identified a number of significant shortcomings of the AML/CFT system in Azerbaijan. Moneyval was of the opinion that the country's new AML/CFT law, passed on 31 October, 2008, did not "comply in a comprehensive manner with key international standards."

MONEYVAL also issued three public statements (in December 2008, March 2009 and September 2009), which called on its member States and other countries to advise their financial institutions to pay special attention by applying enhanced due diligence to transactions with persons and financial institutions from or in Azerbaijan.

At its 31st plenary meeting on 7-11 December 2009, MONEYVAL issued its fourth statement on Azerbaijan, noting that the country had now created and implemented the legislative base to counter money laundering and terrorist financing. Accordingly, MONEYVAL decided to withdraw its previous public statements and the advice to financial institutions. MONEYVAL will continue to monitor progress on other outstanding issues raised.

In the MONEYVAL Progress Report of December 2009, Azerbaijan was asked to "bring its national legislation on freezing of assets into line with FATF Special Recommendation III and other international instruments". The Progress Report also made a number of concrete recommendations on the implementation of SR III.

In April 2010, Azerbaijan sent MONEYVAL a draft Regulation on the Implementation of the List of Natural and Legal Persons Designated by the United Nations Security Council Resolutions, aimed at implementing FATF SR III, as well as UN Security Council Resolutions 1267 (1999) and 1373 (2000) and follow-up resolutions.

3. Analysis and Recommendations

General observations

The draft Regulation on the Implementation of the List of Natural and Legal Persons Designated by the United Nations Security Council Resolutions constitutes an administrative measure by the executive of Azerbaijan to transpose FATF Special Recommendation (SR) III into national legislation.

As a measure of the national executive, it will not require a decision of the judiciary for each modification of the official list of designated persons and allows therefore for more flexibility in applying modifications to the list and taking the appropriate measures, such as rapidly freezing assets of designated persons or entities.

The draft Regulation has largely drawn on language suggested by the FATF in its Interpretative Note to SR III, available at www.fatf-gafi.org.

Despite including a large number of elements from the Interpretative Note as well as suggestions from the latest MONEYVAL Progress Report, there are still a number of significant shortcomings in the draft Regulation, which should be addressed before its final adoption.

It is also not clear from the present draft Regulation whether further measures will be adopted to provide more detailed guidance on the implementation of SR III.

Observations in detail

I. General Provisions

- 3.1 Paragraph 1 refers to previously adopted Presidential Decrees on the implementation of United Nations Security Council Resolutions (UNSCRs) 1368, 1373 and 1377 of 2001, as well as “UN Security Council successor Resolutions targeted to counter terrorism”.
- 3.2 If the last phrase of Paragraph 1 refers to UNSCRs 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009), as well as the Resolutions mentioned in Paragraph 1.2. (UNSCRs 1267 (1999) and 1333 (2000)), it is in line with FATF Special Recommendation (SR) III.
- 3.3 Paragraph 2 refers to “persons”. If this term refers to both physical persons and legal entities, it is in line with FATF SR III. The draft Regulation would however benefit from a definition of the term “person” either in the regulation itself or in an accompanying bylaw.
- 3.4 Paragraph 3 is in line with the spirit of FATF SR III and the relevant UNSC Resolutions, including the implementation of an asset freeze, a travel ban and an arms embargo.
- 3.5 Paragraph 3.1 (asset freeze) would benefit from a more detailed definition of the term “other financial assets”, unless it is provided in another legal document.

II. Procedure of domestic implementation

- 3.6 Paragraph 4 states that the list of designated persons is “approved” by the Financial Monitoring Service. This may be a translation issue. In this context, the term “confirmed” would be a better choice.
- 3.7 Paragraph 5 states that the Financial Monitoring Service “shall make appropriate amendments within 3 business days upon the reference of the” MFA. This is not in line with the spirit of SR III. According to the FATF’s Interpretative Note, the term “without delay” implies an implementation “ideally within a matter of hours of a designation by the Al-Qaida and Taliban Sanctions Committee” [FATF I Note]. It is therefore suggested to amend Paragraph II 5. accordingly.
- 3.8 Paragraph 6 states that the “list of designated persons... shall be published... in the official newspaper.” If the term “official newspaper” refers to the government’s official gazette, it is in line with SR III. (On the use of the term “approved” in Paragraph 6, please see the comment on Paragraph 4.)

3.9 Paragraph 7 is in line with SR III.

III Procedures for the submission of listing request

3.10 Paragraphs 8, 9, 10 and 11 are in line with SR III as well as UNSC Resolutions 1267 and 1373.

3.11 Paragraph 12 is largely in line with SR III as well as UNSC Resolutions 1267 and 1373. As the FATF recommends that newly listed persons be informed on the possibility of a review procedure and receive information on the de-listing process, it is suggested to add a phrase to this effect to this paragraph.

IV Procedures for the submission of de-listing request

3.12 Section IV (paragraphs 13 to 18) describes the basic de-listing procedure that Azerbaijan intends to apply. Although there are no contradictions to the spirit of SR III, this sections remains incomplete for the following reasons:

3.13 The FATF recommends that the procedure for de-listing be publicly known. Unless this is addressed in a bylaw, it is suggested to add it to this section.

3.14 The FATF further recommends that de-listings should be published. Unless this is addressed in a bylaw, it is suggested to add it to this section.

3.15 The FATF also recommends that countries take measures to unfreeze assets and remove sanctions from individuals and entities who have been de-listed. This should be included in this section.

3.16 This section should also contain a reference to how a person or entity that is the target of a freezing mechanism can challenge the measure by having it reviewed by a competent authority or in court.

V Sanctions

3.17 Paragraph 20 is in line with SR III well as UNSC Resolutions 1267 and 1373.

3.18 Paragraph 21 describes the types of funds or assets to be frozen. Although the draft Regulation uses the wording recommended by the FATF, it does not provide a detailed definition of the term “other assets”. It is suggested to add this to the text or include a definition in a related bylaw.

3.19 There are no comments on paragraphs 22 and 23.

4. Conclusion

The draft Regulation has drawn largely on recommendations by the FATF on the implementation of SR III and UNSC Resolutions 1267 and 1373 and is therefore largely in line with the spirit of these documents.

The draft Regulation also addresses most of the shortcomings with regard to SR III that were highlighted in the 2009 MONEYVAL Progress Report.

There are however a number of significant shortcomings in the draft text that should be addressed before adoption. Among these are the following:

In the draft Regulation, there is no reference to the access to frozen funds or other assets, for example for basic expenses or fees.

There is also no reference to the protection of bona fide 3rd parties.

There is also no reference on how a listed person or entity can challenge a measure before the court.

It is furthermore suggested to provide a definition of the term “funds and other assets” in the Regulation, in line with FATF recommendations for the implementation of SR III to provide clear guidance to the financial sector.

It is suggested to provide a definition of the term “persons” or to specify whether the term refers to both physical persons and legal entities.

In line with FATF recommendations, it is suggested to add a provision in the Regulation that the lists of designated persons is regularly reviewed and updated.

5. Annex

FATF Special Recommendation III

1. The full text

Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.

Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

2. The objectives

Special Recommendation III is intended [...] to assist jurisdictions in implementing the targeted financial sanctions contained in the United Nations Security Council resolutions (UNSCRs) relating to the prevention and suppression of the financing of terrorist acts – UNSCR 1267 and its successor resolutions and UNSCR 1373 and any successor resolutions related to the freezing, or, if appropriate, seizure of terrorist assets.

Special Recommendation (SR) III consists of two obligations. The first requires jurisdictions to implement measures that will freeze or, if appropriate, seize terrorist-related funds or other assets without delay in accordance with relevant United Nations resolutions.

The second obligation of SR III is to have measures in place that permit a jurisdiction to seize or confiscate terrorist funds or other assets on the basis of an order or mechanism issued by a competent authority or a court.

The objective of the first requirement is to freeze terrorist-related funds or other assets based on reasonable grounds, or a reasonable basis, to suspect or believe that such funds or other assets could be used to finance terrorist activity.

The objective of the second requirement is to deprive terrorists of these funds or other assets if and when links have been adequately established between the funds or other assets and terrorists or terrorist activity.

3. Implementation mechanisms

Special Recommendation III can be transposed into national legislation through judicial or administrative measures.

The text of the draft

CABINET OF MINISTERS OF THE REPUBLIC OF AZERBAIJAN

**On adoption of the Regulation on implementation of the list of
natural and legal persons designated by the
United Nations Security Council Resolutions**

ORDINANCE № _____

Baku, « _____ » « _____ » 2010

In order to provide the implementation of item 1.3 of the Decree # 241, dated March 17, 2010, of the President of the Republic of Azerbaijan «On application of the Law of the Republic of Azerbaijan «On amendments to individual legislative acts of the Republic of Azerbaijan to enhance the prevention of the legalization of criminally obtained funds or other property and the financing of terrorism», **Cabinet of Ministers hereby order the following:**

1. «The Regulation on implementation of the list of natural and legal persons designated by the United Nations Security Council Resolutions» shall be approved (attached).
2. This Ordinance shall enter into force since the date of its publishing.

A. Rasi-zade

Prime Minister of the Republic of Azerbaijan

**Regulations on implementation of the list of
natural and legal persons designated by the
United Nations Security Council Resolutions**

I. General provisions

1. These Regulation has been developed in accordance with Decree #241, dated March 17, 2010, of the President of the Republic of Azerbaijan «On application of the Law of the Republic of Azerbaijan «On amendments to individual legislative acts of the Republic of Azerbaijan to enhance the prevention of the legalization of criminally obtained funds or other property and the financing of terrorism»; Decree # 920, dated May 11, 2002, of the President of the Republic of Azerbaijan «On Action Plan to provide implementation of the UN Security Council Resolutions #1368 dated September 12, 2001, #1373 dated September 28, 2001 and #1377 dated November 12, 2001 and UN Security Council successor Resolutions targeted to counter terrorism.

2. These Regulation establishes the procedure of domestic implementation the list of persons (hereinafter – designated persons) designated by the the United Nations Security Council Committee established pursuant to resolution 1267 (1999) on 15 October 1999 (hereinafter – the Al-Qaida and Taliban Sanctions Committee) in accordance with S/RES/1267(1999), and in the context of UN Security Council Resolution S/RES/1373(2001); make amendments to the list of persons, as well as identify duties of government authorities of the Republic of Azerbaijan.

3. These Regulation are intended to be preventive in nature, and does not identify the guilt of the designated persons in perpetration of specific crime in accordance with the presumption of innocence and targets taking the following preventive measures:

3.1. freeze without delay the funds and other financial assets of the designated persons derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets are made available, directly or indirectly for such persons' benefit, or by their nationals or by persons within their territory;

3.2. prevent the entry into or transit through the territory of the Republic of Azerbaijan of the designated persons, **provided that nothing in this paragraph shall oblige to deny entry or require the departure of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Al-Qaida and Taliban Sanctions Committee determines on a case-by-case basis only that entry or transit is justified;**

3.3. prevent the direct or indirect supply, sale, or transfer, to the designated persons , or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.

II. The procedure of domestic implementation of the list of designated persons

4. According to the international agreements joined by the Republic of Azerbaijan, the list of the designated persons published by the Al-Qaida and Taliban Sanctions Committee is approved by the Financial Monitoring Service under the Central Bank of the Republic of Azerbaijan (hereinafter – Financial Monitoring Service).

5. In the event the Al-Qaida and Taliban Sanctions Committee makes amendments to the list of the designated persons, the Financial Monitoring Service shall make appropriate amendments within 3 business days upon the reference of the Ministry of Foreign Affairs of the Republic of Azerbaijan (hereinafter – the Ministry of Foreign Affairs).

6. After being approved, the list of the designated persons as well as amendments to the list shall be published by the Financial Monitoring Service in official newspaper and to be sent to the relevant government authorities.

7. The list of the designated persons as well as amendments to the list shall be placed on the web-site of the Financial Monitoring Service «www.fiu.az», and to be submitted to the financial institutions and DNFBP by the Financial Monitoring Service directly or via relevant supervision authorities in accordance with the Law of the Republic of Azerbaijan «On Prevention of Legalization of Criminally Obtained Funds or Other Property and Financing of Terrorism».

III. Procedures for the submission of listing requests and other listing issues

8. Whether grounds specified in paragraph 9 of this Regulation exist to propose to the Al-Qaida and Taliban Sanctions Committee for listing of the citizen of the Republic of Azerbaijan, a foreigner permanently residing in the Republic of Azerbaijan or a stateless person, a legal entity registered in the territory of the Republic of Azerbaijan, a subsidiary or branch of a foreign legal entity registered in the territory of the Republic of Azerbaijan, the Ministry of National Security of the Republic of Azerbaijan (hereinafter – the Ministry of National Security) shall submit the following data and documents to the Ministry of Foreign Affairs for presentation of these data and documents to the Al-Qaida and Taliban Sanctions Committee:

8.1. data and documentation justifying the inclusion of the persons mentioned in paragraph 8 of this Regulation to the Consolidated List;

8.2. specific findings demonstrating the relationship of persons mentioned in paragraph 8 of this Regulation with Al-Qaida, Taliban or other terrorist organisation (intelligence, law enforcement, judicial, media, court decisions, etc);

8.3. supporting evidence or documents that can be supplied to prove the relationship of the persons mentioned in paragraph 8 of this Regulation with any person from the list of designated persons;

8.4. necessary data to be disclosed in the summary of the Al-Qaida and Taliban Sanctions Committee justifying the annexation of the persons mentioned in paragraph 8 of this Regulation to the Consolidated List;

8.5. sufficient identifying information to allow for the positive identification of the persons mentioned in paragraph 8 of this Regulation, including:

8.5.1. for individuals – family name/surname, given names, other relevant names, date of birth, place of birth, nationality/citizenship, gender, aliases, employment/occupation, residence, passport or travel document and national identification number, current and previous addresses, website addresses, and current location;

8.5.2. for legal persons – name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business or activity, leadership, tax or other identification number and other names by which it is known or was formerly known, and website addresses.

9. The grounds for reference of the name of the persons mentioned in paragraph 8 of this Regulation to the Al-Qaida and Taliban Sanctions Committee for the inclusion to the Consolidated List include:

9.1. participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

9.2. supplying, selling or transferring arms and related materiel to;

9.3. recruiting for; or otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

10. A standard form for the submission of listing requests and explanatory notes for the standard form for listing can be found in the listing section of the Al-Qaida and Taliban Sanctions Committee's website «www.un.org/sc/committees/1267/docs/worddocs/sfl_ind_adv.doc»

and «www.un.org/sc/committees/1267/pdf/sfl_explan_notes.pdf». The relevant information shall be placed on the websites of the Financial Monitoring Service and Ministry of Foreign Affairs as well.

11. The absence of the judgement for commission of an any offence shall not preclude the reference of the name of the persons mentioned in paragraph 8 of this Regulation to the Al-Qaida and Taliban Sanctions Committee for the annexation to the Consolidated List.

12. Under the reference of the Republic of Azerbaijan, the Ministry of Foreign Affairs is required to take all possible measures to notify or inform in writing without delay the newly listed persons on the Consolidated List of the measures imposed on them, any information on reasons for listing available on the Al-Qaida and Taliban Sanctions Committee's website.

IV. Procedures for the submission of de-listing requests

13. The citizen of the Republic of Azerbaijan, a foreigner permanently residing in the Republic of Azerbaijan or a stateless person, a legal entity registered in the territory of the Republic of Azerbaijan, a subsidiary or branch of a foreign legal entity registered in the territory of the Republic of Azerbaijan included to the Consolidated List by the Al-Qaida and Taliban Sanctions Committee may submit a petition for de-listing to the Al-Qaida and Taliban Sanctions Committee either directly or through the Ministry of Foreign Affairs.

14. In the de-listing submission, the petitioner needs to provide justification for the de-listing request, offer relevant information demonstrating non-compliance with the criteria under paragraph 9 of the Regulation and request support for the de-listing.

15. In case of submission a petition for de-listing through the Ministry of Foreign Affairs, the Ministry of Foreign Affairs forwards simultaneously the delivered documents to the Ministry of National Security, Ministry of Internal Affairs of the Republic of Azerbaijan (hereinafter – Ministry of Internal Affairs) and Financial Monitoring Service for issuance of legal opinion. The Ministry of Foreign Affairs is also required to take measures to obtain additional information and conduct consultations for de-listing with the jurisdiction that initiated the person's inclusion to the Consolidated List, or with the jurisdiction of the person's citizenship or permanent residence if appropriate.

16. A petition for de-listing is reviewed by the Ministry of Foreign Affairs within two months, and during that period the submitted documents shall be sent to the Al-Qaida and Taliban Sanctions Committee in conjunction with the final legal opinion on petition for de-listing endorsed with the Ministry of National Security, Ministry of Internal Affairs and Financial Monitoring Service.

17. A petition for de-listing of the deceased persons shall be made through direct application to the Al-Qaida and Taliban Sanctions Committee either by the Ministry of Foreign Affairs or the person's legal heir in cases concerning the citizen of the Republic of Azerbaijan. In this case, the documents confirming the death of the person and information on his/her legal heirs or stakeholders are attached to the petition.

18. The Ministry of Foreign Affairs is required to take all possible measures to notify or inform in writing without delay the de-listed person on the de-listing decision of the Al-Qaida and Taliban Sanctions Committee.

19. A standard form for the submission of de-listing requests can be found in the de-listing section of the Al-Qaida and Taliban Sanctions Committee's website «www.un.org/sc/committees/1267/delisting.shtml». The relevant information shall be placed on the websites of the Financial Monitoring Service and Ministry of Foreign Affairs as well.

V. Sanctions imposed on the persons on the Consolidated List and duties of government authorities

20. According to the Law of the Republic of Azerbaijan «On Prevention of Legalisation of Criminally Obtained Funds or other Property and the Financing of Terrorism», financial institutions and DNFBP are obliged to freeze without delay terrorist funds or other assets of designated persons, and immediately make STR to the Financial Monitoring Service about it; such freezing should take place without prior notification to the designated persons involved.

21. The freezing actions referred to in paragraph 20 of the Regulation should extend to funds or other assets wholly or jointly owned or controlled, directly or indirectly, by designated persons, terrorists, those who finance terrorism or terrorist organisations; and funds or other assets derived or generated from funds or other assets owned or controlled directly or indirectly by designated persons, terrorists, those who finance terrorism or terrorist organisations.

22. The designated persons and listed persons on the Consolidated List shall be included by the Ministry of Internal Affairs to border–passage constraints list of «Interagency Entry–Exit and Registration Automatic Data–Search System», to prevent the entry into or transit through the territory of the Republic of Azerbaijan of the designated persons and listed persons on the Consolidated List as well as transportation of the terrorist funds or other assets of into or out of the Republic of Azerbaijan.

23. The Financial Monitoring Service is required to take appropriate measures to establish computerised data base on the terrorist funds or other assets of the designated persons and listed persons on the Consolidated List. According to national legal principles and international instruments joined by the Republic of Azerbaijan, the Financial Monitoring Service within the framework of its competence, is required to examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other jurisdictions as well as to ensure the prompt determination, whether reasonable grounds or a reasonable basis exists to initiate a freezing action and the subsequent freezing of funds or other assets without delay.