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

Technical Paper: Assessment of draft Law of the Republic of Azerbaijan on the Prevention of Conflicts of Interest in the Activities of the Public Officials

Prepared by:

Dr Quentin REED, United Kingdom
Council of Europe Expert

PC –TC (2008) 63

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

1. Executive Summary

This opinion provides comments on and recommendations of the Council of Europe Long-Term Advisor to the Project of Support to the Anti-corruption Strategy of Azerbaijan on the Draft Law on the Prevention of Conflicts of Interest in the Activities of Public Officials in the version provided to the AZPAC project in November 2008 by the Commission on Combating Corruption. The provision of this opinion falls under Activity 2.2 of the AZPAC Project (Advice and/or Roundtable Discussions in support of the elaboration of draft laws).

The Long-Term Advisor submitted as a Council of Europe expert an opinion on a previous draft in January 2007, which highlighted important problems in the draft and made a number of recommendations. However, the draft remains identical except for the addition of a requirement that the Enforcement Agency publish its annual report.

The expert therefore remains of the opinion that the draft law needs substantial revision. Since writing the previous opinion, the expert has worked in Azerbaijan for 10 months, giving him greater insight into the local environment. As the authorities state that the draft law will soon be submitted to the Parliament (*Milli Majlis*), the expert wishes to highlight a number of key concerns which, if not addressed, will have a serious and negative impact on the implementation of the law:

- The scope of the draft law is problematic. Definitions of key terms are too wide, and the law includes prohibitions on corruption behaviour which largely belong in other laws. Moreover, the range of officials to which the law applies is problematic, applying the same provisions to elected local officials as to civil servants. The definition of private interests and interested parties is too wide in descriptive terms, yet also too narrow as it does not include indirect business/financial relationships that often are the reality of conflict of interest in Azerbaijan.

- Likewise, the meaning of a number of a number of provisions is either vague or not clear. Together with definitional problems, this may have serious knock-on effects, for example causing prohibitions to be too wide-ranging to be observable or enforceable.

- The emphasis of the law seems to be to attempt to prevent any conflicts of interest arising at all. By contrast, good international practice shows that it is impossible to present conflicts of interest arising, and it is therefore important to define more clearly in the draft law two other elements of regulation: clear duties under which public officials must exclude themselves from taking decisions where they are subject to a conflict of interest, and duties to disclose interests which may give rise to conflicts of interest.

- The provisions in the law establishing the 'enforcement framework' require substantial clarification and revision – in particular to include proper protection of whistleblowers, define more clearly the process for hearings of allegations against public officials, and remove provisions concerning the return of unlawfully acquired assets by public officials.

This opinion makes recommendations based on the need – especially in the Azerbaijani context where corruption (including nepotism) is believed to be widespread - to base conflict of regulation on a limited number of clear priorities, with provisions that are simple, clear and above all realistic so that they may be implemented successfully.

2. Definitions, Clarity and the Scope of the Draft Law

As noted in the previous opinion, the scope of the draft law is problematic. The following comments are particularly important.

2.1 Definition of conflict of interest

Article 1.1.6 defines conflict of interest as

a situation which concerns public official or his/her family members or is a situation in which public official has a private interest which is such as to influence or appear to influence the objective and impartial performance of his/her official duties.

The first part of this definition – 'a situation which concerns public official or his/her family members' is extremely vague and could be interpreted to include a multitude of situations which do not involve any conflict of interest as the concept if ordinarily understood. It is strongly recommended to delete it, as the remainder of the definition is in line with good international practice.

2.2 Conflict of interest vs. corruption

The law tends to create the impression that conflict of interest is a form of corruption by juxtaposing provisions to prevent or address conflicts of interest with prohibitions on misuse of office for private gain. It is vital, by contrast for officials and regulators to be clear that a conflict of interest is a *situation, not an action* and does not in itself entail any wrong-doing. The inclusion of prohibitions on the misuse of office for personal benefit (as in for example Article 4, 8, 11), or soliciting contributions to state institutions (Article 12) do not belong in a law regulating conflicts of interest, and may serve to create the impression that conflict of interest and corruption are the same thing – or at least blur the important distinction between them. The expert recommends again in general that such provisions are limited or deleted where they are already contained in other laws (such as the Law on Combating Corruption).

2.3 Range of officials to which the law applies

The draft law is to apply to a very wide range of public officials, from ministers to local elected officials, although it excludes members of the parliaments of Azerbaijan and Nakhichevan Autonomous Republic.

- The expert remains highly sceptical about applying similar regulations to both civil servants and local elected officials. This approach (which means forbidding elected officials from holding management or statutory positions in legal entities) is clearly not in line with international best practice and imposes excessive restrictions on the activities of officials who are by nature temporary. It is recommended to exclude local elected officials from the scope of the law and to consider making the stricter provisions of the law applicable.

- As noted in the previous opinion, while elected officials should not be regulated as strictly as other public officials, they should be subject to some form of conflict of interest regulations. The imposition of a conflict of interest law on all public officials except national and Nakhichevan MPs appears unbalanced. The latter should be subject at least to duties to declare their financial interests and conflicts of interest that arise in the course of the performance of their mandate.

2.4 Definition of 'interested person'

Article 1.1.7 defines private interest as 'advantages, privileges, material, and other benefits for the public official or the interested person.' An 'interested person' is defined as a wide range of individuals and entities, including close relatives - themselves very widely defined. Many of the other prohibitions in the draft law are then 'operationalised' with these definitions. For example, Articles 5.1-5.2 prohibit an official from participating in the preparation or adoption of laws or

other normative acts or in any other action (inaction), or influencing another public official participating in the same, to benefit his/her own private interests. The expert believes the draft contains the following problems:

- The definition of 'interested person' in Article 1.1.5 of the draft law is too wide (taking into account the unclear meaning of the term of 'business or financial relationships'). Given the scope of the definitions cited, the expert feels that this could put almost any official with important regulatory or discretionary powers at high risk of violating the law involuntarily – in particular, where a relatively benefits without the official knowing, or where an interested person benefits but only incidentally. For example, Articles 13.1-13.2 prohibit a public official or his/her interested person(s) from participation in contracts with the institution served by the public official. Again, due to the wide definition of 'interested person' it is strongly recommended to regulate this issue differently, by imposing a duty on such officials to declare such interests and exclude themselves from decision-making in relevant procurements where this is possible (as recommended in Section 2 of this opinion), and only prohibit such procurements where such a solution is impossible.

- Article 11.3 prohibits a superior public official from entering into 'business or financial relationships with another public official or that public official's interested person'. The law does not however define 'business or financial relationship', and as noted in the previous opinion it is unclear for example whether a superior public official would be violating the law if s/he privately purchased holiday travel insurance from a company in which a relative worked as a manager – an instance that would in most countries be deemed as entirely acceptable.

- The definition is also too narrow in the sense that it will not prohibit the types of corruption-assisted business interests often held in Azerbaijan by public officials. There is a widespread perception that many officials have business interests that are held surreptitiously through third persons, with no formal link or contract linking the official to such persons. In order for the conflict of interest law to be applicable to such situations, it is necessary to ensure that private interest is defined in such a way as to include such informal arrangement.

2.5 Articles 4 and 7

Articles 4 (Use of official powers for private interests) and 7 (Restrictions on public officials holding additional positions) lack clarity to an extent that raises worries concerning the wording of the rest of the draft law. Article 4.2 states that

No public official shall engage any activity, incompatible with his/her official duties and own shares including common property shares in a legal person, which may impair objective and impartial performance of his/her duties.

As noted in the previous opinion, there is no definition of which activities *are* incompatible with official duties, nor any definition of what size or kind of shareholding in a legal person might impair the objective and impartial performance of duties. Equally important, the provision mixes together two issues – engaging in an 'incompatible activity' and owning shares – without clearly stating whether there are two separate prohibitions or one.

Article 7.1 states that 'A public official may not engage in any activity that might create a conflict of interest while exercising his/her professional duties.' Moreover, the article prohibits activities in general rather than the holding of positions, moving it beyond the scope of Article 7 and making it overlap in an unclear fashion with Article 4.2. It is recommended that Article 4.2 is incorporated into Section 7 and clarified.

3. Prohibition, Disclosure and Exclusion from Decision-Making

While the draft law contains many prohibitions, such prohibitions are only one element of a comprehensive framework for regulating conflict of interest. Since it is impossible to foresee (and therefore impossible to prohibit) all possible situations of conflict of interest, two other elements are vital: disclosure (declaration) by officials of their private interests, and exclusion of officials from participation in decisions where they are subject to a conflict of interest.

3.1 The need for clear integrated provisions on exclusion from decision-making

Article 5 contains several provisions which entail exclusion of officials from participating in decisions where they are subject to a conflict of interest. However, in the opinion of the expert these provisions do not define sufficiently clearly the process by which an official is excluded – or excludes him/herself from such decisions:

- Article 5.1 states that 'While exercising his/her official duties, no public official shall participate in drafting or adopting any normative legal acts or acts of normative character, decisions, contracts and perform inspectorial or supervisory duties on the issues concerning his/her private interests…'. This provision does not specify exactly how an official is to withdraw from such participation.

- Article 5.4 states that an official 'who is a member of a board, in case where issues examined by the board affect his/her private interests shall inform this body and ask the latter to be authorised to refrain from participating in the examination of these issues.' It is unclear what is meant by 'board' here, and why the provision only applies to an official who is a member of such a board.

- Article 19.1 states that 'If any of the issues examined by a public official create conflicts of interest, he/she must immediately inform direct superior management or relevant state institution, cease his participation in the solution of such matters, and must take other necessary measures to prevent or eliminate the conflict of interest.' While this article is the closest of any in the draft to a well-drafted statement of disclosure duty, it is in potential conflict with Article 5.4, which states a duty not to cease participation but to request authorisation to cease participation.

The expert recommends that these three articles are covered instead by one clear article stating that any public official who finds that s/he will be in a position of participating in the preparation, drafting, adopting of decisions or otherwise exercising discretionary powers where s/he is subject to a conflict of interest should notify his/her superior and either i) refrain from participation in such decision-making or ii) request his/her superior to allow him/her to refrain from such participation.

3.2 The need for clear duties of disclosure

While Article 19.1 contains a duty of an official to inform the superior of any conflicts of interest that arise in the performance of his/her duty. Article 16.6 states that 'Where proposals of other employment may create conflicts of interest, public official must inform the head of the state institution or municipal body.'

- The expert believes that these disclosure provisions are inadequate. International practice suggests that – and the expert recommends that - the draft is modified such that officials are subject to a general duty to inform their superior of any interests held that could at some point give rise to a conflict of interest, for example any important positions held by family members, shares in legal entities etc. Such information could be required under the implementing regulations expected to be drafted to implement the Law on Approval of

Procedures for Submission of Financial Information by Public Officials.

- The disclosure described in Article 16.6 should not be to the head of a state body but to the official's superior, or head of the relevant department of the institution.

3.3 The need for realism: salaries of public officials

The draft law contains extensive prohibitions on the external activities of public officials. The expert wishes to stress that such prohibitions will only be realistically enforceable – and indeed fair – if the authorities ensure that public officials receive salaries which are commensurate with their responsibilities. This does not appear to be the case at the time of writing.

4. Enforcement

Chapter III of the draft law describes the framework for enforcement of conflict of interest regulations. The expert wishes to underline the following comments and recommendations made in his previous opinion concerning this part of the draft.

4.1 Enforcement framework: general

The expert is under the impression that the Azerbaijan authorities are likely to select the Civil Service Commission as the Enforcement Agency. The expert has the following comments:

- It is important to define more clearly in Article 18.1 who is responsible for enforcement.

- Whether the CSC or the Commission on Combating Corruption is selected, it is of prime importance that the agency is adequately staffed and equipped to carry out its functions envisaged by the law. In the opinion of the expert neither commission is currently staffed and equipped adequately to do this.

- The enforcement framework should be coordinated closely with the framework for supervising the financial declarations of public officials, as the latter may be an important source of information may be an important source of information on the private interests of public officials.

4.2 Applications by public officials and protection of whistleblowers

Article 23 contains all-important provisions concerning the submission by public officials of information on alleged violations, and on the protection of whistleblowers.

- The expert strongly recommends that the law clearly allows anonymous applications to the Enforcement Agency concerning specific officials and violations to be examined and used as a basis for the agency's enquiries. Otherwise public officials will not submit applications concerning violations of any official superior to them.

- Article 23.4 establishes the duty of public officials to notify their superior or the Enforcement Agency of any conduct which s/he knows or should reasonably know to be a violation of the law and related laws, and officials failing to do so are to be subject to disciplinary proceedings. Article 23.6 states that the Enforcement Agency shall defend public officials against retaliation by their state institutions, municipal bodies and superiors by issuing 'recommendations to management of state institution, municipal body or superior public official to take any action to protect such public officials, and reverse any act of retaliation against them.' Given the position of the Azerbaijan authorities that this

will be the only provision in domestic law on whistleblower protection, the expert wishes to underline strongly that Article 23.6 in particular is entirely inadequate to protect whistleblowers. In order to protect public officials against retaliation it is necessary to establish a legal prohibition on retaliation, including sanctions against superiors who carry out such acts of retaliation and compensation for officials so punished.

4.3 Procedures and hearings

The expert wishes to reiterate the need for procedures for investigations and hearings to be more clearly defined. In particular:

- Hearings (Article 25) should not be open to the public unless explicitly requested by the public official under investigation. Public hearings may involve discussion of the details of private affairs of public officials (many of whom will be innocent of any wrong-doing), whose publication will often have no public interest justification.

- A record of each hearing must be made, if for no other reason than the findings of the Agency should be subject to appeal in court if the official so wishes.

- The order for a hearing, its findings and conclusions should be made public if wrongdoing is confirmed and either confirmed in a final court decision on appeal, or if the official explicitly requests. Findings of Enforcement Agency investigations concerning officials who are found to be innocent of any wrongdoing should not be published unless the official so wishes.

- Article 28.1, which states that public officials will voluntarily 'compensate' (i.e. hand over) to the state property they acquired unlawfully as well as the cost (i.e. value) of privileges and advantages unlawfully obtained should be deleted. The findings of the Enforcement Agency regarding this law cannot entail findings on unlawful acquisition of property, since no provisions in the draft law refer to any such acquisition. If the Agency determines that an official has committed criminal or administrative violations, then under **Article 24.10** of this draft law it shall submit a report to a relevant law enforcement body, which will then presumably investigate the matter and initiate criminal proceedings if necessary. Whether an official has unlawfully acquired property can therefore only be determined by a court, and there can therefore be no duty to hand over assets to the State or municipality without a court decision.

- It is vital that public officials have the right to judicial review (appeal to courts) of Enforcement Agency decisions. The expert assumes that this right is contained in administrative law in general; if it is not then the draft law should be amended to establish it.