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Istanbul Anti-Corruption Action Plan for

**ARMENIA, AZERBAIJAN, GEORGIA, THE KYRGYZ REPUBLIC, THE
RUSSIAN FEDERATION, TAJIKISTAN AND UKRAINE**

Review of Legal and Institutional Framework for Fighting Corruption

AZERBAIJAN

Summary Assessment and Recommendations

Endorsed on 18 June 2004

I) NATIONAL ANTI-CORRUPTION POLICY AND INSTITUTIONS

General assessment and recommendations

According to the draft Status Report, Azerbaijan is aware that corruption and weak public administration have a corrosive impact on socio-economic development, building of market economy and promotion of investment, and are detrimental to political and public institutions in a democratic state. Consequently, the country is committed to develop its anti-corruption strategy taking into account best domestic and international practices. Transparency International's Corruption Perception Index placed Azerbaijan at the 125th place (in the list of 133) in 2003. However, it has to be recognised that recently the country made significant improvements in building and strengthening its anti-corruption institutions and the legal framework in this area.

The Republic of Azerbaijan has ratified several relevant international documents, amongst them Council of Europe Convention on Mutual Assistance in Criminal Matters, Council of Europe Convention on Extradition, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, United Nations Convention on Transitional Organized Crime, as well as Council of Europe Civil Law and Criminal Law Conventions on Corruption. In 2004 Azerbaijan has also joined the Council of Europe's Group of States against Corruption (GRECO) and signed United Nations Convention against Corruption.

A legal framework of the anti-corruption strategy in Azerbaijan began to shape in 1994; it comprises laws and other regulations. The Decree "On Enhancement of Fight against Crime and the Strengthening of Law and Order" issued in 1994 provided specific instructions to authorities aimed at uncovering bribery acts. Furthermore, a specialized department for fight against organized crime and corruption has been established within the Ministry of the Interior.

To enhance legislation and public administration the President signed a decree "On Strengthening Fight against Corruption in the Azerbaijan Republic" in June, 2000. Under the Decree, a special State Program for fighting against corruption has been elaborated to provide for a range of practical measures aimed at controlling corruption.

Besides, in early 2004 a Law "On Fight against Corruption" was passed which is designed to strengthen the capacities and powers of state institutions in detection and suppression of corruption offences, eliminating negative effects of corruption, guaranteeing social justice, human rights and freedoms, creating favorable conditions for economic development, ensuring the rule of law, transparency and effectiveness in activities of state or local authorities and public officials. The law provides definitions of corruption, perpetrators of corruption offences, responsibilities of public officials, as well as of natural or legal persons for corruption. According to this law the Commission for Fight against Corruption at the Civil Service Executive Board is responsible for preventive measures.

The decree of the President "On application of Anti-corruption Law" of 3 March 2004 furthermore provides for establishment of the Department for combating corruption under the Prosecutor-General. It is noteworthy that this Department has recently been established.

Despite the high level of Corruption Perception Index in Azerbaijan, the number of persons, actually convicted for corruption related criminal offences in the last years is low. The low figures suggest a need for imminent and concrete measures in the area of law enforcement. At present, different law-enforcement and prosecutor's bodies are engaged in combating the corruption-related offences. Pursuant to Article 1 of the Law "On operative and detection activity" of 29 October 1999, one of the tasks of such activity is the struggle against the crimes which are prepared or being committed, as well as detection of already committed crimes. President's decree of 11 November 1999 "On application of the Law of Azerbaijan "On operative and detection activity" defined the list of competent bodies engaged in operative and detection activity. According to Article 2 of this Decree, these bodies include the Ministry of Interior, The Ministry on National Security, the Ministry of

Justice, the Main Board for Security of State Administration Authorities, the Customs Committee, and the State Frontier Guards. Similar norms were included into relevant statutory laws. Each state body has issued the regulations defining the divisions in charge of the struggle against corruption-related and other kinds of crimes. For instance, order of the Ministry of Interior as of 17 March 2000 approved the provision on the department for the struggle against the organized crime, according to which the collection, processing, storage and realization of operative information about the facts of corruption is included into the jurisdiction of this department. Preliminary investigation is conducted by the prosecutor's office and by investigative departments of the Ministries of Interior, National Security, Justice, Taxation, the State Customs Committee and the State Frontier Guards. Besides, criminal investigation is further divided in two phases: inquest and investigation.

This description indicates a very complex and fragmented system of detection, investigation and prosecution of corruption and corruption-related offences. One of solutions could be the simplification of Azerbaijan criminal and especially pre-trial, investigative proceedings. However, as a priority, the country should undertake measures for consolidating efforts on the repressive side of in the fight against corruption. The Department for combating corruption under the Prosecutor-General of Azerbaijan should be made operational as soon as possible. It is recommended for Azerbaijan that specialized bodies are vested with concrete, investigative and prosecutorial powers as well as preventive and educational tasks. The mentioned Department, which has recently been established, should be independent within the organizational structure of the state prosecution service, it should exercise jurisdiction over the whole territory of Azerbaijan and its subject matter jurisdiction should be based on the law rather than on case to case arbitrary decisions.

It is difficult to tackle corruption in all public agencies at the same time, even more so in a country with limited financial resources. Focusing efforts at a few selected institutions could demonstrate the possibility of positive changes. Such focused measures should comprise a review of regulatory and institutional settings of such agencies and their operational practices in order to identify and minimize factors which favor corruption (e.g. by limiting discretionary powers of civil servants, strengthening internal control, introducing preventive measures, recruiting and promoting new staff through transparent procedures, measuring and reporting improvements). Accordingly, one or two pilot projects, covering preventive and repressive aspects, could be undertaken in one or two selected corruption-prone public institutions.

The country should also conduct further specialized surveys on corruption in public and in private sectors, using special expert methods (possibly in cooperation with the civil society) to better understand the actual level of corruption, its reasons and trends. It is further necessary to involve private sector and civil society in the fight against corruption to largest extent possible. The Government of Azerbaijan should support and encourage activities of nongovernmental organizations. It should loudly and clearly announce that no prosecutions will follow if nongovernmental organizations openly criticize for example high ranking public official for unethical or corrupt behavior. All allegations of corruption coming from private sector and civil society should be dealt with seriously and accurately; if there is substantial violation behind the allegations, legal action from a competent state body shall follow consistently and with no exemptions.

Specific recommendations

1. *Speed up efforts to adopt a comprehensive Anti-Corruption Program (Special State Program for Fighting Corruption) aiming at strengthening the implementation of anti-corruption measures. The Program should build on an analysis of the patterns of corruption in the country. It should propose focused anti-corruption measures or plans for selected institutions and have a balanced approach of repressive and preventive measures. The Program should also envisage effective monitoring and reporting mechanisms based on a participatory process which would include civil society in general and associations with experience in the area of anti-corruption, as well as the private sector / business community. In the light of this, ensure that the adopted strategy is widely disseminated within the civil service and among general public.*

2. *Ensure involvement and participation of civil society in general and through associations with experience in the area of anti-corruption, as well as representatives of the private sector / business community in the work of the existing Commission for Fight against Corruption at the Civil Service Executive Board.*
3. *Speed-up activities to implement the President's Decree "On Application of Anti-corruption Law" of 3 March 2004 and support the work of the Special Anti-corruption Department within the Prosecution Service with adequate resources for its proper functioning. This Department should be empowered to detect, investigate and prosecute corruption offences, as an autonomous Department with a special status integrated in the Prosecutor's Office with officers seconded from the main law enforcement agencies. This Department should have investigative, prosecutorial, administrative and analytical tasks. It is important that it includes specialized prosecutors. Apart from working on actual corruption cases, one of the main tasks of this Department would be to enhance inter-agency cooperation between a number of law enforcement, security and financial control bodies in corruption investigations (e.g. by adopting clear guidelines for reporting and exchange of information, introducing a team-work approach in complex investigations etc.); and to increase analytical capacities and ensure more efficient statistical monitoring of corruption and corruption-related offences in all spheres of the Civil Service, the Police, the Public Prosecutor's Offices, and the Courts on the basis of a harmonized methodology, which would enable comparisons among institutions.*
4. *Continue with corruption-specific joint trainings for police, prosecutors, judges and other law enforcement officials; provide adequate resources for the enforcement of anti-corruption legislation.*
5. *Conduct further surveys and relevant research, based on transparent, internationally comparable methodology, to obtain more precise information about the scale of corruption in the country, and in order to ascertain the true extent to which this phenomenon affects specific institutions, such as the police, judiciary, public procurement, tax and custom services, education, health system, etc.*
6. *Conduct awareness raising campaigns and organize training for the relevant public associations, state officials and the private sector about the sources and the impact of corruption, about the tools to fight against and prevent corruption, and on the rights of citizens in their interaction with public institutions.*
7. *Ratify the UN Convention against Corruption.*

II) LEGISLATION AND CRIMINALISATION OF CORRUPTION

General assessment and recommendations

The Criminal Code of Azerbaijan criminalizes the major forms of corruptive activity, such as receiving a bribe ("passive" bribery) and giving a bribe ("active" bribery). However, bribery offences do not fully comply with international standards (such as the United Nation's Convention on Corruption, the Council of Europe's Criminal Law Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions). Namely, the definition of the prohibited acts, the nature of the bribe and the intervention of third persons appear insufficient.

Under the current legislation, for instance, offering of a bribe is connected with actual receiving a bribe and is not a completed criminal offence. Accordingly, it is only considered as an attempt of giving a bribe if the official, for whatever reason, does not receive the bribe. On the other side, the crime seems to be committed if the official accepts the bribe, but does not deliver the expected action or inaction. The bribe must be given in the interest of the official or persons that he represents; this excludes other third parties, which the official does not necessarily represent, such as political parties. The current criminalization of active and passive bribery is

limited to material benefit. The receipt of non-material benefits could under certain circumstances only be qualified as abuse of official position. This approach cannot be regarded as adequate for the following considerations: (a) it may rule out the responsibility of a person providing non-material benefit, as not being an official, this person cannot be regarded as the subject of office abuse; (b) material and non-material benefit, being by nature identical benefits granted for one and the same purposes, cannot entail different legal evaluations and sanctions differing in severity.

However, draft legislation has already been prepared and after consideration in the Government shall be submitted to the Parliament shortly. The aim of this legislation is to ensure compliance of the criminal legislation in the area of corruption with the above mentioned international standards.

The sanctions for passive bribery seem proportionate and dissuasive, but the sanctions for active bribery are not dissuasive enough as they fall under the category of less grave crimes. Consequently, the statute of limitation allow for prosecution only for five years after commitment of the crime. This period is suspended for very restricted reasons.

The Criminal legislation envisages a number of corruption related offences such as malfeasance in office, forgery in office and abusing official powers. However, corruption in the private sector and trading in influence are currently not criminalized and the liability of legal persons for corruption and corruption-related offences committed by the representatives and/or employers for the legal person or on its behalf is not envisaged in the law.

It appears that anticorruption legislation as well as perception of corruption in Azerbaijan is concentrated mainly on public sector corruption and generally covers the areas of public-public and public-private relationships and activities. Corruption related to activities in the private sector are not perceived as corruption and are not treated with the same seriousness as public sector corruption. As corruption in private sector deserves equal attention, new incriminations need to be considered in this regard, such as giving and accepting gifts related to business activities and insider trading.

Article 308 of the Criminal Code includes a definition of the public official. Although the Status Report claims otherwise, it seems that the notion of "official" does not cover foreign officials and officials of international organizations.

The Deputies of Parliament, the President, the Prime Minister and the human rights Ombudsman enjoy immunity during their office term; their immunity can be lifted under restrictive conditions. Judges also enjoy immunity and their immunity can only be lifted after their suspension. However, there is a need for reviewing the procedures for lifting immunity.

Confiscation of property is done only in cases set forth by relevant articles of the Criminal Code. Under Articles 311 and 312, confiscation is only possible in aggravated cases. Confiscation is seen as an additional penalty only. An efficient confiscation regime should allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of the domestic law. Furthermore, it appears that value-based confiscation is not possible.

The investigative authorities seem to have access to all major forms of investigative techniques. When conducting investigations of corruption offences, competent authorities should be able to obtain documents and information for use in those investigations, and in prosecutions and related actions. This should include powers to use compulsory measures for the production of records held by financial institutions and other persons, for the search of persons and premises, and for the seizure and obtaining of evidence.

Little is known about possible links between corruption and organized crime.

Specific recommendations

8. *Speed up the adoption and implementation of the draft legislation which should harmonize the criminal legislation in the area of corruption with the relevant international standards (such as the United Nation's Convention on Corruption, the Council of Europe's Criminal Law Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions).*
9. *Amend the incriminations of corruption offences to meet international standards. In particular ensure that undue benefits include material as well as non-material benefits, and that bribery through intermediaries is fully covered.*
10. *Take steps to make the actual period of limitation for corruption cases longer and consider increasing the punishment for active bribery.*
11. *Ensure the criminalisation of bribery of foreign and international public officials, either through expanding the definition of an "official" or by introducing separate criminal offences in the Criminal Code.*
12. *Introduce procedures and clear criteria for lifting immunities enjoyed by judges.*
13. *Amend the legislation on confiscation of proceeds from crime to comply with international standards (such as the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime). Introduce a proposal to amend the Criminal Code ensuring that the 'confiscation of proceeds' measure applies mandatory to all corruption and corruption-related offences. Ensure that confiscation regime allows for confiscation of proceeds of corruption, or property the value of which corresponds to that of such proceeds or monetary sanctions of comparable effect. Review the provisional measures to make the procedure for identification and seizure of proceeds from corruption in the criminal investigation and prosecution phases efficient and operational.*
14. *Recognising that the responsibility of legal persons for corruption offences is an international standard included in all international legal instruments on corruption Azerbaijan should, with the assistance of organisations that have experience in implementing the concept of liability of legal persons (such as the OECD and the Council of Europe), consider how to introduce into its legal system efficient and effective liability of legal persons for corruption.*
15. *Recognising that a strong nexus can exist between organised crime and corruption, with the possible assistance of organisations that have experience in fighting against these forms of criminal activity, study the interrelations between the two.*

III) TRANSPARENCY OF THE CIVIL SERVICE AND FINANCIAL CONTROL ISSUES

General assessment and recommendations

Regulatory framework in Azerbaijan appears to be adequate for the operation of merit-based civil service. Meantime, however, the procedure of recruitment allows for some discretionary decisions of such nature, which may leave space for abuse. For example, chief executives of authorities may select one of several candidates for employment who have already passed tests and interviews, i.e. the competition does not result in finding a single best candidate. Considering the above problems, Azerbaijan's Government is preparing amendments to the recruitment system to enhance merit based recruitment.

As for the prevention of corruption, Azerbaijan like most states has its strengths and weaknesses. Apart from "The Code of Honor of Judges in the Azerbaijan Republic" there is no uniformed Codes of Ethics for Public Officials in Azerbaijan. On the other hand it is commendable that officials are required to present information on their income, assets and debts. Civil servants also have a number of incompatibility rules although there appears to be no concept of conflict of interests applied. There seems to be no legal obligation in Azerbaijan to report corruption unless it constitutes a grave or especially grave crime. There is also no procedure for the protection of whistle blowers.

It must be noted positively that both tax and customs bodies in Azerbaijan have individual programs against internal corruption. The legislation of Azerbaijan also does not provide for direct or indirect deductibility of paid bribes from the total taxable amount.

Azerbaijan as the member of the European Organization of Supreme Audit Institutions (EUROSAI) has done much to fulfill objectives, defined in article 1 of the Organization's Statutes: to promote the exchange of information and documentation, to promote the study of public audit, to stimulate the creating of University Professorships in this subject and to ensure the unification of terminology in the field of public audit. It is very important for country with transit economy. However, the financial sector is not very active. Security market is not well developed in Azerbaijan. As regards the insurance sector very small amounts of money circulate in this area. Consequently, the economy of Azerbaijan is heavily cash-based. However, the number of bank accounts for salaries has recently started to increase.

According to the Article 21 (Control over implementation of republican budget) of the Law of Azerbaijan Republic on Budget System: Control over implementation of republican budget is to be carried out by the National Council of the Azerbaijan Republic, the Ministry of Finance, and Chamber of Accounts of the Azerbaijan Republic. These authorities fulfill within the limits of their powers accounting of incomes, directions and spending of budget appropriations both on republican budget and over the territory of the republic as a whole and provide the National Council of the Azerbaijan Republic with the corresponding information. The law determines the order of presentation, terms and forms of accounting. Current control over budget implementation is to be fulfilled by the Ministry of Finance of the Azerbaijan Republic and the Chamber of Accounts. The National Bank can exercise usual supervisory competences, including obtaining access to all information relating to the activities of the banks, including information on specific accounts. The powers of the National Bank lay sanction on the credit institutions in case of non-compliance with the legislation and the orders issued by the National Bank seem quite appropriate and far-ranging. There seems to be in place also appropriate powers for the Securities Committee. In accordance with the regulation of the National Bank on Organising Internal Control and Audit in Banks, banks must establish programmes that include internal control, procedures and policies, law compliance, employee training and an audit function of the internal system.

Overall Azerbaijan has a limited legal framework against money laundering. Corruption offences are not predicate offences to money laundering in Azerbaijan, which falls short of international standards. Azerbaijan has no financial intelligence unit either.

Azerbaijan's constitution provides ample guarantees for citizens' access to information. Nevertheless, the procedures and mechanisms, as well as actual implementation of the legislation in the area of access to information needs to be improved.

The number of registered non-governmental organizations in Azerbaijan is allegedly up to 1600 and NGOs even enjoy certain tax-exempts. Moreover Azerbaijan has by and large adequate legal framework in the area of NGOs.

Azerbaijan has a system of financial reporting of political parties where the parties have to disclose their revenue and sources thereof as well their expenditure. This is a mechanism, which, if enforced in a proper and non-discriminatory manner, is a potent tool against corruption.

Specific recommendations

16. *Strengthen recruitment and promotion process to the civil service by enhancing the significance of objectively verifiable and merit-related criteria and limiting to the extent possible opportunities for discretionary decisions.*
17. *Screen the system for the control of assets of public officials to detect any possible loopholes and develop proposals to eliminate such loopholes. Consider increasing responsibility (not just disciplinary) for public officials for failure to comply with requirement to declare income, assets and liabilities. Consider disclosing publicly the declarations of certain groups of public officials.*
18. *Adopt a uniformed Code of Ethic / Code of Conduct for Public Officials modeled on international standards (e.g. such as Council of Europe Model Code of Conduct for Public Officials) as well as specific codes of conduct for professions particularly exposed to corruption, such as police officers, prosecutors, tax officials, lawyers, accountants, etc. In addition, prepare, and widely disseminate, comprehensive and practical guidelines for public officials on corruption, conflict of interests, ethical standards, sanctions and reporting of corruption.*
19. *Set up a state authority body to supervise the implementation of laws and regulations in the civil service and, particularly, control the observance of conflict of interest regulations. Where needed, introduce legally binding regulations to directly address conflicts of interest in the civil service.*
20. *Adopt measures for the protection of employees in state institutions against disciplinary action and harassment when they report suspicious practices within the institutions to law enforcement authorities or prosecutors, and launch an internal campaign to raise awareness of those measures among civil servants. Adopt regulations on the protection of "whistleblowers".*
21. *Enact and implement clear rules on disclosure (making information accessible) and transparency of public expenditure. Consider possibilities to increase transparency in public procurement and with regard to credit agreements with international financial institutions.*
22. *Introduce legislation that fully covers the international standard as to combating money laundering, namely, as to criminalize the laundering of proceeds of all serious crimes (including corruption). Establish a financial intelligence unit.*
23. *Encourage non-governmental participation in the solving of policy issues and continue efforts to prevent obstacles for NGO registration and activities in practice.*
24. *Revise the access to information legislation to determine more precisely procedures and mechanisms for access to information and ensure that in practice the discretion of public officials is reasonably limited.*