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to the United Nations
Convention against Corruption**

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Convention against Corruption**

Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Azerbaijan

1. Introduction

1.1. Legal system of Azerbaijan

The Convention was signed by Azerbaijan on 27 February 2004 and ratified by Parliament on 30 September 2005. Azerbaijan deposited its instrument of ratification on 1 November 2005.

The Convention can be applied directly, complementary to national statutory law, on procedural issues. On issues of substantive criminal law, in particular the criminalization of offences, implementing legislation is required. Azerbaijan has a civil law system.

1.2. Overview of the anti-corruption legal and institutional framework of Azerbaijan

The institutions most relevant to the fight against corruption in Azerbaijan are the Commission on Combating Corruption, the Anti-Corruption Department of the Prosecutor General's Office (a specialized national agency), other relevant departments of the Prosecutor General's Office, the Financial Monitoring Service, the Ministry of Internal Affairs, the Ministry of Justice, the Ministry of Taxes, the Judicial Legal Council and the Public Service Commission. There are several law enforcement and auditing agencies, and other relevant stakeholders include the judiciary, parliamentarians, the Independent Legal Services Commission, civil society, the private sector and the media.

The Penal Code of Azerbaijan entered into force in September 2000. Chapter 33 related to corruption offences was subject to amendments in April 2006 and in June 2011. Azerbaijan recently passed an amendment to the Penal Code that constitutes the responsibility of legal persons for corruption, among other offences, and the mandatory nature of confiscation for all offences as a criminal measure (signed by the President on 7 March 2012; entry into force on 1 May 2012). Further, legislation on conflict of interest and whistleblowing is being drafted.

2. Implementation of chapters III and IV

2.1. Criminalization and law enforcement (chapter III)

2.1.1. Main findings and observations

A general observation related to the implementation of chapter III is that the terms "public official" and "foreign public official" as prescribed by article 2 of the Convention, are covered by the official note to section 308 of the Penal Code of Azerbaijan, which is applicable to all corruption offences and does not differentiate between representatives of State authorities, including persons elected or appointed to office and persons engaged in commercial activity. While the Azerbaijani legislation is not incompatible with the United Nations Convention against Corruption, and while the spectrum of possible sanctions is considered wide enough to take into account the circumstances of each case, Azerbaijan could consider

differentiating sanctions between persons carrying out public and non-public functions.

Bribery offences; trading in influence (articles 15, 16, 18 and 21)

Sections 312 and 311 of the Penal Code 2000 criminalize active and passive bribery. The relatively low number of prosecutions for active bribery is a consequence of the fact that many perpetrators have been released from criminal liability due to their voluntary notification to the appropriate authorities before the authorities receive information about the bribe giving, as permitted by the official note to section 312 of the Penal Code. The application of the Note was not mandatory but had to follow a specific process in each case, was subject to close scrutiny by supervising prosecutors and could be challenged in court. While the application of the official note to section 312 has significantly contributed to the number of passive bribery cases instituted, it was perceived to incentivize persons to engage in active bribery.

Active bribery of foreign public officials and officials of public international organizations is covered by section 312 of the Penal Code, read together with the official note to section 308 of the Penal Code, which comprises foreign public officials and officials of public international organizations. Section 312 of the Penal Code is not limited to activities in relation to the conduct of international business. The passive version of the offence is covered in section 311 of the Penal Code, read together with the official note to section 308. Higher sanctions for public officials than private individuals are not provided for in the legislation, although higher sanctions can be applied to public officials exercising prominent functions.

Trading in influence is fully criminalized in section 312-1 of the Penal Code. While statistics on the passive version of the offence were provided, it was reported that there have been no cases of active trading in influence.

Bribery in the private sector is established in sections 312 and 311 of the Penal Code, read together with the official note in section 308 of the Penal Code, which covers the private sector, inter alia, through commercial and non-commercial organizations. Also here, bribe payers often make use of the possibility to report the offering of the bribe under the official note to section 312.

Laundering of proceeds of crime; concealment (articles 23 and 24)

The relevant sections of the Penal Code are in line with article 23 of the Convention. Azerbaijan follows an all-crimes approach in that there is no limitation on the range of predicate offences specified in section 193-1 or 194 of the Penal Code and the offence of money-laundering is applicable to all offences criminalized under Azerbaijani criminal law, including corruption.

Concealment is criminalized in section 193-1.1.2 and through the use of the provisions on complicity, section 32, paragraph 5, of the Penal Code.

Embezzlement; abuse of functions; illicit enrichment (articles 17, 19, 20 and 22)

Section 179 of the Penal Code establishes a broad embezzlement offence, which covers the embezzlement or misappropriation by any person entrusted with property and is not limited to situations where property is entrusted to an official “by virtue of his or her position”.

Section 179 is applicable to both the private and public sector, as demonstrated by case law. The majority of embezzlement prosecutions have involved embezzlement in the private sector. Azerbaijan judiciary has interpreted the law in a way that third-party benefits are covered. In case the judiciary changed this interpretation in future, legislative clarification may be necessary.

Abuse of functions is addressed in section 308 of the Penal Code. While all elements foreseen in the Convention are covered, it was noted that under section 308 “substantial damage” must accrue “to the rights and legal interests of natural or legal persons, legally protected interests of society or state” for abuse of functions to be constituted as a criminal offence.

Azerbaijan has not adopted any measures to criminalize illicit enrichment but has taken concrete steps in considering the adoption of such measures.

Obstruction of justice (article 25)

Obstruction of justice is covered in section 299 of the Penal Code, which covers witnesses, victims, experts and translators, and sections 286-288 of the Penal Code. The promise, offering or giving of an undue advantage as foreseen in article 25 will be prosecuted as an attempted inducement under section 29 (Attempt of crime) and section 299.1.

Specific means of obstruction of justice, i.e. physical force, threats and intimidation, are covered by sections 299.2 and 299.3, as aggravating circumstances.

The production of evidence is covered by the above-referenced rules on witnesses, because persons obliged to present evidence must be declared witnesses by the investigator.

It was noted that although the term “law enforcement officials” is not mentioned in the respective provisions of the Penal Code, such officials are covered by the different categories of persons mentioned in the legislation.

Liability of legal persons (article 26)

Civil and administrative liability is established by the Civil Code and the Code of Administrative Violations. The provisions on the criminal liability of legal persons had recently been introduced in the Penal Code at the time of the country visit and were yet to be applied in practice.

Participation and attempt (article 27)

The criminal offence is established principally in sections 28-33 of the Penal Code. The low number of prosecutions for attempt is explained by the broad scope of the corruption offences. For example, the promise and offer, as well as acceptance of a promise or an offer, are considered complete offences of bribery.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30 and 37)

Members of Parliament enjoy absolute immunity, which continues after they have left office for conduct that occurred while in office. Approval of the Parliament and the Judicial Legal Council is needed to initiate an investigation concerning a

member of Parliament or judge. Prosecutors, investigators and detectives of the Prosecutor's Office do not enjoy immunity, although the consent of the President of the Supreme Court requested by the Prosecutor General is needed to arrest employees of the Prosecutor's Office and conduct other specified measures. There have been several convictions of prosecutors in recent years.

Azerbaijan follows a system of mandatory prosecution; however there are limited discretionary powers related to the prosecution of persons addressed in section 14.2 of the Penal Code.

Azerbaijani law contains provisions on release from punishment for persons who self-report active bribery (see above), and mitigated punishment to encourage defendants' cooperation with investigating authorities. Apart from a general obligation of Azerbaijani authorities to protect the participants in criminal proceedings, no concrete protection measures for cooperating offenders are foreseen.

Protection of witnesses and reporting persons (articles 32 and 33)

Azerbaijan affords broad protections to witnesses and experts who give testimony, including non-disclosure of identity and whereabouts of such persons, closed hearings, physical security measures of the persons, their home and property, relocation to another residence, issuance of new identification cards and others. The Presidential Order enforcing the law specified above vests the duty of protection with the Ministry of Internal Affairs (its police units) and the Ministry of National Security, but all relevant State agencies have duties regarding protection. Usually the substantial part of this job is conducted by the police units. A court order is not needed to institute protective measures. The Criminal Procedure Code 2000 provides the same regime of protection for witnesses and victims of crime. Relevant measures are found in sections 95, 97 and 123 of the Criminal Procedure Code 2000 and the State Protection of Persons Taking Part in Criminal Procedure Act 1998.

The criminal legislation of Azerbaijan regulates a duty to report corruption allegations, but does not provide any corresponding protection against unjustified treatment. The Labour Code provides general protections against wrongful termination and establishes a right to take the matter to court but does not include specific protection measures. Whistleblower legislation is under consideration.

Freezing, seizing and confiscation; bank secrecy (articles 31 and 40)

Azerbaijan recently passed Penal Code amendments that establish the mandatory nature of confiscation for all offences as a criminal measure. Under the Penal Code, proceeds and instruments are covered. Although the current legislation would not prohibit application to instrumentalities "destined for use" in corruption offences, it has not been applied in this circumstance previously. An administrative freezing procedure in money-laundering cases before any transaction is executed is possible without a court order. It was not clear to which extent the capacity to administer complex assets that require extensive measures for their administration, such as businesses, existed once such assets were seized. A reversal of the burden of proof requiring that an offender demonstrate the lawful origin of alleged proceeds of crime is not established.

The lifting of bank secrecy is provided through court permission where there is evidence of criminal conduct.

Statute of limitations; criminal record (articles 29 and 41)

The statute of limitations varies between four levels of classified crimes. Corruption offences are classified as less serious and serious crimes, with a corresponding statute of limitations of 7 years and 12 years, respectively, pursuant to article 75 of the Penal Code, with the exception of embezzlement (section 179.1) which has a two-year statute of limitations. The period of limitations is estimated from the date of commission of a crime up to the moment when a valid court decision is introduced. The statute of limitations is suspended if the defendant conceals himself from the investigation or court and other reasons specified in law. In this case, the limitation period resumes running from the moment of detention or from the time that the defendant surrenders himself. No corruption cases have been barred by the statute of limitations to date.

Previous foreign convictions can be taken into account at sentencing.

Jurisdiction (article 42)

Azerbaijan has established all cases of jurisdiction as foreseen in the Convention with the exception of optional jurisdiction in cases where an offender is present in its territory and is not extradited (paragraph 4); this provision is partially implemented.

Consequences of acts of corruption; compensation for damage (articles 34 and 35)

Based on the Civil Code, the prosecuting authority or victim may challenge a transaction, contract or agreement on the grounds of illegality when the contract became possible by corruption. Upon the conclusion of a criminal case, the investigating and prosecuting authorities can apply to the relevant ministries, according to the field of activity, to have the license of a defendant withdrawn and an official warning issued. The absence of a blacklisting system for companies and their principals is a deficiency.

Civil actions for damages may be instituted in a civil proceeding within the criminal process.

Specialized authorities and inter-agency coordination (articles 36, 38 and 39)

The Anti-Corruption Department in the Prosecutor General's Office of the Republic of Azerbaijan is the national anti-corruption agency in charge of detection and investigation of corruption-related offences. The Department has law enforcement and prosecutorial powers, with a staff of 145 prosecutors, investigators, detectives and specialists.

There are several examples for the cooperation between public authorities and the authorities responsible for investigating and prosecuting criminal offences, for example, between the Financial Monitoring Service and the supervisory law enforcement bodies. There are also databases in each central executive authority (real estate, citizens, legal persons registry and others).

Although some examples of cooperation in practice among national investigating and prosecuting authorities and civil society exist, Azerbaijan has done little by way of cooperation on anti-corruption with the private sector, in particular domestic and international businesses.

2.1.2. Successes and good practices

- The foreign bribery offence is not limited to activities in relation to the conduct of international business.
- The number of criminal cases instituted and investigated by the Anti-Corruption Department has increased on a yearly basis since its establishment, including passive bribery cases.

2.1.3. Challenges and recommendations

With regard to mandatory requirements:

- For corruption offences in general, the relevant legislation does not differentiate between representatives of State authorities and persons engaged in commercial activity. While this is not incompatible with the United Nations Convention against Corruption, Azerbaijan could consider differentiating sanctions between persons carrying out public and non-public functions.
- With regard to active bribery, the practice of releasing persons from criminal liability who voluntarily report acts of bribe-giving to the relevant authorities was perceived to incentivize persons to engage in active bribery. Azerbaijan should therefore ensure that appropriate sanctions are imposed for active bribery.
- On laundering of proceeds of corruption, it is recommended that Azerbaijan ensure that the money-laundering legislation cover predicate offences committed outside of the jurisdiction of Azerbaijan when the relevant conduct is a criminal offence under both jurisdictions, since there have been no cases to date. Should the judiciary not interpret the law accordingly, legislative clarification may be considered.
- Statistics should be kept on administrative penalties and proceedings against legal persons, as well as on criminal cases and sanctions against legal persons under the new criminal regime.
- Limited capacity (e.g. human/technological/institution/other) is considered a challenge towards the full use of circumstantial evidence for the subjective elements of the offence.
- The procedure for lifting immunities against members of Parliament and judges, whereby the Prosecutor General must file a petition with the Parliament or Judicial Legal Council, could lead to potential delays and the loss of evidence. A relaxation of the relevant standards and procedures may need to be considered by Azerbaijan especially regarding detective activity, taking into account the overall approach of the national legislation, and steps were being taken in that direction.

- It is recommended that statistics on confiscation be made publicly available and updated regularly.
- On the confiscation of instrumentalities “destined for use” in corruption offences, legislative clarification may be considered should the judiciary not interpret the law accordingly in future cases.
- Azerbaijan should ensure that appropriate capacity is available to administer complex assets that require extensive measures for their administration, such as businesses, once such assets are seized.
- Azerbaijan should consider easing the formal requirements for obtaining authorization to freeze financial accounts in the context of domestic investigations of corruption cases.
- At present the statute of limitations periods are sufficient, given the number of criminal cases and investigative capacity.
- It is recommended to establish a blacklisting system for companies and their principals.
- It was noted that the Cabinet of Ministers was commissioned with taking necessary measures to ensure the access of the Anti-Corruption Department to the databases of all State institutions, which should be encouraged.
- It is recommended that cooperation and awareness-raising on anti-corruption in the private sector be enhanced. This should be considered a priority for the Anti-Corruption Department, also in light of the amount of foreign investment in Azerbaijan.
- It is recommended that Azerbaijan consider easing the formal requirements for obtaining authorization to lift bank secrecy in the context of domestic investigations of corruption cases.

With regard to non-mandatory provisions:

- It is recommended that Azerbaijan consider eliminating the “substantial damage” requirement in the offence on abuse of functions, although all elements of the Convention are covered.
- It is recommended to adopt appropriate legislation and measures for the protection of reporting persons as foreseen in articles 33 and 37 of the Convention.
- It was noted that the Cabinet of Ministers was commissioned with taking necessary measures to ensure the access of the Anti-Corruption Department to the databases of all State institutions, which should be encouraged.

2.2. International cooperation (chapter IV)

2.2.1. Main findings and observations

*Extradition; transfer of sentenced persons; transfer of criminal proceedings
(articles 44, 45 and 47)*

Extradition is regulated by the Constitution, the Criminal Procedure Code (articles 408-505) and the Act on Surrender of Criminal Offenders (Extradition Act)

of 15 May 2001. Azerbaijan is party to several regional and bilateral treaties on extradition and the transfer of sentenced persons; the bilateral treaties are mostly within the region. Azerbaijan does not make extradition conditional on a treaty. In the absence of a treaty, extradition is subject to reciprocity. Azerbaijan also considers the United Nations Convention against Corruption as a legal basis for extradition.

Azerbaijan applies the dual criminality principle, without exceptions and without the possibility to extradite for related offences. The minimum penalty for extraditable offences is one year.

Azerbaijan does not extradite its nationals. A number of nationals have been submitted to national courts when they had not been extradited on grounds of their nationality.

Some regional treaties provide for the enforcement of sentences issued in foreign countries; otherwise, the Convention can be applied directly.

Measures are in place that enable Azerbaijani authorities to refuse extradition based on concerns for discrimination; however, extradition to Azerbaijan has also been refused in some cases based on concerns about discrimination. Azerbaijan cannot refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

Azerbaijan is a party to international treaties on the transfer of sentenced persons.

The transfer of criminal proceedings can be conducted through arrangements on a case-by-case basis.

Mutual legal assistance (article 46)

Mutual legal assistance is regulated by the Criminal Procedure Code of Azerbaijan (sections 488-492) and the Legal Assistance in Criminal Matters Act of 29 June 2001. Azerbaijan is party to several regional and bilateral mutual legal assistance treaties, the latter mostly within the region. The United Nations Convention against Corruption can be applied as a legal basis.

Mutual legal assistance is granted if the request is not contrary to the essential requirements of the Criminal Procedure Code. Bank secrecy is not listed among the grounds for refusal of legal assistance.

According to its legislation, Azerbaijan requires dual criminality for the provision of mutual legal assistance; no exception is made for non-coercive measures. However, Azerbaijani officials stated that in practice once a formal criminal investigation is opened in the requesting country, mutual legal assistance is provided even in the absence of dual criminality.

With regard to the transfer of detained persons whose presence is requested for providing assistance in criminal proceedings in another State, specific regulations are contained in Azerbaijani legislation and the Convention can be applied directly, on the basis of reciprocity.

The central authority for the purposes of the paragraph 13 of article 46 of the Convention is the General Prosecutor's Office. The competent authorities under the European Convention on Legal Assistance in Criminal Matters are the Ministry of

Justice, the General Prosecutor's Office and the courts. Azerbaijani authorities stated that the existence of different central authorities did not present any practical difficulties. Requests and supporting documents on legal assistance should be submitted in Russian or English, accompanied by a translation in Azerbaijani language.

Azerbaijani legislation explicitly contains the rule that the legislation of the requesting foreign country could be applied upon its request, to the extent that this legislation does not contradict the legislation of Azerbaijan.

In cases an individual is in the territory of Azerbaijan and has to be heard as a witness or expert by the judicial authorities of another State party, Azerbaijan does not permit the hearing to take place by videoconference.

The safe conduct for persons from foreign countries giving evidence in Azerbaijan is regulated in regional treaties; otherwise the Convention can be applied directly.

Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49 and 50)

Azerbaijan has undertaken some measures to establish channels of communication between its competent authorities and those of other States parties. The Ministry of Internal Affairs and the Prosecutor General's Office have concluded several bilateral agreements with their counterparts, and Azerbaijan has started to cooperate through the World Customs Organization and the Egmont Group. The Ministry of Internal Affairs has placed liaison officers in foreign States. The Convention can be used as a basis for mutual law enforcement cooperation.

Azerbaijan has had little experience conducting joint anti-corruption investigations at the international level.

Special investigative techniques can be applied in corruption cases by the detective search unit in the Prosecutor General's Office. With regard to international cooperation in the use of special investigative techniques, experience is still very limited.

2.2.2. Successes and good practices

- Frequent consultations with foreign authorities are held during extradition procedures and before refusing extradition.
- Informal consultations with foreign authorities are carried out frequently before requests for formal mutual legal assistance are made. The acceptance and review of a draft request before submission of a formal request for mutual legal assistance is a common practice.
- During the mutual legal assistance process, queries and consultations are held through informal channels.
- In mutual legal assistance, the legislation of the requesting foreign country can be applied to the extent that this legislation does not contradict domestic laws.

2.2.3. Challenges and recommendations

With regard to mandatory requirements:

- Azerbaijan should ensure that the safe conduct is granted by direct application of the Convention to witnesses, experts or other persons who, at the request of another State party, consent to give evidence in a proceeding in the territory of the other State party when relevant cases appear (article 46, paragraph 27).
- Although Azerbaijan provides mutual legal assistance for non-coercive measures in practice also in the absence of dual criminality, legislative clarification could contribute to the further application of article 46, paragraph 9.

With regard to non-mandatory provisions:

- Azerbaijan should consider granting the extradition of a person for offences that are not punishable under its domestic law (article 44, paragraph 2).
- Azerbaijan should consider extraditing for offences related to corruption offences as foreseen in article 44, paragraph 3.
- If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of Azerbaijan, Azerbaijan should ensure the direct application of its regional treaties or the Convention regarding enforcement of the sentence or the remainder thereof. Should the judiciary not interpret the law accordingly, the adoption of an appropriate provision in the Criminal Procedure Code should be considered (article 44, paragraph 13).
- Although article 46, paragraph 4, is implemented, a legislative amendment allowing submission of information without prior request could further enhance its application.
- Azerbaijan should consider, in case an individual is in the territory of Azerbaijan and has to be heard as a witness or expert by the judicial authorities of another State party, whether the hearing could be permitted to take place by videoconference, at the request of the other State party (article 46, paragraph 18).
- Azerbaijan is encouraged to continue strengthening its international law enforcement cooperation.
- Azerbaijan is encouraged to consider the possibility of conducting joint anti-corruption investigations at the international level.

3. Technical assistance needs

The following technical assistance needs were identified by Azerbaijan:

- As a general matter, it is suggested that technical assistance could be provided to support the translation of relevant legislation.
- Article 15: Relevant staff (including prosecutors, investigators, detectives and others) in the Anti-Corruption Department of the Prosecutor General's Office could benefit from a series of workshops dedicated to case studies from various jurisdictions (partially provided).

- Article 20: 1. Model legislation; 2. Legislative drafting; 3. Summary of good practices/lessons learned. The measures are intended to address concerns that illicit enrichment is seen as a deviation from the fundamental principles of the criminal justice system, so that better results would be assured if relevant measures were adopted by Azerbaijan (no assistance provided).
- Article 22: A summary of good practices/lessons learned, as part of a broader training programme for the Anti-Corruption Department in the Prosecutor General's Office (no assistance provided).
- Article 26: A summary of good practices/lessons learned. Assistance was rendered through the Council of Europe Project AZPAC, the Special Investigation Department STT of the Lithuanian Republic, and the Twinning Project "Support of the Anti-Corruption Department of the Republic of Azerbaijan with the Prosecutor General" sponsored by the European Union.
- Article 28: A summary of good practices/lessons learned (no assistance provided).
- Article 31: Other: Request by the Azerbaijani Government for technical assistance on the application of article 31, paragraph 1 (b) (instrumentalities "destined for use" in corruption offences).
- Article 33: 1. Legal advice; 2. Model legislation; 3. Summary of good practices/lessons learned (no assistance provided).
- Article 36: 1. Summary of good practices/lessons learned; 2. On-site assistance by an anti-corruption expert; 3. Other assistance: Training on the use of facilities, investigation techniques, the application of special investigation means, etc. (assistance partly provided through the above-mentioned Twinning Project).
- Article 37: 1. Model agreement/arrangement; 2. Legal advice; 3. Model legislation (assistance partially provided by the Embassy of the United States of America in Azerbaijan).
- Article 38: 1. Development of an action plan for implementation; 2. On-site assistance by a relevant expert; 3. Other: Statutory duty to report corruption offences in the private sector (though beyond the scope of the provision under review) (no assistance provided).
- Article 46: 1. Legal advice with regard to enhancing the normative framework for mutual legal assistance (Constitution, laws, regulations, etc.); 2. Capacity-building programmes for authorities responsible for international cooperation in criminal matters; 3. Summary of good practices and lessons learned (no assistance provided).
- Article 48: 1. Summary of good practices/lessons learned; 2. Technological assistance (e.g. set-up and management of databases/information-sharing systems); 3. Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation; 5. Model agreement(s)/arrangement(s) (assistance partially rendered through the above-mentioned Twinning Project).

- Article 50: 1. Summary of good practices/lessons learned; 2. Model agreement(s)/arrangement(s); 3. On-site assistance by a relevant expert; 4. Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques; 5. Capacity-building programmes for authorities responsible for international cooperation in criminal/investigative matters (assistance partially rendered through the above-mentioned Twinning Project).
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