

Strasbourg, 1 October 2010

**Public**  
**Greco Eval III Rep (2010) 2E**  
**Theme I**

## **Third Evaluation Round**

### **Evaluation Report on Azerbaijan on Incriminations (ETS 173 and 191, GPC 2)**

(Theme I)

Adopted by GRECO  
at its 48<sup>th</sup> Plenary Meeting  
(Strasbourg, 27 September - 1 October 2010)

## I. INTRODUCTION

1. Azerbaijan joined GRECO on 1 June 2004, i.e. after the close of the First Evaluation Round. Consequently, Azerbaijan was submitted to a joint evaluation procedure covering the themes of the First and Second Evaluation Rounds. The relevant Joint Evaluation Report (Greco Eval I/II Rep (2005) 5E) in respect of Azerbaijan was adopted at its 29<sup>th</sup> Plenary Meeting (23 June 2006) available on GRECO's homepage (<http://www.coe.int/greco>).
2. GRECO's current Third Evaluation Round (launched on 1 January 2007) deals with the following themes:
  - **Theme I – Incriminations:** Articles 1a and 1b, 2-12, 15-17, 19 paragraph 1 of the Criminal Law Convention on Corruption (ETS 173), Articles 1-6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (criminalisation of corruption).
  - **Theme II – Transparency of party funding:** Articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, and - more generally - Guiding Principle 15 (financing of political parties and election campaigns).
3. The GRECO Evaluation Team (hereafter referred to as the "GET") carried out an on-site visit to Azerbaijan from 26 to 30 April 2010. The GET for Theme I (26-27 April) was composed of Mr Fabrizio GANDINI, Judge, Tribunal of Rome (Italy) and Ms Olena SMIRNOVA, Head of Unit responsible for development of anticorruption policy, Ministry of Justice (Ukraine). The GET was supported by Mr Michael JANSSEN from GRECO's Secretariat. Prior to the visit the GET experts were provided with a reply to the Evaluation questionnaire (document Greco Eval III (2010) 2E, Theme I).
4. The GET met with officials from the following governmental organisations: Ministry of Justice, Anti-Corruption Department of the General Prosecutor's Office, Commission for Combating Corruption, Ministry of Internal Affairs (police), Supreme Court, Baku Court of Appeal and First Instance Courts. The GET also met with representatives of non-governmental organisations (Anti-Corruption Network of NGO's, Azerbaijan Young Lawyers Association, Confederation of Lawyers of Azerbaijan, Constitution Research Fund, League on Protection of Citizens Rights, Transparency International) and with lawyers.
5. The present report on Theme I of GRECO's Third Evaluation Round – Incriminations – was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to evaluate the measures adopted by the Azerbaijan authorities in order to comply with the requirements deriving from the provisions indicated in paragraph 2. The report contains a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Azerbaijan in order to improve its level of compliance with the provisions under consideration.
6. The report on Theme II – Transparency of party funding – is set out in Greco Eval III Rep (2010) 2E, Theme II.

## II. INCRIMINATIONS

### Description of the situation

7. Azerbaijan ratified the Criminal Law Convention on Corruption (ETS 173) on 11 February 2004 and the Convention entered into force in respect of Azerbaijan on 1 June 2004. Azerbaijan has made reservations in respect of Articles 5 (passive bribery of foreign public officials), 6 (active and passive bribery of members of foreign public assemblies), 10 (active and passive bribery of members of international parliamentary assemblies) and 12 (active and passive trading in influence).<sup>1</sup> These reservations were first introduced for a period of three years in June 2004 and last renewed for a period of three years from 1 June 2010 to 1 June 2013. As regards the territorial application of the Convention, Azerbaijan has declared that it will be “unable to guarantee compliance with the provisions of the Convention in its territories occupied by the Republic of Armenia until these territories are liberated from that occupation.” The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) has not been signed by Azerbaijan.
8. The Penal Code of Azerbaijan (hereafter: PC) entered into force on 1 September 2000. The corruption-related provisions were subject to the legal amendments of 2006<sup>2</sup> which aimed at adjusting national legislation to the requirements of the Criminal Law Convention on Corruption. These amendments included the redefinition of the provisions on active and passive bribery, changes to the concept of public official, an increase in sanctions for active and passive bribery and the criminalisation of trading in influence.

### Bribery of domestic public officials (Articles 1-3 and 19 of ETS 173)

9. Section 311 PC establishes the offence of *passive bribery* and section 312 PC that of *active bribery* (paragraph 1). Both sections provide that the sanctions may be increased in cases where the – intended or real – act or omission by the public official is illegal and in other aggravated cases (section 311, paragraphs 2 and 3 PC/section 312, paragraph 2 PC).

#### **Section 311 PC: Receiving a Bribe (Passive Bribery)**

*(1) Receiving a bribe – i.e. request or receipt by an official, directly or indirectly, personally or through the intermediary of third persons, of any material or other values, privileges or advantages for him/herself or third persons, for any act (inaction), as well as general patronage or indifference, in the exercise of his/her official functions – shall be punished by 4 to 8 years' imprisonment with deprivation of the right to hold certain positions or to engage in certain activities for a period of up to 3 years and confiscation of property.*

*(2) Receiving a bribe by an official for committing an illegal act (inaction) shall be punished by 5 to 10 years' imprisonment with deprivation of the right to hold certain positions or to engage in certain activities for a period of up to 3 years and confiscation of property.*

<sup>1</sup> See Appendix A. – In addition, Azerbaijan has made a reservation in respect of Article 26, paragraph 1 (mutual legal assistance).

<sup>2</sup> The Law “On changes and amendments to some legislative acts of the Republic of Azerbaijan in connection with combating corruption” was adopted on 7 April 2006 and entered into force on 31 May 2006.

(3) *The acts provided by articles 311 (1) or (2) of the present Code, committed:*

- 1. on preliminary arrangement by a group of persons or an organised group;*
- 2. repeatedly;*
- 3. involving a large amount;*
- 4. with application of threats*

*shall be punished by 8 to 12 years' imprisonment and confiscation of property.*

*Note: A bribe of a "large amount" is understood to be a sum of money, cost of securities, property or benefits of property nature, exceeding 5,000 Manat/AZN.<sup>3</sup>*

#### **Section 312 PC: Giving a Bribe (Active Bribery)**

*(1) Giving a bribe – i.e. giving any material or other values, privileges or advantages, directly or indirectly, personally or through the intermediary of third persons, to an official for him/herself or third persons to act or refrain from acting in the exercise of his/her official functions – shall be punished by a fine of 1,000 to 2,000 Manat<sup>4</sup> or 2 to 5 years' imprisonment and confiscation of property.*

*(2) Presentation of a bribe to an official for the commitment of an intentional illegal act (inaction) by him/her, or repeated presentation of a bribe, shall be punished by a fine of 2,000 to 4,000 Manat<sup>5</sup> or 4 to 8 years' imprisonment and confiscation of property.*

*Note: The person giving a bribe shall be released from criminal liability if the presentation of the bribe took place under threat by the official or if the person has voluntarily informed the appropriate State body about the presentation of a bribe.*

#### Elements of the offence

*"Domestic public official"*

10. The bribery provisions employ the term "official",<sup>6</sup> which is defined in the "note" to section 308 PC. The authorities explained that this note has the same legal force as other parts of the PC.

#### **Note to section 308 PC:**

*(1) Officials in sections of Chapter 33 of the PC<sup>7</sup> shall be persons carrying out permanently, temporarily or by special permission, the functions of the authority representative, or carrying out organisational-administrative or managerial-administrative functions in State bodies, institutions of local government, State and municipal establishments, enterprises or organisations, and also in other commercial and non-commercial institutions, representatives of international organisations as well as other persons considered officials for the purposes of the Law "on Combating Corruption" of the Republic of Azerbaijan.<sup>8</sup>*

<sup>3</sup> Approximately 4,490 EUR – exchange rate from AZN to EUR on 1 February 2010.

<sup>4</sup> Approximately 900 to 1,800 EUR.

<sup>5</sup> Approximately 1,800 to 3,600 EUR.

<sup>6</sup> In this report the term *public official* is used and is to be understood in the sense of "official", unless otherwise specified.

<sup>7</sup> I.e. sections 308 to 314-2 PC.

<sup>8</sup> The latter two categories – i.e. "representatives of international organisations" and "officials" in the meaning of the Law "on Combating Corruption" – had been included in this definition by the 2006 legal amendments.

*(2) Civil servants and employees of institutions of local government who are not comprised in officials, and also employees of commercial and non-commercial organisations carry criminal liability under sections of the present chapter in cases which are specially provided for by appropriate sections.*

11. Regarding the persons considered officials for the purposes of the Law “on Combating Corruption”, referred to in paragraph 2 of the above note, section 2 of this law contains the following list of persons.

*2.1.1 Persons elected or appointed to State bodies within the procedure laid down in the Constitution and laws of the Republic of Azerbaijan;*

*2.1.2 persons who represent State bodies on the basis of special powers;*

*2.1.3 public servants who hold administrative office;*

*2.1.4 persons who exercise management or administrative functions in appropriate structural units of the State bodies, in State-owned institutions, enterprises and organisations as well as in enterprises in which the control package of shares is owned by the State;*

*2.1.5 persons whose candidatures to elected offices in State bodies of the Republic of Azerbaijan were registered as stipulated by law;*

*2.1.6 persons elected to municipal bodies within the procedure laid down in the laws of the Republic of Azerbaijan;*

*2.1.7 persons who exercise managerial or administrative functions in municipal bodies;*

*2.1.8 persons who exercise managerial or administrative functions in non-State entities discharging the powers of State authorities in cases provided for by law.*

12. The authorities indicated that the concept of “official” as defined in the note to section 308 PC also covers, *inter alia*, ministers and mayors, judges and prosecutors. They explained, however, that this concept does not encompass all the different categories of public officials covered by legislation on the civil service, namely certain categories of “civil servants” – in particular, persons who hold an auxiliary position – and certain categories of “employees of institutions of local government”. According to the authorities, such persons may not be punished for bribery as principal offenders but as accomplices, aiders, abettors or “organisers” of bribery (sections 31 and 32 PC in conjunction with section 311 PC) or under other provisions of the PC (e.g. fraud, section 178 PC, or embezzlement, section 179 PC).

*“Request or receipt, acceptance of an offer or promise” (passive bribery)*

13. Section 311 PC uses the words “request” and “receipt”. In addition, this provision contains the alternative concept of “general patronage or indifference” which applies to situations where a relation between the briber and the bribee is established by service dependency and not by a concrete act or omission in the exercise of the official’s functions. As regards the “acceptance of an offer or promise”, the authorities affirmed that such acts are punishable under sections 28 or 29 PC in conjunction with section 311 PC as preparation of or attempt at bribery. There is no case law/court decision confirming this affirmation. It is also to be noted that the preparation of a crime is incriminated only in cases of serious and especially serious crimes. Serious crimes are defined as crimes which are, if committed deliberately, punishable by imprisonment of up to 12

years.<sup>9</sup> Section 28 PC is therefore applicable to bribery offences under sections 311 and 312, paragraph 2 PC but not under section 312, paragraph 1 PC – nor to offences of trading in influence. According to section 27, paragraph 3 PC, the criminal liability for uncompleted crimes – i.e. prepared or attempted crimes – is equivalent to the responsibility for completed crimes, but pursuant to section 63 PC the maximum sanctions are reduced. The punishment for crime preparation cannot exceed half of the maximal limit and the punishment for an attempted crime cannot exceed three quarters of the maximal limit of the severest punishment provided for the completed crime. Under the provisions of section 30 PC the perpetrator of a prepared or attempted crime is not criminally liable if s/he voluntarily refuses to complete the crime.

**Section 28 PC: Preparation of a crime**

*(1) Preparation of a crime shall be the purchasing or manufacturing by a person of means or instruments to commit a crime, looking for accomplices to a crime, arrangement on commitment of a crime or other deliberate creation of conditions for commitment of a crime, if the crime was not completed by circumstances not dependent on the will of this person.*

*(2) Criminal liability shall be instituted only for the preparation of serious and especially serious crimes.*

**Section 29 PC: Attempt at a crime**

*An attempt at a crime shall be a deliberate act (action or inaction) by a person, directed at committing a crime, if the crime was not completed by circumstances not dependent on the will of this person.*

**Section 30 PC: Voluntary refusal to commit a crime**

*(1) Termination by a person of the preparation of a crime or of an act (action or inaction) which is directed at committing a crime, if the person realised the opportunity of completing the crime up to the end, shall be admitted as a voluntary refusal of a crime.*

*(2) A person who voluntarily and finally refuses to carry out a crime completely shall not be criminally liable.*

*(3) A person who has voluntarily refused to carry out a crime completely shall be criminally liable only in the event that the act committed by him/her contains the elements of another crime.*

*(...)*

*“Promising, offering or giving” (active bribery)*

14. Section 312 PC only uses the word “giving”. As for the “offer” and the “promise” of a bribe, the authorities affirmed that such acts are punishable under sections 28 or 29 PC in conjunction with section 312 PC as preparation of or attempt at bribery. There is no case law/court decision confirming this affirmation.

*“Any undue advantage”*

15. The concept of “any undue advantage” is transposed by reference to “any material or other values, privileges or advantages” in the penal provisions concerning active and passive bribery. The element “undue” is not explicitly transposed. It is to be noted, however, that section 8 of the

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<sup>9</sup> See section 15, paragraph 4 PC.

Law “on Combating Corruption” – which applies to civil servants and elected/appointed officials and provides for the basic regulations on gifts – makes the following distinction regarding the acceptance of gifts by an official.<sup>10</sup> Under this provision, gifts which may influence or appear to influence the objectivity and impartiality with which the official carries out his/her service duties, or may appear as a reward relating to his/her duties are prohibited. By contrast, an official may accept “conventional hospitality” and minor gifts, the latter only insofar as the aggregated value of gifts received from “any natural or legal persons” during 12 consecutive months does not exceed 55 AZN/approximately 49 EUR. The authorities explained that such minor gifts do not fall under the bribery provisions unless they might influence or appear to influence the objectivity and impartiality with which the official carries out his/her service duties or unless they might be considered as a reward relating to his/her duties.

*“Directly or indirectly”*

16. Sections 311 and 312 PC explicitly provide that the offences of active and passive bribery can be committed “directly or indirectly, personally or through the intermediary of third persons.”

*“For himself or herself or for anyone else”*

17. The provisions on active and passive bribery use the term “for him/herself or third persons”. The authorities indicated that the term “third persons” covers both natural and legal persons.

*“To act or refrain from acting in the exercise of his or her functions”*

18. The legislation expressly covers both positive – legal and illegal – acts and omissions by a public official in the exercise of his/her official functions. The authorities indicated that “official functions” are to be understood as the functions which are assigned to the person by law or by employment contract.

*“Committed intentionally”*

19. The authorities indicated to the GET that both active and passive bribery can only be committed with intention.

## Sanctions

20. Passive bribery offences are punishable by 4 to 8 years’ imprisonment with deprivation of the right to hold certain positions or to engage in certain activities for a period of up to 3 years and confiscation of property. If the bribe is received by the official for an illegal act or omission the sanctions available are 5 to 10 years’ imprisonment with deprivation of the right to hold certain positions or to engage in certain activities for a period of up to 3 years and confiscation of property. The authorities explained that all these sanctions are mandatorily imposed. If the bribe is received under other aggravated circumstances, namely “on preliminary arrangement by a group of persons or an organised group, repeatedly, involving a large amount<sup>11</sup> or with application of threats”, the penalty is up to 8 to 12 years’ imprisonment and confiscation of property. In these cases, there is no deprivation of the right to hold certain positions or to engage

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<sup>10</sup> Cf. GRECO’s Joint First and Second Round Compliance Report on Azerbaijan, document Greco RC-I/II (2008) 4E, paragraphs 74 to 78.

<sup>11</sup> A bribe of a “large amount” is understood as the sum of money, cost of securities, property or benefits of property nature, exceeding 5,000 AZN/approximately 4,490 EUR.

in certain activities. Active bribery is punishable by a fine of 1,000 to 2,000 AZN/approximately 900 to 1,800 EUR or 2 to 5 years' imprisonment with confiscation of property. If the bribe is presented in order to have the official engage in an illegal act (or omission), or in the case of repeated presentation of a bribe, the sanctions available are a fine of 2,000 to 4,000 AZN (approximately 1,800 to 3,600 EUR) or 4 to 8 years' imprisonment and confiscation of property.

21. It is to be recalled that only the requesting and receiving as well as the giving of a bribe constitute completed bribery offences. By contrast, according to the authorities, the offering and promising as well as the acceptance of an offer or promise are punishable as prepared or attempted bribery. In these cases, the maximum sanctions are reduced.<sup>12</sup> The punishment for crime preparation cannot exceed half of the maximal limit. The sanction for an attempted crime cannot exceed three quarters of the maximal limit of the severest punishment provided for the completed crime i.e. that of imprisonment as detailed above.
22. According to section 58 PC, in determining the punishment, the court has to take account of the nature and degree of the public danger of the crime, the personality of the perpetrator, including the circumstances mitigating and aggravating the punishment, as well as the influence of the punishment on the correction of the perpetrator and on the conditions of his family. Mitigating and aggravating circumstances are listed in sections 58 and 59 PC, the former including situations where the perpetrator confesses to having committed the crime.
23. Similar sanctions are available for other comparable criminal offences such as fraud (section 178 PC), embezzlement or squander (section 179 PC), abuse of official powers (section 308 PC), excess of official powers (section 309 PC), misappropriation of official powers (section 310 PC) or service forgery (section 313 PC).

#### **Bribery of members of domestic public assemblies (Article 4 of ETS 173)**

24. The authorities indicated that members of domestic public assemblies are covered by sections 311 and 312 PC which criminalise active and passive corruption involving "officials" as defined in the note to section 308 PC, including officials in the meaning of section 2 of the Law "on Combating Corruption", *inter alia*, "persons elected or appointed to State bodies within the procedure laid down in the Constitution and laws of the Republic of Azerbaijan", "persons who represent State bodies on the basis of special powers" and "persons elected to municipal bodies within the procedure laid down in the laws of the Republic of Azerbaijan".<sup>13</sup> The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of members of domestic public assemblies. There is no case law/court decision concerning bribery of members of domestic public assemblies.

#### **Bribery of foreign public officials (Article 5 of ETS 173)**

25. Neither active nor passive bribery of foreign public officials are covered by the law and Azerbaijan has made a reservation in respect of Article 5 of the Convention regarding the incrimination of passive bribery of such officials.<sup>14</sup>

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<sup>12</sup> See section 63 PC.

<sup>13</sup> See paragraphs 10 and 11 above.

<sup>14</sup> See Annex A.

### **Bribery of members of foreign public assemblies (Article 6 of ETS 173)**

26. Neither active nor passive bribery of members of foreign public assemblies are covered by the law and Azerbaijan has made a reservation in this respect.<sup>15</sup>

### **Bribery in the private sector (Articles 7 and 8 of ETS 173)**

27. The definition of an “official” provided by the note to section 308 PC, as amended in 2006, includes “persons carrying out permanently, temporarily or by special permission, the functions of the authority representative, or carrying out organisational-administrative or managerial-administrative functions in ... State and municipal establishments, enterprises or organisations, and also in other commercial and non-commercial institutions”.<sup>16</sup> According to the authorities, persons acting on behalf of private sector entities are therefore captured by the bribery provisions of sections 311 and 312 PC. They referred to statistics on indictments made against “officials” of the private sector for criminal offences under chapter 33 of the PC (e.g. in 2009, 55 private sector “officials” were indicted); these crimes included abuse or excess of official powers, embezzlement by using an official power and, in one case, passive bribery.

#### Elements of the offence

28. According to the authorities, the elements described under bribery of domestic public officials also apply to bribery in the private sector in accordance with the following particular elements.

*“Persons who direct or work for, in any capacity, private sector entities”*

29. The note to section 308 PC uses the words persons “carrying out organisational-administrative or managerial-administrative functions ... in ... commercial and non-commercial institutions”. The authorities explained that the term “organisational-managerial or administrative functions” applies only to “persons who perform managerial functions in working teams of different organisational structures and who also manage various production activities, and economic areas.” The authorities stated that these functions typically involve the selection, appointment and discharge of employees, planning of activities, overseeing discipline and other functions. They furthermore indicated that the note to section 308 PC does not cover entities without legal personality.

*“In the course of business activity”; “...in breach of duties”*

30. The provisions applicable to private sector bribery make no reference to the concepts of “business activities” and “breach of duties”. It is to be noted though that in cases of illegal acts or omissions by an official the sanctions are increased.<sup>17</sup>

#### Sanctions

31. The applicable sanctions detailed under bribery of domestic public officials also apply to bribery committed in the private sector in the meaning of the note to section 308 PC.

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<sup>15</sup> See Annex A.

<sup>16</sup> See paragraph 10 above.

<sup>17</sup> See paragraph 2 of sections 311 and 312 PC.

### **Bribery of officials of international organisations (Article 9 of ETS 173)**

32. Bribery of officials of international organisations is covered by sections 311 and 312 PC, as the definition of an “official”, as amended in 2006, explicitly includes “representatives of international organisations”.<sup>18</sup> The authorities affirmed that this concept is broad enough to also cover contracted employees, seconded personnel and persons carrying out functions corresponding to those performed by public officials. The elements of the offence and the applicable sanctions detailed under bribery of domestic public officials also apply to bribery of officials of international organisations. There is no case law/court decision concerning bribery of officials of international organisations.

### **Bribery of members of international parliamentary assemblies (Article 10 of ETS 173)**

33. Azerbaijan has made a reservation in respect of bribery of members of international parliamentary assemblies.<sup>19</sup> Nevertheless, the authorities indicated that bribery of such persons is partly covered by the law. According to the authorities, active and passive bribery of members of international parliamentary assemblies are criminalised under sections 311 and 312 PC in so far as they can be considered representatives of international organisations, who are explicitly included in the definition of an “official” in the note to section 308 PC. The authorities indicated that as far as bribery of members of international parliamentary assemblies is incriminated, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply. There is no case law/court decision concerning bribery of officials of international parliamentary assemblies.

### **Bribery of judges and officials of international courts (Article 11 of ETS 173)**

34. Active and passive bribery of judges and officials of international courts are not explicitly addressed by sections 311 and 312 PC. Nevertheless, the authorities indicated that bribery of such persons is partly covered by the law. According to the authorities, active and passive bribery of judges and officials of international courts are criminalised under sections 311 and 312 PC in so far as they can be considered representatives of international organisations, who are explicitly included in the definition of an “official” in the note to section 308 PC. The authorities indicated that as far as bribery of judges and officials of international courts is incriminated, the elements of the offence and the applicable sanctions detailed under bribery of domestic public officials apply. There is no case law/court decision concerning bribery of judges and officials of international courts.

### **Trading in influence (Article 12 of ETS 173)**

35. Azerbaijan has made a reservation in respect of trading in influence.<sup>20</sup> However, the offences of active and passive trading in influence were introduced by legal amendments of 2006, entered into force on 31 May 2006.

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<sup>18</sup> See paragraph 10 above.

<sup>19</sup> See Annex A.

<sup>20</sup> See Annex A.

**Section 312-1 PC: Influencing the decision of an official (Trading in influence)**

(1) Requesting or receiving by any person of any material or other values, privileges or advantages for him/herself or third persons, with the purpose of exerting an improper influence over the decision-making of an official using his/her real or assumed possibilities of influence shall be punished by a fine of 3,000 to 5,000 Manat<sup>21</sup> or 3 to 7 years' imprisonment and confiscation of property.

(2) Giving to any person any material or other values, privileges or advantages with the purpose of exerting an improper influence over the decision-making of an official using his/her real or assumed possibilities of influence shall be punished by a fine of 1,000 to 2,000 Manat<sup>22</sup> or 2 to 5 years' imprisonment and confiscation of property.

Elements of the offence

*“Asserts or confirms that s/he is able to exert an improper influence over the decision-making of [public officials]”*

36. This concept is implemented in section 312-1 PC by use of the words “with the purpose of exerting an improper influence over the decision-making of an official using his/her real or assumed possibilities of influence”. The authorities indicated that it is not relevant whether the influence was actually exerted or if it led to the intended result.

*Other constitutive elements*

37. The constitutive elements of bribery offences largely apply with regard to active and passive trading in influence. However, indirect commission of trading in influence is not regulated and the concept of third party beneficiaries is only included in the provision on passive trading in influence.

Sanctions

38. Passive trading in influence is punishable by a fine of 3,000 to 5,000 AZN/approximately 2,700 to 4,500 EUR or 3 to 7 years' imprisonment and confiscation of property. The sanctions applicable to active trading in influence are a fine in the amount of 1,000 to 2,000 AZN/approximately 900 to 1,800 EUR or 2 to 5 years' imprisonment and confiscation of property.

**Bribery of domestic arbitrators (Article 1, paragraphs 1 and 2 and Articles 2 and 3 of ETS 191) and bribery of foreign arbitrators (Article 4 of ETS 191)<sup>23</sup>**

39. Domestic and foreign arbitrators are not covered by the bribery provisions of sections 311 and 312 PC.

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<sup>21</sup> Approximately 2,700 to 4,500 EUR.

<sup>22</sup> Approximately 900 to 1,800 EUR.

<sup>23</sup> As for the offences of bribery of arbitrators and jurors, it has to be noted that Azerbaijan is not party to ETS 191.

**Bribery of domestic jurors (Article 1, paragraph 3 and Article 5 of ETS 191) and bribery of foreign jurors (Article 6 of ETS 191)**

40. Domestic and foreign jurors are not covered by the bribery provisions of sections 311 and 312 PC.

**Other questions**

**Participatory acts**

41. Aiding and abetting the commission of all of the abovementioned criminal offences is criminalised.<sup>24</sup> The same sanctions can be imposed on aiders and abettors (“helpers” and “instigators”) – and on “organisers” who organise or supervise the commission of a crime – as on the principal offender but the court has to take into account the nature and degree of participation of each accomplice in the fulfilment of a criminal offence.<sup>25</sup>

**Jurisdiction**

42. Under the relevant provisions of the general part of the PC, which apply to all criminal offences, jurisdiction is, firstly, established over acts committed within the territory of Azerbaijan (principle of territoriality), see section 11 PC which also includes offences which have only begun or terminated in Azerbaijan.

***Section 11 PC: Implementation of the criminal law on the persons who have committed a crime on the territory of the Republic of Azerbaijan***

*(1) The person who has committed a crime on the territory of the Republic of Azerbaijan shall be subject to criminal liability by the present Code. A crime which has begun, proceeded or terminated on the territory of the Republic of Azerbaijan, shall be admitted as crime committed on the territory of the Azerbaijan Republic.*

*(2) A crime committed in the territorial waters of the Republic of Azerbaijan, on the sector of the Caspian sea (lake) which belongs to the Republic of Azerbaijan, in air space above the Republic of Azerbaijan and its economic zone, shall be admitted as crime committed on the territory of the Republic of Azerbaijan.*

*(3) A person who has committed a crime on a water or air vessel, which are attributed to the air or to the seaport of the Republic of Azerbaijan, carried out in the water or air space outside the limits of the Republic of Azerbaijan, flying under the flag or a recognised symbol of the Republic of Azerbaijan, shall be subjected to criminal liability by the present Code.*

*(4) A person, who has committed a crime on a ship, which belongs to the military fleet or military - air forces of the Republic of Azerbaijan, shall be subject to criminal proceedings under the present Code, irrespective of the location of this ship.*

*(5) Criminal liability shall be implemented according to the norms of international law regarding diplomatic representatives of foreign States and other citizens with immunity: who commit a crime on the territory of the Republic of Azerbaijan.*

<sup>24</sup> See sections 31 to 35 PC.

<sup>25</sup> See section 64 PC.

43. As regards offences committed abroad, section 12, paragraph 1 PC provides that citizens of Azerbaijan, as well as residents of Azerbaijan without Azerbaijani citizenship, who commit a criminal act outside the territory of Azerbaijan are subject to criminal liability provided that the offence committed is recognised as a crime in both Azerbaijan and the State where the offence was committed (requirement of dual criminality). In such cases, courts in Azerbaijan cannot deliver a more severe sentence than would be possible in the other State (see paragraph 5 of the same section). In this connection, the authorities indicated that civil servants,<sup>26</sup> judges, prosecutors, MPs and other elected officials have to be citizens of Azerbaijan. Moreover, jurisdiction is established over offences committed abroad, by persons without citizenship of Azerbaijan, which are directed against the citizens or interests of Azerbaijan, as well as in cases stipulated by international agreements to which Azerbaijan is a party, if these persons have not been condemned in the foreign State (see paragraph 2 of the same section – which according to the authorities, also applies to corruption offences).

**Section 12 PC: Implementation of the criminal law concerning the persons who have committed a crime outside the borders of the Republic of Azerbaijan**

*(1) Citizens of the Republic of Azerbaijan and persons residing on the territory of the Republic of Azerbaijan without citizenship, who have committed action (action or inaction) outside the borders of the Republic of Azerbaijan, shall be instituted to criminal liability under the present Code, if this action is recognised as a crime in the Republic of Azerbaijan and in the State on the territory of which it was committed and if these persons have not been condemned in the foreign State.*

*(2) Foreigners and persons without citizenship who have committed a crime outside the borders of the Republic of Azerbaijan, shall be subject to criminal proceedings under the present Code, in cases where the crime is directed against the citizens of the Republic of Azerbaijan, interests of the Republic of Azerbaijan, and also in cases stipulated by international agreements to which the Republic of Azerbaijan is a party and if these persons have not been condemned in the foreign State.*

*(3) Citizens of the Republic of Azerbaijan, foreigners and persons without citizenship, who have committed crimes against peace and mankind, war crimes, terrorism, financing of terrorism, theft of an air ship, capture of hostages, torture, sea piracy, illegal circulation of narcotics and psychotropic substances, manufacturing or sale of false money, attack on persons or organisations with international protection, crimes connected to radioactive materials and also other crimes, the punishment of which is stipulated in international agreements to which the Republic of Azerbaijan is a party, shall be subject to criminal liability and punishment under the Present Code, irrespective of the place where the crime was committed.*

*(4) Military personnel of military units of the Republic of Azerbaijan included in peace forces, who commit outside of the borders of the Republic of Azerbaijan, shall be subject to criminal proceedings under the present Code, unless it is not stipulated by the international agreements to which Republic of Azerbaijan is a party.*

*(5) On condemnation by courts of the Republic of Azerbaijan, of the persons specified in articles 12.1-12.4 of the present Code, punishment shall not exceed the maximum limit of the sanction provided by the law of the foreign State on whose territory the crime was committed.*

<sup>26</sup> See section 14 of the Law “on civil service”.

## Statute of limitations

44. The period of limitation is determined by the classification of crimes<sup>27</sup> – into crimes of no great public danger, less serious crimes, serious crimes and especially serious crimes – on the basis of the severity of sanctions which can be imposed for the offence in question.<sup>28</sup> On this basis, the limitation period provided for passive bribery offences (section 311, paragraphs 1 to 3 PC) and active bribery offences in cases implying an illegal act or omission by the public official (section 312, paragraph 2 PC) is 12 years. Active bribery offences in cases implying a legal act or omission (section 312, paragraph 1 PC) and offences of trading in influence are subject to a limitation period of 7 years.

## Defences

45. A special defence is provided by the note to section 312 PC for active bribery offences.

**Note to section 312 PC:**

*The person giving a bribe shall be released from criminal liability if the presentation of the bribe took place under threat by the official or if the person has voluntarily informed the appropriate State body about the presentation of a bribe.*

The authorities explained that in order to benefit from this defence, denunciation must be made to appropriate law enforcement bodies such as the General Prosecutor's Office, the Ministry of Internal Affairs or the Ministry of Taxes. In cases where the authorities had already learned of the offence before the denunciation by the bribe-giver, the latter is released from criminal liability only if s/he had no knowledge of that fact. The release from criminal liability is decided upon by the public prosecutor. If the defence is successfully invoked, the case against the bribe-giver may not be brought before the court.

## Statistics

46. According to the statistics submitted by the Anti-Corruption Department of the General Prosecutor's Office, from 2005 to 2010 34 persons were indicted for violations of section 311 PC (passive bribery; one case concerned passive bribery in the private sector), nine persons for violations of section 312 PC (active bribery) and five persons for violations of section 312-1 PC (trading in influence).
47. As regards the judgments made during the period 2005-2010, 29 out of 34 accused persons were convicted for passive bribery (28 of which were sentenced to imprisonment) and in respect of the other 5 persons the court proceedings were not yet terminated. During the same period, 5 out of 9 accused persons were convicted for active bribery (3 of which were sentenced to imprisonment) and in respect of the other 4 persons the court proceedings were not yet terminated. Moreover, 5 persons were convicted for trading in influence (3 of which were sentenced to imprisonment). There is no final court decision on bribery in the private sector. In the only case where an indictment was made for passive bribery in the private sector, the charge was changed to fraud upon a decision of the Court of Appeal.

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<sup>27</sup> See section 15 PC.

<sup>28</sup> See section 75 PC.

48. Finally, the statistics provided show that during the period 2005-2010, charges of active bribery were dropped in respect of 12 persons by application of the special defence (note to section 312 PC), within criminal cases of passive bribery.

#### IV. ANALYSIS

49. The corruption provisions of the Penal Code (hereafter: PC) were amended in May 2006 with a view to aligning national legislation to the standards of the Criminal Law Convention on Corruption (ETS 173) (hereafter: the Convention) which entered into force in respect of Azerbaijan in June 2004. The provisions on active bribery (section 312 PC) and passive bribery (section 311 PC) were redesigned, the concept of public official was extended, *inter alia*, to cover officials of international organisations and persons working for certain private sector entities (see the “note” to section 308 PC), the sanctions for active and passive bribery were increased and trading in influence was criminalised (section 312-1 PC). Despite these commendable efforts, several major deficiencies remain which need to be addressed, as will be described below. In this context, the GET was interested to learn that a revision of the PC was under preparation and that in this framework proposals on how to improve the corruption legislation could possibly be taken into account.
50. The GET was furthermore informed during the visit that discussions were being held within the government on not renewing or withdrawing the reservations<sup>29</sup> made in respect of Articles 5 (passive bribery of foreign public officials), 6 (bribery of members of foreign public assemblies), 10 (bribery of members of international parliamentary assemblies) and 12 (trading in influence) of the Convention – as there were no specific reasons to maintain them – and on signing its Additional Protocol (ETS 191). The GET would strongly support such moves. It is to be noted, however, that the reservations have recently been renewed for a period of three years from 1 June 2010 to 1 June 2013, and that Azerbaijan thus remains one of the GRECO member States to have entered nearly the maximum number of reservations allowed under the Convention. The GET regrets that six years after the entry into force of the Convention in respect of Azerbaijan and without any obvious reasons, no progress has been achieved in this regard and it is concerned that such a situation may significantly hamper the comprehensive implementation of the standards established by the Convention.
51. In addition, the GET wishes to stress that necessary legal reforms need to be complemented by concrete measures for their practical implementation in order to be effective. In this connection, the GET shares the concerns of several interlocutors met on site about the rare application of bribery and trading in influence provisions, which is at variance with the widely shared view that Azerbaijan appears to be extensively affected by corruption. In this connection, the authorities pointed to the fact that the concept of “corruption” in the meaning of the Azerbaijani legal system included other related crimes such as abuse of official powers, excess of official powers, misappropriation of official powers or service forgery, and that the number of prosecuted cases had been increasing since the establishment of the Anti-Corruption Department of the General Prosecutor’s Office in 2005 (e.g. in 2009, 176 persons were indicted for corruption-related crimes, as compared to 35 persons in 2005). However, the GET is concerned that during the period 2005-2010 only five persons were convicted of active bribery, 29 persons of passive bribery and five persons of trading in influence<sup>30</sup> and it takes the view that further legislative amendments as

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<sup>29</sup> See Appendix A. – These reservations were first introduced for a period of three years in June 2004 and last renewed for a period of three years from 1 June 2010 to 1 June 2013.

<sup>30</sup> According to statistics provided by the General Prosecutor’s Office.

recommended below will be an important, but not in itself sufficient, contribution to more effectively fighting corruption.

52. Turning to the criminal legislation in place, the GET notes that the term “official” is used to determine the possible perpetrators of corruption offences. This term is defined in the “note” to section 308 PC which has – according to the authorities – the same legal force as other parts of the PC.<sup>31</sup> The definition encompasses “persons carrying out permanently, temporarily or by special permission, the functions of the authority representative, or carrying out organisational-administrative or managerial-administrative functions in State bodies, institutions of local government, State and municipal establishments, enterprises or organisations, and also in other commercial and non-commercial institutions, representatives of international organisations as well as other persons considered officials for the purposes of the Law ‘on Combating Corruption’ of the Republic of Azerbaijan.” The latter part of this definition, which had been introduced by the 2006 amendments, refers to a list of categories of persons contained in section 2 of the Law “on Combating Corruption”, including *inter alia* “persons elected or appointed to State bodies or to municipal bodies”, “public servants who hold administrative office” and “persons who exercise management or administrative functions in State or municipal bodies”.
53. The GET is satisfied with the explanations provided by the authorities that the definition of an official in its amended form covers mayors, ministers, judges, prosecutors as well as members of Parliament and of local assemblies. However, several provisions of the PC clearly show that certain categories of civil servants and employees of institutions of local government are not captured by the notion of “official”.<sup>32</sup> The authorities and other interlocutors confirmed this understanding and explained that the concept of “civil servant” in the meaning of the legislation on public service<sup>33</sup> is wider than the concept of “official”, in particular in so far as it also covers persons who hold an auxiliary position such as clerks, typists, couriers, drivers or archivists. The GET understood from the interviews that such civil servants, as well as public employees at central or local level without managerial or organisational functions, are not to be considered officials and are not subject to criminal liability under the bribery provisions. According to the authorities, such persons may be punished as accomplices, aiders, abettors or “organisers” of bribery<sup>34</sup> or for other offences such as fraud or embezzlement,<sup>35</sup> depending on the circumstances. However, the GET very much doubts that all cases of bribery in the meaning of Articles 2 and 3 of the Convention would indeed be covered by the aforementioned provisions, e.g. cases where a civil servant holding an auxiliary position unsuccessfully requests a bribe and there is no principal bribery offender. Although Article 1(a) of the Convention does not contain an autonomous definition of a public official, the GET is seriously concerned that bribery of important categories of civil servants and other employees in public service is not sufficiently penalised – all the more so as very few bribery cases have been brought to the courts in recent years. Therefore, the GET recommends **to take the legislative measures necessary to ensure that bribery of all categories of public officials (in the meaning of the Criminal Law Convention on**

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<sup>31</sup> The authorities explained that the PC has the same structure as the former Soviet Penal Code which contained no definitions. In order to integrate the definition of an official into the PC without changing its structure, it had been decided to include it by way of a “note”.

<sup>32</sup> See, for example, section 313, paragraph 1 PC (“Service forgery, that is bringing by official, and also civil servant or employee of institutions of local government who is not being official, to official documents of obviously false data, ...”) and the second paragraph of the note to section 308 PC (“Civil servants and employees of institutions of local government who are not comprised in officials, ...”).

<sup>33</sup> Cf. the definition in section 14, paragraph 1 of the Law “on civil service”, according to which civil servants are “citizens of the Republic of Azerbaijan who hold a civil service position, whose salary derives exclusively from the State budget”.

<sup>34</sup> See sections 31 and 32 PC in conjunction with section 311 PC.

<sup>35</sup> See sections 178 and 179 PC.

**Corruption, ETS 173) at central and local level is criminalised, including all civil servants covered by the legislation on civil service as well as public employees without managerial or organisational functions.**

54. As concerns the international dimension of bribery offences, the GET notes that the above-mentioned definition of an official was amended to also include “representatives of international organisations”. However, several significant shortcomings in relation to the standards of the Convention remain. Firstly, foreign public officials and members of foreign public assemblies in the meaning of Articles 5 and 6 of the Convention are not mentioned and therefore not covered by the bribery provisions at all. Secondly, it would appear that the concept of “representatives of international organisations” in the meaning of the note to section 308 PC is narrower than the concept of “any” officials or other employees of international organisations used by Article 9 of the Convention. The majority of interlocutors met by the GET indicated that the concept of “representatives of international organisations” implied a certain degree of authority of the persons concerned, namely the authority to speak or act on behalf of the organisation. Other officials such as employees with auxiliary or consultative functions would therefore be excluded from the scope of the bribery provisions. By contrast, the Convention does not contain any such restriction. Thirdly, the GET is far from convinced that the concept of representatives of international organisations is broad enough to cover all members of parliamentary assemblies, judges and officials of international courts, as required by Articles 10 and 11 of the Convention (e.g. members of the Parliamentary Assembly of the Council of Europe cannot generally be considered as representatives of the Council of Europe). To conclude, it is to be noted that Azerbaijan has entered reservations in respect of Articles 5 (but only with regard to *passive* bribery of foreign public officials), 6 and 10 but not to Article 11 of the Convention. The reservations were recently renewed for a period of three years from 1 June 2010 to 1 June 2013, but during the visit the GET was informed that discussions were being held within the government on withdrawing or not renewing these reservations as there were no specific reasons to uphold them. The GET would strongly support such moves. In light of the above, the GET recommends **(i) to criminalise active bribery of foreign public officials, in accordance with Article 5 of the Criminal Law Convention on Corruption (ETS 173); (ii) to consider criminalising passive bribery of foreign public officials as well as active and passive bribery of members of foreign public assemblies, in accordance with Articles 5 and 6 of the Convention, and therefore withdrawing or not renewing the reservations relating to these Articles of the Convention; (iii) to criminalise bribery of all judges and officials of international courts unambiguously, in accordance with Article 11 of the Convention; and (iv) to consider taking the legislative measures necessary to ensure that bribery of all officials of international organisations and members of international parliamentary assemblies is criminalised, in accordance with Articles 9 and 10 of the Convention, and therefore withdrawing or not renewing the reservations relating to these Articles of the Convention.**
55. The GET notes that jurors and arbitrators are not specifically referred to in the note to section 308 PC nor are there any relevant court decisions in this respect. According to the authorities, domestic and foreign jurors and arbitrators are not covered by the general definition of an official. The GET shares this view and furthermore notes that the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) has not been signed or ratified by Azerbaijan. In this connection, the GET was pleased to learn about current discussions within the government to sign this instrument and to adjust the national legislation accordingly. This initiative is certainly supported. The GET wishes to stress that clear legislation to penalise unambiguously bribery of jurors and arbitrators will be required. Consequently, the GET recommends **to criminalise active and passive bribery of domestic and foreign jurors and arbitrators in accordance with**

**Articles 2, 3, 4, 5 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and to sign and ratify this instrument as soon as possible.**

56. As regards the different forms of corrupt behaviour, section 312 PC only uses the word “giving” and section 311 PC uses the words “request” and “receipt”.<sup>36</sup> The elements “offer” and “promise” of a bribe as well as the “acceptance of an offer or a promise” are therefore missing. The authorities claimed that such acts are punishable under sections 28 or 29 PC in conjunction with sections 311/312 PC as preparation of or attempt at bribery (“uncompleted crimes”),<sup>37</sup> but there is no case law or court decision confirming this view. Legal practitioners interviewed on site agreed with the authorities but could not report on specific cases, and some of them strongly suggested to introduce the missing elements in order to make prosecution of corruption cases easier. The GET has serious doubts that sections 28 and 29 PC guarantee the adequate incrimination of the offer, promise and acceptance of an offer or promise as referred to in Articles 2 and 3 of the Convention. In particular, under these provisions uncompleted crimes are punishable only if they are not completed “by circumstances not dependent on the will of this person” [i.e. the briber] and if the perpetrator has not voluntarily abandoned the performance of his or her acts.<sup>38</sup> These conditions will almost certainly not be fulfilled in cases where a person withdraws his or her offer or promise, e.g. before it is clearly refused by the bribee. Furthermore, it must be noted that in cases of uncompleted crimes the maximum sanctions are reduced.<sup>39</sup> The punishment for crime preparation or attempted crime cannot exceed respectively half of the maximum limit or three quarters of the maximum limit of the severest punishment provided for the completed crime. The GET has misgivings about the considerable reduction of penalties in the case of several basic types of corrupt conduct. Overall, the GET takes the view that the offer, promise and acceptance of an offer or promise need to be explicitly criminalised in order to clearly stigmatise such acts, submit them to the same rules as the giving, receiving and requesting of a bribe and avoid loopholes in the legal framework. In this core area, bribery law must be unambiguous. In light of the foregoing, the GET recommends **to introduce the concepts of “offering” and “promising” an advantage and “accepting an offer or a promise” in the provisions on active and passive bribery.**
57. Concerning the other elements of the bribery definitions in sections 311 and 312 PC, both explicitly establish that the offence may be committed “directly or indirectly, personally or through the intermediary of third persons”. They furthermore contain the element of third party beneficiaries, by stipulating that the advantage may be given to or received by the official “him/herself or third persons”. Moreover, the above-mentioned provisions expressly cover both positive – legal and illegal – acts and omissions by an official “in the exercise of his or her official functions”. The interlocutors questioned by the GET concurred and stated that this concept is broad enough to cover situations where an official commits an act which falls outside his or her competences. In principle, such cases would constitute illegal acts and therefore aggravated cases of bribery under sections 311, paragraph 2 and 312, paragraph 2 PC. The GET notes that the term “in the exercise of his or her official functions” is almost identical to that employed in Articles 2 and 3 of the Convention (“in the exercise of his or her functions”) and has no reason to

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<sup>36</sup> In addition, section 311 PC contains the alternative concept of “general patronage or indifference” which applies to situations where a relation between the briber and the bribee is established by service dependency and not by a concrete act or omission in the exercise of the official’s functions.

<sup>37</sup> It is to be noted that under section 28, paragraph 2 PC the preparation of a crime is incriminated only in cases of serious and especially serious crimes. Serious crimes are defined as crimes which, if committed deliberately, carry a sentence of up to 12 years’ imprisonment, see section 15, paragraph 4 PC. Section 28 PC is therefore applicable to bribery offences under sections 311/312 (2) PC but not under section 312 (1) PC (active bribery implying legal acts/omissions by an official).

<sup>38</sup> See section 30 PC.

<sup>39</sup> See section 63 PC.

doubt the explanations provided in this respect. Finally, the object of bribery includes any material and immaterial (“other”) advantage – except for “conventional hospitality” and minor gifts as defined by section 8 of the Law “on Combating Corruption” – which might be accepted by civil servants and elected/appointed officials unless they could influence or appear to influence the objectivity and impartiality with which the official carries out his or her service duties, or could appear as a reward relating to his or her duties. The GET considers that these rules are in line with the concept of “undue advantage” as used by the Convention.

58. Turning to private sector bribery, the GET notes that the definition of “official” in the note to section 308 PC as amended in 2006 includes “persons ... carrying out organisational-administrative or managerial-administrative functions in ... commercial and non-commercial institutions”. According to the authorities and further interlocutors met on site, persons acting on behalf of private sector entities are therefore captured by the bribery provisions of sections 311 and 312 PC. It was explained, however, that the term “organisational-managerial or administrative functions” presupposes a certain degree of responsibility within the entity concerned, in that it applies only to “persons who perform managerial functions in working teams of different organisational structures and who also manage various production activities, and economic areas.” It was stated that “these functions typically involve the selection, appointment and discharge of employees, planning of activities, overseeing discipline and other functions.” It was furthermore indicated to the GET that the note to section 308 PC does not cover entities without legal personality. By contrast, Articles 7 and 8 of the Convention unambiguously refer to “any persons who direct or work for, in any capacity, private sector entities” without any restrictions as to the functions or responsibilities of the person or the legal status of the private sector entity.<sup>40</sup> In addition to these specific and obvious shortcomings, the GET has serious misgivings about the somewhat confusing approach chosen by the legislator, namely to include persons acting in the private sector under the definition of “official” – which is, moreover, contained in a note to another provision, i.e. section 308 PC on “abuse of official powers”. Although it was stressed during the interviews that legal practitioners were able to prosecute cases of private sector bribery on this basis (e.g. in 2009, 55 private sector “officials” were indicted for criminal offences under chapter 33 of the PC, including – in one case – for passive bribery), the GET shares the view expressed by some interlocutors that the system would doubtless benefit from the introduction of separate and clearly identifiable provisions designed specifically to cover private sector bribery, along the lines of Articles 7 and 8 of the Convention. Therefore, the GET recommends **(i) to consider including specific provisions on bribery in the private sector in the Penal Code; and (ii) to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173).**
59. As regards trading in influence, the GET came across a quite peculiar situation in that Azerbaijan has made a reservation in respect of Article 12 of the Convention (recently renewed for a period of three years from 1 June 2010 to 1 June 2013), whereas this offence was included in section 312-1 PC in 2006, albeit with several shortcomings as compared to the Convention. Firstly, section 312-1 PC employs – like the bribery provisions – the term “official” which excludes certain categories of civil servants and other public employees,<sup>41</sup> foreign public officials and members of foreign public assemblies, as well as – following the analysis contained in the present report – certain officials of international organisations, members of international parliamentary assemblies,

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<sup>40</sup> Including entities without legal personality, as well as individuals – see the Explanatory report to the Criminal Law Convention, paragraph 54.

<sup>41</sup> See paragraph 53 above.

judges and officials of international courts.<sup>42</sup> Secondly, section 312-1 PC misses the elements “offer” and “promise” of an advantage as well as the “acceptance of an offer or promise”. In this connection, the GET refers to its comments on the bribery provisions of sections 311 and 312 PC which are identical in this respect.<sup>43</sup> Thirdly, indirect commission of trading in influence is not regulated, whereas the bribery provisions explicitly state that the offence may be committed “directly or indirectly, personally or through the intermediary of third persons”. Fourthly, the provision on active trading in influence misses the concept of third party beneficiaries, in contrast to the provision on passive trading in influence which expressly regulates the request or receipt of advantages by a person “for him/herself or third persons”. The GET wishes to stress how important it is for the sake of consistency and clarity that all corruption offences contain the same basic elements. It is therefore of the firm opinion that an explicit reference to indirect commission of trading in influence and to third party beneficiaries is needed in order to ensure, without any doubt, their coverage as required by Article 12 of the Convention. To conclude, the GET supports the idea of not renewing or of withdrawing the reservation as is currently being discussed within the government. In light of the foregoing, the GET recommends **to consider withdrawing or not renewing the reservation relating to Article 12 of the Criminal Law Convention on Corruption (ETS 173) and aligning the incrimination of trading in influence of section 312-1 of the Penal Code with the standards of this Article of the Convention, in particular with regard to the categories of persons targeted, the different forms of corrupt behaviour as well as the coverage of indirect commission of the offence and of instances involving third party beneficiaries.**

60. The sanctions available for corruption offences under the legislation of Azerbaijan appear to conform to the requirements of Article 19, paragraph 1 of the Convention. The level of penalties for bribery offences depends on whether they imply a legal or illegal act or omission by the official. In their most serious forms, i.e. in cases of illegal acts or omissions, bribery offences committed in the public or private sector carry prison sentences of up to eight (active bribery) or ten years (passive bribery). Offences of trading in influence carry prison sentences of up to five or seven years. It is to be recalled, however, that cases of a refused offer or promise and cases of the acceptance of a mere offer or promise may only constitute uncompleted crimes i.e. preparation of or attempt at bribery or trading in influence. In such cases the punishment cannot exceed respectively half of the maximum limit or three quarters of the maximum limit of the severest punishment provided for the completed crime. The GET refers to its concerns about the considerable reduction of sanctions for basic types of corrupt behaviour expressed above.<sup>44</sup> Moreover, when looking at the overall statistics for the years 2005 to 2010, the GET is concerned that during the whole period, only 34 persons were indicted for violations of section 311 PC (passive bribery), nine persons for violations of section 312 PC (active bribery) and five persons for violations of section 312-1 PC (trading in influence). This raises the question whether law enforcement officials are sufficiently aware and informed of these relatively new provisions, as amended, and have the requisite resources and skills to investigate corruption offences. In the view of the GET, this question deserves an accurate analysis, possibly followed by measures such as training and advice for officials concerned, especially in the context of possible further amendments to the corruption legislation as advocated in this report.
61. The note to section 312 PC provides for a special defence which releases the bribe-giver from criminal liability in cases of active bribery in the public as well as the private sector on the condition that either the bribe was given under threat or that the bribe-giver voluntarily reports the

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<sup>42</sup> See paragraph 54 above.

<sup>43</sup> See paragraph 56 above.

<sup>44</sup> See paragraph 56.

offence to the law enforcement bodies. During the visit, the GET was able to clarify several specific questions relating to this defence. It emerged from the interviews that in the second case – effective regret – the defence may be applied in situations where the bribe-giver reports the offence either before it is discovered or before s/he learns that the offence has already been discovered. Furthermore, it was explained that according to the general rules on confiscation of proceeds of crime, in cases of effective regret the bribe is not returned to the bribe-giver but mandatorily confiscated. Finally, it was indicated that the decision on release from criminal liability is taken by the public prosecutor. If the conditions of the defence are met, the prosecutor may not indict the bribe-giver. As regards the practical relevance of the effective regret provision, some interlocutors interviewed on site stated that it was rather ineffective and rarely applied in practice (according to statistics provided by the General Prosecutor's Office, it was applied in respect of 12 persons during the period 2005-2010). On the other hand, several officials and further interlocutors considered this defence as a necessary incentive for reporting instances of corruption. Although the GET is concerned about the low number of convictions for active bribery (only five during the period 2005-2010), it in principle accepts the decision by the authorities to maintain this tool for the purpose of stimulating reporting – which according to numerous interlocutors needs to be actively encouraged in Azerbaijan. By contrast, the GET has misgivings about the automatic nature of the defence. There is no possibility for review of the situation and of the motives of the bribe-giver by the prosecutor or by a court. In principle, very serious cases of active corruption could go totally unpunished by reference to this defence, and it could be misused by the bribe-giver as a means of exerting pressure on the bribe-taker to obtain further advantages. Therefore, in line with GRECO's previous pronouncements on this issue, the GET recommends **to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery who report to law enforcement authorities.**

62. The jurisdictional principles of territoriality and nationality apply to all corruption-related offences. As regards nationality jurisdiction, section 12, paragraph 1 PC establishes that the penal law of Azerbaijan is applicable to citizens and residents of Azerbaijan having committed an offence abroad, but on the condition of dual criminality. This means that citizens of Azerbaijan can only be prosecuted for corruption offences committed abroad when the offence is also punishable in the foreign State and, if so, courts in Azerbaijan may not apply sanctions which are more severe than those applicable under the law of the foreign State. These arrangements restrict the scope of application of Article 17, paragraph 1.b of the Convention. Consequently, the GET recommends **to abolish the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad.**
63. Moreover, the GET notes that Article 17, paragraph 1.b of the Convention not only establishes jurisdiction for offences committed by nationals abroad but also extends nationality jurisdiction to public officials and members of domestic public assemblies of member States – i.e. not necessarily nationals. This extension is not fully reflected in section 12, paragraph 1 PC which generally requires either citizenship of Azerbaijan or residence on the territory of Azerbaijan. Domestic officials and members of domestic public assemblies who are not at the same time citizens or residents of Azerbaijan would therefore not be covered. The authorities indicated, however, that such situations could not arise as under the legislation of Azerbaijan civil servants – which is a broader concept than the concept of an official as used in the corruption provisions –,<sup>45</sup> judges, prosecutors, MPs and other elected officials have to be citizens of Azerbaijan. The GET accepts this explanation but wishes to stress that in the case of future legislative changes to this nationality requirement on public officials the jurisdictional rules would have to be adjusted

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<sup>45</sup> See section 14 of the Law “on civil service”.

accordingly. Finally, the GET discussed with various interlocutors the transposition into national law of the standards established by Article 17, paragraph 1.c of the Convention, i.e. jurisdiction over offences *involving* nationals who are at the same time domestic public officials, members of domestic or international parliamentary assemblies, officials of international organisations or judges or officials of international courts. It would appear that section 12, paragraph 2 PC covers some but not all of the relevant cases. This provision establishes jurisdiction over, *inter alia*, offences directed against the interests of Azerbaijan. These conditions are clearly not fulfilled in cases involving, for example, officials of international organisations or members of international parliamentary assemblies. Consequently, the GET can only conclude that the legislation of Azerbaijan is not fully compatible with Article 17, paragraph 1.c of the Convention and it therefore recommends **to establish jurisdiction over acts of corruption committed abroad by non-citizens, but involving officials of international organisations, members of international parliamentary assemblies, judges or officials of international courts who are, at the same time, citizens of Azerbaijan.**

## V. CONCLUSIONS

64. The 2006 amendments to the corruption provisions of the Penal Code can be considered an important step towards bringing the legislation of Azerbaijan into line with the standards of the Criminal Law Convention on Corruption (ETS 173). However, further significant amendments are required in order to remedy the remaining shortcomings. At present, the concept of “official” used by the relevant bribery provisions does not cover all civil servants and public employees at central and local level. The offer and the promise of a bribe as well as the acceptance of an offer or a promise do not constitute completed crimes. The criminalisation of trading in influence shows several lacunae – partly identical to those identified in the bribery provisions – and private sector bribery is not penalised in respect of *any* person working in private sector entities. As concerns nationality jurisdiction, Azerbaijan is urged to abolish the requirement of dual criminality regarding the offences of bribery and trading in influence. Moreover, the possibility provided by the special defence of effective regret to exempt the bribe-giver who voluntarily declares the offence should be reviewed in order to limit the risks of abuse. Finally, current corruption provisions do not ensure the full coverage of foreign and international officials and of domestic and foreign jurors and arbitrators. Azerbaijan should reconsider its position concerning the reservations made to the Convention in this respect and, furthermore, become a Party to the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191). It is to be regretted that six years after the entry into force of the Convention in respect of this country, Azerbaijan remains one of the GRECO member States to have entered nearly the maximum number of reservations allowed under the Convention. Given that a revision of the Penal Code is currently under way, the present report and its recommendations should be seen as a timely contribution to the ongoing reform process. Above all, the main challenge with regard to fighting corruption in Azerbaijan lies with the effective application of legislation. This calls for a more determined use and stricter enforcement of the relevant criminal provisions in practice.
65. In view of the above, GRECO addresses the following recommendations to Azerbaijan:
- i. **to take the legislative measures necessary to ensure that bribery of all categories of public officials (in the meaning of the Criminal Law Convention on Corruption, ETS 173) at central and local level is criminalised, including all civil servants covered by the legislation on civil service as well as public employees without managerial or organisational functions (paragraph 53);**

- ii. (i) to criminalise active bribery of foreign public officials, in accordance with Article 5 of the Criminal Law Convention on Corruption (ETS 173); (ii) to consider criminalising passive bribery of foreign public officials as well as active and passive bribery of members of foreign public assemblies, in accordance with Articles 5 and 6 of the Convention, and therefore withdrawing or not renewing the reservations relating to these Articles of the Convention; (iii) to criminalise bribery of all judges and officials of international courts unambiguously, in accordance with Article 11 of the Convention; and (iv) to consider taking the legislative measures necessary to ensure that bribery of all officials of international organisations and members of international parliamentary assemblies is criminalised, in accordance with Articles 9 and 10 of the Convention, and therefore withdrawing or not renewing the reservations relating to these Articles of the Convention (paragraph 54);
- iii. to criminalise active and passive bribery of domestic and foreign jurors and arbitrators in accordance with Articles 2, 3, 4, 5 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) and to sign and ratify this instrument as soon as possible (paragraph 55);
- iv. to introduce the concepts of “offering” and “promising” an advantage and “accepting an offer or a promise” in the provisions on active and passive bribery (paragraph 56);
- v. (i) to consider including specific provisions on bribery in the private sector in the Penal Code; and (ii) to ensure that legislation concerning bribery in the private sector covers in an unequivocal manner the full range of persons who direct or work for, in any capacity, any private sector entity as provided for in Articles 7 and 8 of the Criminal Law Convention on Corruption (ETS 173) (paragraph 58);
- vi. to consider withdrawing or not renewing the reservation relating to Article 12 of the Criminal Law Convention on Corruption (ETS 173) and aligning the incrimination of trading in influence of section 312-1 of the Penal Code with the standards of this Article of the Convention, in particular with regard to the categories of persons targeted, the different forms of corrupt behaviour as well as the coverage of indirect commission of the offence and of instances involving third party beneficiaries (paragraph 59);
- vii. to analyse and accordingly revise the automatic – and mandatorily total – exemption from punishment granted to perpetrators of active bribery who report to law enforcement authorities (paragraph 61);
- viii. to abolish the requirement of dual criminality with respect to the offences of bribery and trading in influence committed abroad (paragraph 62);
- ix. to establish jurisdiction over acts of corruption committed abroad by non-citizens, but involving officials of international organisations, members of international parliamentary assemblies, judges or officials of international courts who are, at the same time, citizens of Azerbaijan (paragraph 63).

66. In conformity with Rule 30.2 of the Rules of Procedure, GRECO invites the Azerbaijan authorities to present a report on the implementation of the above-mentioned recommendations by 30 April 2012.
67. Finally, GRECO invites the authorities of Azerbaijan to authorise, as soon as possible, the publication of the report, to translate the report into the national language and to make this translation public.