



## Regulating conflicts of interest in challenging environments: The case of Azerbaijan

Quentin Reed

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By

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## **U4 Issue**

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## Abstract

Current approaches to regulating conflicts of interest, often encouraged by international anti-corruption standards, are commonly judged by how restrictive they are. Such interpretations reflect a mistaken view that a conflict of interest itself is corruption. This paper critiques current treatment of conflict of interest regulation through the lens of experience from Azerbaijan. It concludes by suggesting how the implementation and evaluation of compliance with international standards might be modified to encourage more meaningful ethical regulation, especially in difficult contexts: by prioritising standards, achieving the right balance in the types of regulation enacted, and encouraging partial rather than across-the-board regulation.

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- "Squeezing a Balloon? Challenging the nexus between organised crime and corruption" (U4 Issue 2009:7)  
This U4 Issue argues that understanding the connections between organised crime and corruption requires a deeper analysis of the relationships between organised criminals and public officials at different levels of the state.  
<http://www.u4.no/document/publication.cfm?3399=squeezing-a-balloon>
- "Sitting on the Fence: Conflicts of Interest and How to Regulate Them" (U4 Issue 2008:6)  
This U4 Issue paper describes the problem of conflict of interest of public officials and the main ways in which it may be tackled, with particular focus on regulation of elected officials.  
<http://www.u4.no/document/publication.cfm?3160=sitting-on-the-fence>

## Introduction

In recent years, Azerbaijan has been developing policies – in particular a civil service code of ethics, a draft conflict of interest law and a law on financial declarations by public officials – to underpin and regulate the ethical conduct of public officials. These measures, and the country's national anti-corruption strategies that contained them, reflect efforts to fulfil the country's obligations as a party to conventions, and other obligations stemming from membership of international organizations, specifically the Council of Europe and the United Nations.

However, these steps appear to have either had no impact or to have been systematically stalled. Rather than ascribing this lack of success to a lack of political will – an undefined concept – this paper attempts to outline the factors that obstruct the introduction and/or implementation of such legal norms. Many of the obstacles relate to a national context where the formally-democratic political system in reality disguises a power structure that is inimical to the separation of the political and economic spheres; where a public administration founded on reasonable pay and meritocratic principles has yet to be established; and where the very notion of conflict of interest and ethics regulation in general is understood in a highly compliance- and sanction-based fashion instead of a means to enable public office holders to make intelligent decisions when confronted with ethical dilemmas.

This paper ends with conclusions and suggestions on how the implementation and evaluation of compliance with international standards relating to conflict of interest regulation might be modified to encourage more meaningful ethical regulation, especially in difficult contexts: by prioritising standards, achieving the right balance in the types of regulation enacted, and encouraging partial rather than across-the-board regulation.

### 1. Conflicts of interest and their regulation

In order to structure the discussion, this section attempts to clarify and summarise key issues: what conflicts of interest are, how they may be regulated and what obligations exist in the area of conflict of interest regulation under international anti-corruption conventions. The first two issues are addressed in more detail in a previous U4 Issue paper by this author (Reed 2008).

#### 1.1. What is a conflict of interest?

A conflict of interest situation arises when “a public official has a private or other interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties” (Council of Europe 2000). A conflict of interest situation does not necessarily involve wrongdoing or misconduct, unless an official enters a conflict of interest situation deliberately and/or – crucially – resolves the conflict of interest to the detriment of the public interest. This understanding of conflict of interest is underlined here because it has key implications for regulating conflicts of interest: in particular, that while some conflicts of interest can be prevented this is only one of several types of regulation.

#### 1.2. How can conflict of interest be regulated?

Conflict of interest regulations may take a number of forms, including laws, codes of conduct and internal rules or management guidelines. Such regulations may pursue one or more of three broad approaches to address conflicts of interest:

1. Incompatibility provisions – prohibitions on the performance of certain functions, and/or the holding of certain positions or certain interests by public officials: for example, a prohibition on a civil servant holding external business interests or employment.
2. The establishment of duties of public officials to declare interests they have, either generally or in specific cases: for example, an obligation of a procurement official to declare any ownership or ties with companies participating in a tender in which this official exercises decision-making powers or influence, or a duty of a Member of Parliament to declare regularly any external financial interests.
3. Exclusion or self-exclusion of public officials from participation in decision-making processes or matters where they are subject to a conflict of interest: in the previous examples, the withdrawal of the procurement official from participation in particular tender processes or the withdrawal of the MP from a parliamentary debate or vote on a matter in which s/he holds a relevant interest.

As the author has previously argued (2008), it is of fundamental importance to strike the right balance between these different approaches when designing conflict of interest regulations. Choosing the right balance will depend on many factors. One of these factors is the type of public official to be regulated: for example, there are strong reasons for preferring provisions on declaration of interests and *ad hoc* exclusion for elected officials, while some stricter incompatibility provisions are likely to be more appropriate for full-time professional civil servants. In devising regulations, the key question to pose is what the exact objectives of regulation in a particular case are.

### *Comprehensive vs. partial regulation*

This paper also suggests a distinction between comprehensive regulation and partial regulation. By comprehensive regulation is meant a single legal provision that attempts to regulate conflicts of interest for a wide range or even all categories of public official. Partial regulation refers to regulations enacted for a single area, or even a single institution, of public administration or the political sphere (for example the civil service, a particular ministry, the tax authority, or Parliament). This distinction has become a highly relevant one in the context of the increasing influence wielded by international organizations on anti-corruption policies, especially in newly democratising countries. Traditionally, conflict of interest regulation has tended to emerge in an evolutionary fashion and in response to the needs of particular institutions. Many advanced democracies (for example the United Kingdom) do not possess conflict of interest legislation as such, but rather a set of institution-specific regulations, rules and codes of conduct. Emerging democracies – for example in Central and Eastern Europe or the former Soviet Union – have tended more often to adopt or propose all-encompassing or very broadly-encompassing conflict of interest legislation in an attempt to “regulate everything in one go”. As this paper will later suggest, there are reasons to believe that such attempts face high risks of failure.

### 1.3. International standards

In the area of conflict of interest regulation, the past decade or more has seen the emergence of a number of internationally binding obligations. For the case study presented in this paper, the relevant ones are the following<sup>1</sup>:

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<sup>1</sup> Azerbaijan has been a member of the Council of Europe since 2001, joined the Council’s Group of States against Corruption (GRECO) in June 2004 and ratified the United Nations Convention against Corruption (UNCAC) in 2005.



### General

- Guiding Principle 10 of the Council of Europe's Twenty Guiding Principles for the Fight Against Corruption (1997) stipulates the need for the rules relating to the rights and duties of public officials to "promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct".
- Article 13 of the Council of Europe Model Code of Conduct for Public Officials (2000) defines conflict of interest (see Section 1.1 above) and contains general duties of public officials, including to avoid conflicts of interest, disclose them where they arise and comply with decisions of superiors relating to the resolution of such conflicts.
- Article 7.4 of the United Nations Convention against Corruption (2003, hereinafter UNCAC) contains a general obligation for states to "endeavour to adopt, maintain and strengthen systems that... prevent conflicts of interest."

### Incompatibility provisions

- Article 15 of the Model Code requires, in particular, that a public official should not "engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his or her duties as a public official" and should seek approval to pursue any external activities.
- Article 12.2e of the UNCAC proposes that states should impose "restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure."

### Duties of declaration

- Article 14 of the Model Code requires that "a public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests".
- Article 8.5 of the UNCAC requires states to endeavour to create systems and measures requiring "public officials to make declarations to appropriate authorities regarding, *inter alia*, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials".

To sum up, international standards lay down obligations or near-obligations to establish broad incompatibility provisions both for current public officials and officials leaving the public service, as well as extensive requirements to declare interests, assets and income. A key point to note here is that the standards do not contain any mention of exclusion or self-exclusion by public officials from participation in matters in which they are subject to a conflict of interest. This issue is revisited in the conclusion to this paper.

## 2. Tackling conflicts of interest in Azerbaijan: A brief history

In line with its international obligations – and in addition to implementation of convention obligations in the realm of criminal law and enforcement – Azerbaijan has taken a number of steps towards introducing mechanisms to address conflicts of interest of public officials. These may be divided into three main steps, in chronological order: legislation on financial declarations by public officials; a Law on Rules of Ethical Conduct of Civil Servants; and a draft Law on the Prevention of Conflicts of Interest in the Activities of Public Officials. As the following brief accounts of these three steps makes clear, the results to date have been less than positive.

### 2.1. Legislation on the submission of financial declarations by public officials

The Azerbaijani Civil Service Law establishes a general duty of civil servants to submit annual declarations of income and assets. The Law on Combating Corruption establishes the same duty for civil servants with decision-making authority and for other key categories of officials such as the President, ministers, MPs and so on. In 2005, the Law on Approval of Procedures for Submission of Financial Information by Public Officials was passed. The law defines again and more exactly the categories of officials obligated to submit declarations, and to whom they should do so: for example, key public officials are to submit to the Commission on Combating Corruption, and other officials to the relevant financial or other authority determined by their state authority, or the authority under which their organization falls.

Although the law was originally passed without obvious pressure from the international community, the 2005 Group of States against corruption (GRECO) Evaluation Report commended the authorities for introducing financial declaration requirements, while recommending measures to ensure a system for effective verification of declarations and provisions to enforce the obligations in the law. It also recommended considering making declarations public.

However, in fact, implementation of these provisions has not taken place at all. Article 4.1 of the Law states that the form (i.e. format or template) of financial statements is to be determined by the relevant executive authority – meaning, in practice, the President of the Republic. As required by law, the President issued within one month a decree delegating this task to the Council of Ministers. However, up to the time of writing, the Council of Ministers had not taken any action to implement this instruction – despite the Law on Combating Corruption listing in some detail in Article 4 the types of assets and income that officials should declare. The result is that the provisions of the three laws mentioned have not been implemented at all.

### 2.2. The Law on Rules of Ethical Conduct of Civil Servants

In June 2007, a Law on Rules of Ethical Conduct of Civil Servants came into effect. The Law establishes a wide range of ethical duties for civil servants, from loyalty and obedience to appropriate use of public property. Article 15 of the Law establishes general provisions on conflicts of interest, requiring civil servants to avoid conflicts of interest, to declare relevant interests on recruitment, and, in addition, to observe provisions that are contained in the draft Law on Conflict of Interests (see Section 2.3).

The law appears to have been passed to a significant extent as a result of pressure from GRECO, whose 2005 evaluation report on Azerbaijan explicitly recommended the adoption

of a code of ethics for all civil servants (2005:34-35). In contrast to codes of ethics in many countries, the Azerbaijan authorities chose to formulate the Code as a law whose violation would lead to disciplinary sanctions. GRECO's 2008 compliance report on implementation of its 2005 recommendations acknowledged the adoption of the new law and the fact that the authorities reported implementation of it; the report stated that its recommendation had been "satisfactorily implemented".

Despite the positive evaluation of GRECO, closer observation of the functioning of the Law on Rules of Ethical Conduct yields a different assessment. The author has been closely involved in organizing and providing a number of trainings on implementation of the Law on Rules of Ethical Conduct for Civil Service Commission officials and human resource officials from a wide range of government bodies during 2008. It has been evident from interaction with all counterparts in this process that real implementation of the Law has been minimal, and has amounted, at best, to the adoption of codes of ethics by state institutions that do little more than repeat the provisions of the Law (state bodies are required by the Law to develop their own codes). The author has not been able to identify any case of disciplinary proceedings being launched against a civil servant for violation of the code. Nor does any system of training of civil servants on how to implement the Law appear to have been established – to a significant extent due to the severe lack of staff and resources of the Civil Service Commission.

The author's experience in providing training on implementation of the Law on Rules of Ethical Conduct indicates that there has not been a clear objective and vision as to the precise objective of the Law and how it should be implemented. The dominant impression of the Code appeared to be of a law whose primary purpose is to "enforce ethical behaviour" and address violations through disciplinary (and by extension, where violations are particularly serious, even criminal) sanctions. Yet the pervasive lack of any move to implement the Law even in this sense strengthen the impression that the drafting and enactment of the Law were more a formal exercise to attain a positive external evaluation rather than a serious attempt to establish a system of ethical regulation. These observations might be interpreted as criticism of the Azerbaijan authorities. However, they are perhaps more a cause for contemplation over the absence of key conditions in which a code of conduct could work in Azerbaijan, and by extension, over the efficacy of international standards and the way in which they are advocated and monitored.

### 2.3. The draft Law on the Prevention of Conflicts of Interest in the Activities of Public Officials

In addition to the Law on Rules of Ethical Conduct and the Civil Service Law, Azerbaijan has been in the process of drafting a conflict of interest law since at least 2005. According to the 2005 GRECO Evaluation, the Azerbaijan authorities expected to submit the draft Law on the Prevention of Conflicts of Interest in the Activities of Public Officials to Parliament in 2006. In the event, the authorities requested an opinion on the draft that was provided by the Council of Europe in February 2007. However, no significant changes were made in the draft from that date, and another opinion was provided by the same expert (this author) in November 2008 (2008/2). These opinions were critical of the draft for a number of reasons, in particular: the fact that uniform provisions of the draft apply to both civil servants and local elected officials rather than regulating them differently; that the draft appears to aim at preventing conflicts of interests occurring at all; and, that it uses a flawed definition of private interests.<sup>2</sup> In addition, the opinions criticized the draft for not laying out clearly provisions on

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<sup>2</sup> The author also criticized the law for its definition of interested person as being insufficient to cover typical situations in Azerbaijan where officials control business operations through third parties (often family members). However, this criticism was misplaced: the definition does cover such situations.

exclusion or self-exclusion of officials from participation in decisions or other relevant matters where a conflict of interests exists. Such provisions are a key component of any comprehensive conflict of interest regulation yet - as noted in Section 1.3 - are also not clearly covered in international conventions.

The GRECO November 2008 Compliance Report noted the preparation of the law and that the authorities expected to submit the law to Parliament during its Autumn 2008 session. However, this also did not happen, and at the time of writing still no change had been made to the draft law on the website of the Commission on Combating Corruption.

### 3. Azerbaijan: Barriers to conflict of interest regulation

The lack of progress towards regulating conflict of interest in Azerbaijan – and more broadly, constructing an ethics framework in public administration – could easily be attributed to a lack of political will, to use a phrase popular within the anti-corruption community. In some sense this may be true, but it is by no means a sufficient explanation. The oft-cited concept of political will is much more complicated than it may seem at first, and requires specification of its meaning in a particular context in order to be useful. Such specification, for example, involves identifying whether the problem is opposition of elites to possible reforms due to the likely consequences for their personal interests (and whether this is due to personal venality or a system in which they have little choice but to participate), disagreement with the content of possible reforms on justified or justifiable grounds, conflicts/incompetence within the political elite, and so on. Put differently, the phrase alone does not help to identify the actual barriers to conflict of interest regulation, or which of the conditions necessary for the effectiveness of such regulation are absent. This section therefore attempts to outline a number of key barriers in Azerbaijan to the functioning of conflict of interest regulation and ethics regulation in general.

#### 3.1. Corruption, clans and the fusion of political and business elites

From the perspective of anti-corruption policy, conflicts of interest are a problem due to the risk that persons who are subject to them will exercise their power or authority contrary to the public interest. Regulations that have the objective of preventing or addressing conflicts of interest presuppose that the distinction between the public interest that officials are mandated to serve and other private or personal interests is sufficiently clear in the local context, and that local norms and political culture are reasonably disapproving of situations where officials are subject to conflicts of interest.

In Azerbaijan, it is reasonable to argue that these conditions are not in place. As an analysis commissioned by USAID (Johnson 2006) described presciently, there is a wide consensus among experts that corruption is “systemic and pervasive”, with public perceptions of corruption to match. Moreover, according to the same analysis and a large amount of anecdotal evidence made available to the author during work conducted in Azerbaijan, corruption is vertically integrated “from the most common point of contact between citizen and civil servant, through entire Ministry and Agency structures, to the Presidential Administration...” (Johnson 2006:5). The USAID analysis is worth citing at length:

In brief, corruption activities can be viewed as a pyramid. The top of the pyramid includes the presidential administration and 12 to 15 major clans. Informed observers estimate that the top of this crime pyramid consists of no more than perhaps 1,000 people. Underpinning the pinnacle of the pyramid are franchises run by important members of the leading clans, whose interests

span both the public and private sectors. In any given ministry, the minister is effectively the head of a long chain of corrupt payment schemes and he or she has paid the presidential administration for the privilege of holding such a powerful position... To obtain a position in any given ministry, a person must pay a pre-established fixed amount plus a pre-determined annuity. Everyone up the chain of managerial command obtains a piece of this “job fee plus annuity.” In order to pay this, the newly hired official extracts a fee from those below him or her. The payment pyramid scheme is self-perpetuating. (2006:5-6)

If the system exhibits the characteristics cited above, the situation is further exacerbated by the stability of the political elite, in which former President Heydar Aliyev (who took power in 1993) effectively handed power to his son Ilham before his death in 2003, with the latter holding power since then. The continuity of leadership has been reflected in an extraordinary continuity of ministers, with the great majority of ministers and heads of major state institutions serving for a decade or more in either the same posts or other posts at the same level. Thus, many ministers are widely believed to control networks of companies in key lucrative sectors. For example, one independent Azerbaijani expert and economist referred to the existence of a few main clans or networks of clan families in the country (the most powerful comprising the families of the President, his wife’s family and daughter’s family through marriage, followed by a second, linking *inter alia* the families of the ministers of Emergency Situations, Taxes, Economic Development and the Chairman of the State Customs Committee).

Hard evidence on the ownership and control of companies by senior political or administration figures (or their family members) is virtually impossible to come by, as the ownership of joint-stock companies is not public information in Azerbaijan (see Section 3c below). Nevertheless, as one example, an Al-Jazeera documentary in October 2008 (Al-Jazeera 2008) cited examples of companies that the Minister of Transport is believed by many to control. One was a holding that in turn appeared to control the companies that built a massive new \$80 million bus terminal in the capital Baku; the letters in the name of the holding, ZQAN, coincidentally or otherwise are the first name initials of the Minister, his wife, son and daughter. The other construction company AzVirt carries out major highway and airport surface repairs, including the reconstruction of the highway between Baku and Heydar Aliyev International Airport – a project completed at a very high cost and implemented after the opening of a second brand new highway to the airport.

### 3.2. The nature of public administration within the pyramid system

Another condition for conflict of interest to work – and more broadly for meaningful systems of ethical regulation to be put in place – is the need for public administration to exhibit certain characteristics. These include but are not limited to a reasonable level of remuneration for public officials and at least the partial implementation of meritocratic principles as the basis for recruitment, promotion and other human resources policies.

In Azerbaijan, however, neither of these two conditions is fulfilled. Although they have risen significantly, public sector salaries remain woefully inadequate, with little in the way of in-kind benefits to compensate. Based on wage tables that apply to all ministries, the average monthly salary of officials in the Ministry of Taxes, for example, was around 200 AZN (around 190 Euro) in 2008, compared to a national official average wage of 285 AZN. Particularly in the capital city, these salaries are unambiguously insufficient and would not cover the rental cost of a small apartment. While it is impossible to prove, such salary levels appear to mandate either the securing of a second income or engagement in corrupt behaviour, and the analysis cited suggests that officials with significant discretionary powers

are obliged to collect bribes to pass up to superiors. The widespread understanding of this real remuneration system is that in a number of ministries this functions as a so-called “envelope system” where officials face quotas of bribes they must collect; the bribes are passed upwards to the top of the institution and then partially redistributed as unofficial salary. As the USAID analysis points out, in such a system, overstaffing is also likely to result because “each job generates a continuing stream of revenues upward to the top of the pyramid” (Johnson 2006:6); the same report cites overstaffing at the Ministry of Health as an example. In institutions where such streams of revenue cannot be ensured (for example, due to lesser opportunities for securing bribes), the size of salaries mandates the securing of a second income, with the risks of possible conflicts of interest implied in such situations.

The Civil Service Law requires competitive recruitment for civil servants to be conducted by the Civil Service Commission (CSC). However, this only applies to civil service grades 6-9 (Article 29); for central ministries this means positions at the level of specialist or lower, i.e. under the level of deputy head of department. Moreover, it remains unclear whether executive bodies are bound to select from the CSC’s recommendations. In addition, even for the categories of civil servants to whom competitive recruitment applies, recruits who are 28 years of age or older are exempted from these provisions. Provisions of the Civil Service Law on promotion are even less strict, stating only the ways in which civil servants may be recruited and very vague criteria on which promotion should be made (Article 31).

While this discussion of public administration remains extremely brief, it sufficiently illustrates the lack of a proper system of recruitment and remuneration. Requiring public officials to observe and internalize ethical regulations in such a system – where they are paid inadequately and work in institutions in which merit is not the primary criterion for reward – is unrealistic, not to mention unfair.

### 3.3. Opacity of ownership

Another condition for conflict of interest regulation to function properly is a degree of transparency in ownership, particularly of companies. As mentioned in Section 3a above, such transparency does not exist. As noted in the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)’s December assessment report on Azerbaijan (MONEYVAL 2008:126-127) the Law on State Registration and State Registry of Legal Entities requires only the registration of persons who establish a legal entity and those who are authorized to manage and represent it, and not its owner(s). The report also notes that

There are also no legal requirements for the Azerbaijani authorities to take reasonable measures in order to establish which are the natural persons that ultimately control or own the legal entity. Financial institutions are not obliged to determine/understand the ownership of the legal entity. For this reason, the evaluators have real concerns that sold information on legal persons will not be available for the investigative authorities in time. Moreover the entities are not obliged to seek or register such information (2008:127).

Together with an absence of restrictions on the issuance of bearer (anonymous) shares, this represents acute barriers to the implementation of both conflict of interest regulation and the legislation on declaration of assets and income already passed in Azerbaijan, whose enforcement would require cross-checking of officials’ asset and income declarations with other official information – in particular ownership of business enterprises.

### 3.4. Perceptions of the law: control vs. guidance

A fourth factor that may constitute a less tangible yet no less important barrier to introducing ethical regulation is a different understanding of what are the purposes of ethical regulations. The author's strong impression from providing training on implementation of ethics regulations is that the local understanding – shaped strongly by the Soviet legal tradition – is that the Law on Rules of Ethical Conduct states exactly how officials should behave, or where it does not, this can be deduced from other legal provisions. Accordingly, implementation of the Law is understood simply as detecting violations of these clear provisions and applying sanctions to violators.

This compliance-based understanding of the role of ethics regulation contrasts sharply with best practice in advanced democracies, in which codes of conduct are also (if not primarily) a means for inculcating – through training and the appropriate institutional set-up – standards and ethical awareness, enabling officials to make intelligent decisions when confronted by ethical dilemmas.<sup>3</sup> For the compliance-based approach to work at all, the articles of the Law itself would need to be very precisely formulated – and even then they would require legal interpretation in order to deduce specific violations. The Law on Rules of Ethical Conduct, however, does not state precise duties but code of conduct-style duties, which would be very difficult to enforce, or conversely carry the risk of arbitrary enforcement.

## 4. Conclusions: Rethinking implementation and monitoring of international standards

The first main conclusion of this paper is that key conditions necessary for meaningful implementation of conflict of interest regulation – and indeed ethical regulation in general – are absent in Azerbaijan. On the basis of the author's experience in other countries across the Central and Eastern Europe and the former Soviet Union, it is likely that similar obstacles are also present in many other countries of these regions, and by extension in other developing or democratising countries, especially those with an authoritarian past. The presence of such barriers – in the Azerbaijan case, the appearance of a clan-based pyramid system of corruption, the absence of key components of a functioning modern public administration, the lack of transparency of ownership and a specific local understanding of the purpose of ethical regulation - is not particularly surprising.

The second more tentative conclusion, however, is that the processes in place to ensure implementation and monitoring of international standards fail to take account of such barriers at present. In Azerbaijan, monitoring and evaluation – which has so far come primarily from the Council of Europe – has appeared to be directed at particular laws, without looking at the wider context. For example, GRECO's acknowledgement of the passage of the Law on Rules of Ethical Conduct or of the drafting of a conflict of interest law do not even note the severe barriers to implementation of these provisions in the local reality of Azerbaijan. In the case of the Law on Rules of Ethical Conduct, the result of this omission is that a law was passed and has been in force for two and a half years but with, in reality, no implementation at all. The Evaluation recommendations concerning the draft conflict of interest law also overlook key barriers to implementation – in particular, the fact that the consistent implementation of the draft Law would probably end the careers of many of the country's most senior politicians and officials. As concerns the legislation on financial declarations, GRECO failed to note the absence of information on ownership of companies (without which declarations can not effectively be checked). In addition, the Evaluation's recommendation of a maximalist “publish all declarations” approach does not reflect any universal practice in advanced

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<sup>3</sup> See for example Whitton (2009).

democracies; this recommendation might even be expected to block rather than encourage further progress on the implementation of the legislation in Azerbaijan, given the sensitivity of the information involved.

The aim of this paper is not to apportion blame for the difficulties of implementing the legal provisions discussed. Rather, based on the analysis so far, the author wishes to make tentative suggestions on how future evaluations of countries' fulfilment of international obligations and standards might encourage more meaningful progress on conflict of interest and other ethical regulations.

#### 4.1. Contextualise and prioritise

First, it is notable that most of the missing conditions for effective ethical regulation elaborated in this paper are also required by international standards. For example, Article 7.1 of the UNCAC lists requirements for the public sector that cover the gaps identified in Section 3.b above – for example, adequate remuneration and meritocratic personnel policy. Likewise, transparency in the ownership of legal entities is an implicit requirement under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005) or Financial Action Task Force (FATF) recommendations (2003). However, the GRECO evaluations of ethical regulation to date have not taken into account any of these other standards – nor has it been the remit of the evaluators.

This situation implies strongly that evaluation of the implementation of the ethical regulation components of UNCAC (for example codes of conduct and conflict of interest regulation) by States Parties needs to take into account whether prior conditions for their implementation are in place. This might be done for example in a two-step process:

- Contextualisation of UNCAC obligations. This would involve an analysis of the UNCAC to identify conditions necessary for the fulfilment of obligations in individual articles. Such conditions may in fact be other UNCAC obligations, but as in the examples stated above, they may be present in other international standards or materials.
- Prioritisation of UNCAC obligations. In this approach, and based on the contextualisation analysis, evaluations of compliance with UNCAC would be scheduled so to focus first on those obligations that constitute prior conditions for the implementation of others. This should help to avoid pushing for the fulfilment of certain obligations when the conditions for their implementation are not in place – and moreover, to identify in evaluations which conditions are absent with respect to individual obligations.

#### 4.2. An issue to be managed not prevented

Second, the author wishes to underline that the strictest regulation of conflicts of interest is not necessarily the most effective. This comment is motivated by the emphasis in discourse on preventing conflicts of interest rather than managing them, an emphasis that sometimes appears to assume that conflict of interest itself constitutes corruption. Regarding international standards, the obligation to develop systems that “prevent conflicts of interest” defined by UNCAC Article 7.4 may encourage such a perception. As the author has underlined elsewhere, while many conflicts of interest may be prevented, any official with important powers or authority to make or participate in decisions is likely to encounter situations in which s/he is subject to a conflict of interest. In such situations, addressing the situation through disclosure and (where appropriate) recusal from participation in the relevant matter is the appropriate solution. Requirements of recusal or self-recusal in specific



situations are also likely to be a more realistic approach than across-the-board prohibitions in difficult contexts such as the country described in this paper.

International standards do not appear to mention the issue of exclusion. This should not, however, prevent legislators and those that manage conflicts of interest from appreciating their importance. In addition, the *ad hoc* exclusion approach should also be given a higher profile in international standards and evaluations of countries' fulfilment of those standards.

### 4.3. Encouragement of partial regulation

In addition, the author wishes to suggest an important contrast between advanced democracies and emerging or transitional democracies. In the former, conflict of interest regulation is often something that has arisen in an evolutionary fashion in response to the specific needs of particular institutions, rather than as an attempt to legislate in one go and cover everything. One example is the United Kingdom, where specific regulation of conflicts of interest of MPs has evolved in stages through the development of standards and internal rules within Parliament; conflicts of interest for civil servants are addressed by the Civil Service Management Code (including its Code of Conduct), employment contracts and internal rules of government institutions; and, elected local government officials are regulated by separate provisions again.

In emerging or transitional democracies, it is relatively common to see attempts to regulate everything through one conflict of interest law. Examples include the Czech Republic, Estonia, Azerbaijan or Montenegro. However, attempts to regulate everything in one go may have undesirable consequences:

- A crisis of implementation. Across the board regulations lead to an extensive oversight and enforcement burden. Indeed, the author's perception is that in some countries laws may have been deliberately made too comprehensive in order to prevent proper implementation.
- Such attempts are likely to ignore the fact that the conflict of interest regulations that are appropriate for different types of public official are themselves very different, as mentioned in Section 1.2. In theory, one law may cover all categories of official and apply different types of regulations to each. However, this is a near-insurmountable challenge for emerging or less-developed democracies, and one which does not conform with the experience of advanced democracies in which a more incremental approach has been dominant.
- Relating to the previous point, it might also be argued that specific regulations that emerge from within an institution (or from one enlightened leader of that institution) are likely to be better targeted and also better implemented. In a context where corruption is systemic and pervasive as seems to be the case in Azerbaijan, such an approach – with its more limited aim of creating an island or islands of integrity – is more likely to achieve some limited success than all-encompassing regulations. The implication of this is that evaluations of ethical regulations should pay as much attention to the quality of such regulations and their implementation as to the coverage they achieve. This again underlines the need for a nuanced rather than “checklist” approach to the evaluation of fulfilment of international standards and obligations, and to the provision of technical assistance for their fulfilment.

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## Abstract

Current approaches to regulating conflicts of interest, often encouraged by international anti-corruption standards, are commonly judged by how restrictive they are. Such interpretations reflect a mistaken view that a conflict of interest itself is corruption. This paper critiques current treatment of conflict of interest regulation through the lens of experience from Azerbaijan. It concludes by suggesting how the implementation and evaluation of compliance with international standards might be modified to encourage more meaningful ethical regulation, especially in difficult contexts: by prioritising standards, achieving the right balance in the types of regulation enacted, and encouraging partial rather than across-the-board regulation