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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

NOTE

ON THE

**DRAFT LAW ON THE OMBUDSMAN
OF THE REPUBLIC OF AZERBAIJAN
(as adopted at first reading by the Milli Mejlis)**

The following observations refer to the draft law on the Ombudsman adopted at first reading by the Milli Mejlis of the Republic of Azerbaijan. They are based on the comments made on the original draft (CDL (2001) 40) by Ms Maria de Jesus Serra Lopes and Mr Pieter van Dijk, members of the Venice Commission.

1. The draft considered has incorporated an important number of observations and suggestions made by the Venice Commission Rapporteurs . In this respect the following new elements should be welcome:
 - The Ombudsman's competence to protect human rights as enshrined not only in the Constitution but also in international agreements to which Azerbaijan is a party (Article 1 par. 1);
 - The deletion of the Prime Minister from the list of persons whose activities are outside the Ombudsman's investigation powers (Article 1 par. 3; see also below point 3);
 - The election of the Ombudsman by the Milli Mejlis;
 - The increased majority required for the appointment of the Ombudsman (83 of the 125 members of the Milli Mejlis);
 - The clarifications concerning the procedure for appointment in Article 2;
 - The qualifications and incompatibilities of the Ombudsman in Article 3; in this respect it is underlined that being a member of an NGO is no longer a reason of incompatibility;
 - The introduction of the Ombudsman's oath in Article 3 par 5;
 - The extension of the Ombudsman's mandate to seven years and the provision according to which the Ombudsman cannot be re-elected;
 - The rules according to which not only citizens but also foreigners and stateless persons as well as legal persons have access to the Ombudsman (Article 8 par. 1).

In this respect, the draft adopted at first reading is a considerable improvement compared to the initial draft.

2. The following observations are still valid:

3. Article 1 par.3 seems to exclude from the investigation power of the Ombudsman all activities of the President of the Republic, members of the Milli Mejlis and judges. It should be made clear that activities exercised by the President and/or the Presidential administration in his/her capacity as head of the executive should not be out of reach for the Ombudsman. Activities of the President, unless they are of an exceptional nature (e.g. declaration of war) or of a political nature (e.g. appointment of the Prime Minister) should fall within the monitoring competence of the Ombudsman. Equally, the activities of the Milli Mejlis and those of the judicial administration should also be within the monitoring competence of the Ombudsman. The Ombudsman must be able to recommend the adoption or revision of a law and suggest a friendly settlement of a pending dispute. He/she must also be capable to consider issues regarding the administration of justice (loss of files, undue delays, questions concerning the execution of judgments). The wording in Article 2 par. 1 of the draft may be construed in a manner that would deprive the Ombudsman of essential powers for the effective exercise of his competence to protect human rights.

4. The proposal to involve also other persons (such as academics and/or judges of the highest judicial authorities) in the selection of persons proposed for the office of Ombudsman to the Milli Mejlis has not been retained.

5. In article 5 par.2 the terms “he shall not be replaced” (in a)) are redundant with Article 4 par. 1 “while in office, he shall not be replaced”.

Equally, in Article 5 par. 2 b) the sentence “there shall be restrictions ... for terminating his/her powers” is redundant with Article 5 par. 1 which clearly sets out that the “Powers of the Ombudsman may be terminated only on the grounds provided for in Article 7”.

6. In Article 6 it should be made clear that the Ombudsman’s immunity is valid during his term of office but also, after the expiry of the term of office for opinions held or action taken while in office.

7. It should be considered whether the lifting the Ombudsman’s immunity should require a qualified majority of members of the Milli Mejlis (83).

8. The list of reasons that may lead to the termination of the Ombudsman’s mandate in Article 7 should be as clear as possible. It might be advisable to adopt the following list, already suggested by the Venice Commission with regard to Ombudsman rules in other countries:

- a) death of the Ombudsman
- b) final judgment declaring him missing or incapable
- c) final judgment declaring him guilty of an serious intentional offence
- d) violation of incompatibility requirements;
- e) manifest inability to perform his/her duties.

Termination of the Ombudsman’s mandate for reasons indicated in d) and e) should only be after decision of the Milli Mejlis, adopted by qualified majority (83 members) and after hearing of the Ombudsman.

9. In Article 8 par.1 the requirement for foreigners and stateless to live temporarily or permanently in Azerbaijan may be too restrictive; the same goes in respect of legal persons as far as the requirement of “registration in accordance with Azerbaijani legislation” is concerned. It might be appropriate to stick to the usual human rights wording “any natural or legal person or group of individuals”.

10. In Article 8 par. 2 the words « where possible » should be added, as the consent should not be a condition sine qua non for lodging a complaint by third persons, if the alleged victim of a human rights violation is not in a position to give this consent.

11. It follows from Article 9 par. 2 that the Ombudsman is not obliged to investigate into anonymous complaints. This does not mean of course that he/she cannot initiate an investigation ex officio, under Article 12 par. 3, if he/she believes that the information in the anonymous complaint is credible and sufficiently serious to justify an ex officio investigation.

12. Article 12 par 5 sets out time limits for the investigation procedure (30 days plus another 30 days if so required). It must be made clear that this is a safeguard in favour of applicants having a legitimate interest in their case being rapidly dealt with. These time limits cannot be

construed as limiting the Ombudsman power to investigate a case and no authority or official can refuse to co-operate with the Ombudsman after these time, limits have expired.

13 In Article 13 par. 4 in fine, it might be appropriate to add: “the latter may apply to other hierarchically superior authorities”.

14. The Ombudsman’s right to apply to the Constitutional Court must be explicitly set out in the Constitution. The Constitution in force could be construed as not allowing such appeals. In this respect the Venice Commission Rapporteurs have underlined the need for a constitutional amendment setting up the institution of Ombudsman.

The Venice Commission re-iterates the availability of the Working Group established in co-operation with the Directorate General II (Human Rights) of the Council of Europe to further consider, together with the competent authorities in Azerbaijan, the preparation of the final draft of the law on the Ombudsman.