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"Support to the National Coordinating Unit (NCU) and the Implementation of the Partnership and Cooperation Agreement (PCA) in Azerbaijan"

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Editorial Letter

Dear Readers,

Welcome to the forth issue of the Partnership and Cooperation Journal (PCJ) published by the team of the EU TACIS project "*Support to National Coordinating Unit (NCU) and Partnership and Cooperation Agreement (PCA) Implementation in Azerbaijan "*.

The Partnership and Cooperation Journal started to be published in December 2006. It was an initiative taken by the TACIS project with the aim to inform the public administration, scientific and professional community as well the civil society of the country about specific topics of legal and economic interest related to the Implementation of the Partnership and Cooperation Agreement (PCA) between European Union and Azerbaijan in particular and legal approximation of the national legislation.

From March 2008 a new TACIS project has started, named "Support to the NCU and the PCA implementation in Azerbaijan" with the aim to strengthen further relations between European Union and Azerbaijan under the new environment of the European Neighborhood Policy and the decentralization of the EU Assistance with the support of the EC Delegation in Azerbaijan and to continue legal approximation of the national legislation in most important and strategic areas.

Working in cooperation with the NCU, the Project decided to continue the publication of the Partnership and Cooperation Journal widening the scope of information on the issues of common interest and raising further awareness on a deeper and closer relationship of Azerbaijan and European Union. Two pillars upon which the Journal will be based are the Partnership and Cooperation Agreement and the European Neighborhood Policy to both of which Azerbaijan is a main partner.

This Issue is dedicated to the most important and interesting issues which can be quite new for the country. The Journal covers various legal and economic topics, such as intellectual property, consumer protection, prohibition of discrimination, etc., and it will be interesting as for the general readers, so for the professionals. Thus, the Journal consists of a number of articles and one of them is dedicated to the Regulatory Impact Analysis which is analytical approach to assess probable costs, consequences, and side effects of the planned policy instruments (laws, regulations, etc.) that can also be applied in Azerbaijan during law making process. The Journal has also an Article on a Monitoring System which is being developed. Such instrument will serve as a basis for an improved communication and feedback process between its users as well as a common reference tool.

It should also be noted that, starting from the second edition, the PCJ received international registration and ISSN number (1993-6141).

With the present publication we start the second period of the Partnership and Cooperation Journal hoping to reciprocate your expectations. The Journal will be a field of an opened dialogue and your contributions and remarks will be a precious support to our common efforts which are building of a space of peace and prosperity among European Union and Azerbaijan in which all of us will share the same common values.

Sincerely,

Anastasios Mantelis
The project team leader

The Challenge of RES in Azerbaijan: European Best Practices and Trends for an Adequate Legal Framework

By Anastasios Mantelis, Team Leader of the Europe Aid project

Policies for the Promotion of RES

Major universal problems the humanity attempts to combat through the Renewable Energy Sources (RES). The security of the energy supply which imperils the industrialized economies, the climate changes which threaten the way of life in the planet and the poverty which runs over 2.5 billion of the global population. The RES capability to be inexhaustible, their capacity to confront the greenhouse emissions and their ability to found conditions for sustainable development in local, national and wider level are the keystones upon which the expectations of the universe are based.

In the race for the promotion of RES the European Union is the leading part. Legislative reforms broke down barriers and targeted programs and incentives but mainly the open market created a favorable and profitable investment climate. This policy was expressed by initiatives as *Altener, Save, Thermie, Intelligent Energy, R&D Framework Programs* as well by the directives: 2001/77 governing the electricity generation from RES; 2003/30 ordering the compulsory use of biofuels in vehicles; and 2002/91 regulating the energy performance in buildings. Thus, the three main sectors of energy consumption and greenhouse emissions, notably electricity generation, transportation and energy efficiency in the buildings, were regulated and only the heating and cooling sector remained unregulated.

Azerbaijan, though an oil producer country, traced this policy with distinguished state acts as: the State Program on Utilization of Alternative and Renewable Energy Sources, adopted by Presidential Decree in October 2004; the National Plan of Alternative Energy for 2004-2013; the Memorandum of Understanding with the EC of 7-11-2006; and the Energy Reforms Sectoral Program (ERSP), which was recently signed. The ERSP is the first sectoral program in Azerbaijan under the new Instruments of European Neighborhood Policy, the Sector Budget Support, through which funds of 13 million euros are allocated from EU to the country, mainly for the promotion of RES.

Best Practices in the Legislation of the EU Member-States

Following the principle of subsidiarity, the EU Directives set indicative targets and the member-states according to their national peculiarities decide the appropriate measures, the various support schemes and the field of RES upon which they want to invest. Thus in France opportunities were created regarding biofuels, in Germany priority was given to photovoltaics, in Denmark, Spain and Greece more favorable was the wind (aeolic) energy and of course solar energy in Greece. Most of the success stories among the EU members-states were based on the following legislative reforms which were the pillars upon which the development of RES was found.

The Right to Produce Electricity from RES

Everybody, who wants to invest and meets the requirements of the law, has the right to request from the state or an independent regulatory body a license for installing the proper installations and generating electricity from RES. The electricity generated is not only for self-consumption of the producer but mainly for being sold to the others, notably to system operators, single buyers and to individual consumers.

This right was forerunner of the electricity market opening to the competition. When it was established there was not any open electricity market and all the cycle of generation, transmission and distribution was performed by strong state monopolies. These monopolies were, as they are still now, incapable to reorient investments and meet the needs of the security of supply and the protection from the CO2 emissions.

The advantage of RES to be independent from any supplier, able to generate electricity in any place where the wind blows, the sun shines and the water runs and operate at extremely low cost, was a challenge for new engineers and investors who created the new market. Installations were established in mountains, rivers and plains, new jobs were created in the core business and the auxiliary industry, the demand of the citizens in islands and isolated areas for electricity of good quality, notably continuous and stable, was satisfied and profits came for all the relevant investments.

The Right of Access to the Electricity Grid

The producer of electricity from RES has the right to be connected to the transmission and distribution electricity grid in order to supply his clients either system operators or final consumers. Refusal to requested connection is not permitted except in justified cases of lack of the necessary capacity. In such cases the system operator is obliged to plan additional investments for the grid. In some of the national legislations priority is given to the transmission of electricity from RES.

The transmission or distribution fees should be rational, objective, transparent and non-discriminatory. The system operators have not the right to impose fees different from those paid by their own business or their filial companies. The independent regulatory bodies or the system operators are obliged to set in advance objectively verified technical standards for the integrity of the grid, which should be followed by all, producers, system operators and big consumers.

The System of Guaranteed, Feeding-in, Tariffs

The tariffs for the electricity from RES should be guaranteed and able to feed investments return. Equal terms of competition between electricity from RES and that one from conventional sources requires the co-estimation of the external cost, paid indirectly by the consumers or the state for the protection of the environment, the services in health and other. This cost, significant for the conventional sources, meaningless for RES, cannot be included, at least for the present time, in the tariffs because they will surcharge unaffordable the consumers. Instead of this co-estimation, guaranteed tariffs for RES are provided which benefit the consumer among other and by avoiding the external cost.

The guaranteed tariffs vary among the member-states according to the national peculiarities. In Greece the system operator, who is the single buyer of electricity, pays to the producer from RES in the continental part, where an interconnected system exists, the 70% of the price charged to the households and in the islands, where the system is not connected, the 80% of the price charged to the households. These tariffs ensure profitability to both, the electricity producer who sells in a good price and the single buyer who avoids important expenses related to the external cost.

In Germany for reducing the cost of the construction of photovoltaics and promoting this energy source, the tariffs paid for electricity from photovoltaics are higher than those charged to the households. Nevertheless such high tariffs do not result actually to the final price paid by the

consumer or to the revenues of the buyer due to the limited contribution in the mix of the electricity from all sources, which is distributed. By this way investments return is ensured, the profits for the producers increase the demand for more installations, reducing further the cost

The Compulsory Long-term Contracts

The electricity single buyers or system operators are obliged to conclude with the electricity producers from RES long-term contracts, able to ensure that the electricity produced will be sold during a period of time necessary for the investments return. The terms of such contracts should be transparent, non-discriminatory and objectively justified. It is not permitted the single buyers or system operators to abuse their significant position in the electricity market. Independent regulatory bodies have the right after consultation to amend the terms of such contracts in order to be in compliance with the above principles.

The electricity generation requires high investments and long programming and construction period, during which revenues do not exist. The investment return is expected to be covered by future profits of an also long period of time. The state monopolies, being single sellers of electricity and raising funds for investments direct or indirect from the taxpayers, do not need any contract. The producers from RES for financing constructions, installations and production have to raise the necessary funds from the market and mainly the banks. The long-term contracts ensure that after the long programming and construction period the electricity produced will be sold, the investments made will be returned and the loans given will be paid.

Trends in the Proposals for New EU Legislation

At the beginning of 2006 the EC prepared the Energy Green Paper and the Strategic European Energy Review and called member states, scientific and financing institutions, producers, associations, stakeholders groups, consumers' organizations, NGOs and citizens to public consultation. This dialogue was traced till the end of 2007 by further more specific public consultations regarding the role of the biofuels, the heating and cooling from RES and the withdrawal of administrative barriers for the development of RES. Besides, an Impact Analysis was carried out estimating the consequences of the policy proposed, exploring and comparing a wide range of alternative solutions to the existing problems.

Having minded the conclusions of the widespread public consultation and the findings of the above Impact Analysis the EC at the beginning of 2008 made a legislative proposal for a new Directive on RES which includes important new provisions, covering the new needs arisen and expressing the modern trends traced in the sector. Main points of this legislative proposal are the following.

The Mandatory Target of a 20% Share of RES by 2020

The policy of the indicative targets is quitted. A binding overall EU target of 20% share of RES in the final energy consumption is established, shared among the member-states, on the basis of GDP, for ensuring fairness and cohesion. This target is consistent with the binding EU target of a 20% reduction of the greenhouse gas emissions by 2020 and the expansion of the EU Emission Trading System.

The binding target engages the member-states in the process of its achievement but with flexibility regarding the ways and measures that suit more to the particular national circumstances. The member-states are free to develop the renewable energy sector that corresponds best to their potentialities. The binding target ensures also the long-term certainty

and stability which are necessary for the business community in order to make rational investment decisions in the renewable energy sector.

The Mandatory Target of a 10% Share of Biofuels in Transport

A binding also target of 10% share of biofuels in transport by 2020 is established, compulsory by each member-state. Biofuels from wastes, residues, plastics (cellulosic material) are considered as contributing twice in the target. It is expected the cost of the biofuels production to be reduced and opportunities to be given for alternative cultivations in agriculture increasing the income of the farmers.

This flat-rate mandatory target is justified by the fact that the transport sector has the most rapid increase in greenhouse gas emissions of all sectors of the economy and, at the moment, only biofuels are able to tackle the oil dependence of the transport sector. Besides, the biofuels are easily traded and member states with low domestic production are able to obtain them from other countries and to achieve their target, according to their environmental, cost and energy security interests.

The Heating and Cooling Sector

The sector is regulated for first time although that it has significant share in the energy consumption and greenhouse emissions. The proposal covers heating and cooling produced by RES and delivered to manufacturing industry, transport, households, services, agriculture, forestry, fisheries and more over district heating or cooling of renewable origin. District systems are strengthened by the promotion of the co-generation of electricity and heating/cooling and by the introduction of the guarantees of origin for heating and cooling produced from RES only in plants with at least 5 MWth production, suitable for such district systems.

The building regulations of the member-states have to promote heating and cooling of renewable origin in new or refurbished buildings. Planning rules should be adapted taking into account cost effective and environmentally beneficial renewable heating and cooling and electricity equipment. Local and regional administrative bodies should promote district heating and cooling installations using RES when planning, designing, building and refurbishing industrial or residential areas.

The Guarantees of Origin

Electricity, heating and cooling produced by RES are proved by the guarantees of origin, issued, transferred and cancelled electronically. The guarantees must be accurate, reliable, fraud-resistant and contain all the necessary information as energy source, time of production, identification of the installations, amount and type of any investment aid given for the installation. Each guarantee of origin has standard size of 1 MWh and for each MWh of energy produced only one can be issued.

The guarantees of origin are used and cancelled when the energy produced receives support in the form of feed-in tariffs, premium payments, tax reductions or payments resulting from calls for tenders or when the energy produced is counted for assessing compliance with a renewable energy obligation or when an energy supplier or energy consumer wishes to point out and prove to the public the share or quantity of renewable energy in its energy mix.

When in a member-state, the previous two years, the mandatory target has been achieved the guarantees of origin may be transferred to other member-state and from person to person. This

transfer has an economic value and a trading system it is expected to be developed motivating further the generation from RES. Imported electricity produced from RES in third country is counted towards the mandatory targets if it is proved by guarantees of origin issued according to standards equivalent to that laid down by the EU legislation.

The Environmental Sustainability of the Biofuels

The production, import and use of biofuels should be environmental sustainable according to certain defined criteria. Only in this case they are counted towards the mandatory targets and may be benefited by national support schemes. More specific:

The greenhouse gas emission saving should be at least 35% calculated in totality from the use of biofuels and the cultivation of the raw material. Cultivation in lands with high stock of carbon should be avoided if it releases into the atmosphere carbon dioxide more than that saved from the use of biofuels. The same it is provided for the wetlands covered with or saturated by water for a long period of time and from continuously forested areas, which also contain high carbon stock.

The raw material should not be obtained from land with high biodiversity value as forest undisturbed by significant human activity, areas designated for nature protection and highly biodiverse grassland rich in species. Such lands are exhaustible resources and should be preserved as having an important value to all mankind. It is unacceptable the demand for biofuels to encourage their destruction.

The Access to the Electricity Grid

The priority access to the grid for electricity generated from RES should be guaranteed by transmission and distribution system operators. These operators should maintain the reliability and the safety of the grid and develop the infrastructure such as to ensure capacity able to accommodate the priority access. When dispatching electricity generating installations, they should also give priority to installations using RES insofar as the security of the national electricity system permits.

Transmission and distribution system operators should set up and publish objective, transparent and non-discriminatory standard rules relating to the bearing and sharing of costs of technical adaptations, necessary to integrate new producers feeding electricity from RES into the interconnected grid. Where appropriate, such costs may be bore, in full or in part, by the above operators. The charging of relevant fees should not discriminate against electricity from RES, in particular in peripheral regions, islands and regions of low population.

The Withdrawal of Administrative Barriers

The national rules concerning authorization, certification and licensing of plants generating electricity, heating or cooling from RES as well biofuels production should be proportionate. The responsible national, regional and local administrative bodies should be clearly defined, with precise deadlines for approving applications. If there is not any response within the set time limits automatic approval of planning and permit applications for RES installations should be provided.

Administrative charges paid by consumers, planners, builders, installers and suppliers should be transparent and cost-related. Geographical locations should be indicated suitable for exploitation of energy from RES in land-use planning and for the establishment of district heating and cooling. Single administrative bodies, “one-stop-shopping”, are proposed for processing

authorisation, certification and licensing applications for RES installations and providing assistance to applicants.

These proposals will have sooner or later a wider international influence and they will be a challenge for Azerbaijan fully justifying the Energy Reforms Sectoral Program. Promoting this Program Azerbaijan will be able to participate in the future evolutions of the energy trade, to diverse the energy production among the various sectors providing benefits to a wider range of the population, mainly those of remote and mountainous areas and to prolong the oil and gas exploitation increasing the benefits for the country.

Anastasios Mantelis is the team leader and chief advisor of the project. He is also lawyer at the Supreme Court and the State Council of Greece and international legal consultant. He was Member of the Greek Parliament and Minister. In the public administration he possessed high level positions as Secretary General, among which of the Cabinet of Ministers, and Chairman of important organizations. He is married and has two children.

Regulatory Impact Analysis

(Experiences in application throughout Western and Eastern Europe)

By Otto Kammerer, Long-Term Legal Expert

1.1. Principles, Aims, Purposes of RIA

In the frame of the PCA implementation project, actually realised by an international consortium in Azerbaijan, the sector of legal approximation is of paramount importance to assure a gradual convergence of the legal order of Azerbaijan with the body of EU legislation, the *aquis communautaire*.

To fulfil such requirement, it is evident, that in the course of this process, numerous laws in Azerbaijan will have to be amended or require an entirely new drafting.

In this context it is the legislator or at a previous level, the legal drafter, who has to pay attention to the expected or unexpected side-effects of such laws which means that are careful analysis on the possible impacts of any new legislation is made. In other words, it is important that legislators fully understand the consequences, costs, benefits and distributional effects of their legislative actions.

Let us first try and find a valid definition of what we understand under Regulatory Impact Analysis.

I think we would best describe RIA as being a decision tool, a method of systematically and consistently examining the positive and negative impacts of regulations and of communicating this information to decision makers.

Governments use RIA programmes to achieve these goals by systematically analysing the expected effects of draft regulations and their feasible alternatives on the social and economic welfare of their citizens.

The results may then be used to make decisions based on this and other information.

In this context it should be noted that we usually understand by analysis an "*ex ante*" evaluation of a draft regulation, not an "*ex post*" evaluation on already applied legislation.

RIA comes in many forms that reflect various policy agendas and different policy traditions of governments.

Some countries like the US, Canada and the UK assess business impacts, others, administrative and paperwork burdens.

Others use very elaborate benefit-cost analysis based on social welfare theories. Environmental impact assessment is used to identify impacts of regulations on environmental quality. Other regulatory assess how proposed rules affect sub-national/sub-federal local governments or racial minorities or small businesses, employment or international trade.

With regards to the legal drafting process it is also important to establish the place of the RIA therein.

I think that there is no doubt that the RIA is an integral part of the legal drafting process.

The following OECD checklist for regulatory decision making will enhance the assertion that RIA is an integral part of the legal drafting process.

The principles listed below are at the same time a good starting point on which to build an effective RIA programme.

So, in this context, a legal draftsman would typically apply the following questions when he is working out a legal draft:

- Is the problem correctly defined?
- Is the government action justified?
- Is the regulation the best form of government action?
- Is there a legal basis for regulation?
- What is the appropriate level of government for this action?
- Do the benefits of regulation justify the costs? (Benefit-cost analysis)
- Is the distribution of effects across society transparent?
- Is the regulation clear, consistent, comprehensible and accessible to users?
- Have all interested parties had the opportunity to present their views?
- How will compliance be achieved?

As stated above, RIA is a relative new phenomenon which found its entrance into the legal drafting procedure in the middle of the 90'ies due to a recommendation of the OECD council that its member states institute a check list of modern management techniques "to ensure the quality and transparency of government regulations".

At the present most OECD countries use RIA programs in order to reduce the costs of regulations and to enhance policy effectiveness by improving the quality of legislation.

This shows clearly the emphasis that most governments place on improving their legislation.

The OECD has underlined that RIA contributes to a "cultural shift" whereby regulators become more aware of the costs of action and feel a greater incentive to adopt decisions to reduce costs.

Especially taking into account the above quoted OECD check list for regulatory decision it can be said that the most important use of the RIA is to provide a tool to decision makers to question more thoroughly their reasons for regulating, to consider other alternatives, to evaluate impacts and finally to become capable to make better decisions and regulations.

There is nearly universal agreement among regulatory reform offices that RIA, when it is properly executed, improves the cost-effectiveness of regulatory decisions.

1.2 What is the Need for RIA?

After these introductory remarks about the purpose and the general usefulness of a RIA programme, let us have a closer look on the question "why does a country need a RIA program and why could this be useful for Azerbaijan"?

Before I go more into details let us have a look on some recent historic events.

After the breakdown of the Soviet Union many of its ex member states undertook the ambitious task of completely changing their legal framework.

This required the foundation of new legal procedures which were of course very different from traditions of the past.

Especially the new EU member states – the 3 Baltic countries – were facing the comprehensive and difficult process of harmonisation of their entire legal system to the requirements of the EU's *aquis communautaire.*

It was evident that – during the transition period - the costs to businesses and citizens of complying with the new laws and regulations could be high, as could be the costs to the governments for administering them.

In order to avoid costly mistakes that could have had negative effects to their business communities the 3 Baltic countries decided to install rigorous RIA programmes.

I would like to draw the attention of the reader to another important point:

During my work as legal advisor in this country and other countries in Eastern Europe I found that there was in many cases a considerable discrepancy between a piece of legislation and its application.

RIA can help to identify implementation needs that are necessary to reach a good practice in legislative decision-making. In this way, the resources spent on regulations to achieve policy goals will ensure a higher level of policy effectiveness.

Moreover RIA is helpful because it provides a systematic set of information which decision-makers can use to make informed comparisons and choices among alternatives.

RIA is most helpful in its advanced form when it uses economic theory to forecast impacts on competition and benefit-cost analysis (BCA) to inform decision-makers about what alternatives are likely to be most cost effective for society.

BCA is also useful in estimating the distributive impacts, i.e. who gains and who loses from the regulation. Using economic theory to predict the impact of government policy on competition has long been accepted by economists worldwide.

Benefit – cost analysis can play an important role in legislative and regulatory policy debates on protecting and improving health, safety and natural environment.

If we take carefully into account all the arguments being said above, the reasons for establishing an RIA programme in Azerbaijan are evident:

Like in the 3 Baltic countries, the economical and legal system of Azerbaijan– albeit not heading for EU-membership- saw already important changes in the last 15 years.

As in other democracies, legislators and decision-makers in **Azerbaijan** are now held accountable by the electorate for the policy choices made by them.

In **Azerbaijan** now as in other open societies private owned business bears the cost of ill-conceived regulations as long as there is no systematic information about possible costs and

benefits of Russian draft laws, as long as there is no systematic consideration of feasible alternatives.

As in other open democratic societies, the **Azerbaijan** citizen has a well established right to expect policy decision makers to apply decisions which are well balanced and have undergone a rigorous cost benefit analysis.

I understand that establishing a formal RIA programme in **Azerbaijan** requires an entire change of the legal drafting culture where possible costs and benefits of a piece of legislation for an open society have to be taken into account by law and decision-makers.

1.3 How Can a Sound RIA Programme Effectively be Implemented?

Before talking about institutional responsibilities it is important to determine the material scope of RIA programme, in other words, ask the question on which kind of regulation should an RIA programme ideally focus on.

In my opinion, an RIA program should focus on both federal and sub-federal law. This is a really important issue for countries with federal structure like Russia but does certainly not apply to the case of Azerbaijan. So in this case the focus would mostly but not exclusively be directed to primary law.

In this context one should however not forget that many effects of legislation meet the citizen in form of *secondary legislation* which is an essential instrument for implementation of primary law, hence the necessity to extend RIA to secondary legislation if the need arises.

Which institution should be responsible for executing a RIA?

Principally there are two ways:

It is a common fact that in practically all countries, the bulk of the draft legislation stems from the government, in other words from the responsible line ministries. In this case Azerbaijan is no exception.

Now in all the countries which have implemented RIA programmes the ministries responsible for the drafting of the regulation are primarily responsible for executing a RIA which means that RIA can be applied at that stage for the simple reason that it makes more sense to have the people who are the most knowledgeable about the substance of the regulation do the analysis and have the experts in analysis consult with them.

These people can either be legal drafters with special training or experts working in special Regulatory Impact Units as this is the case in the UK, Canada, Australia and the US for example.

However we should not forget that a certain kind of quality control and oversight should be guaranteed by a central body.

Talking about draft regulation coming from the government, this oversight body should be ideally located at the centre of government. In this way it is able to take a whole government view of policy issues and to develop the expertise in the analytical requirements of RIA.

In this context we should not forget the importance of training those who are tasked to execute the RIA. It is quite obvious that the skills required for the production of high quality RIA are quite different from the traditional skills of a legal drafter.

Therefore training programmes for high quality RIA are essential. The elaboration and publication of a training handbook would be highly desirable.

Despite the fact that in **Azerbaijan** as in all other countries the role of the parliament in producing law drafts is diminishing, the principles quoted above should also be applied with respect to the legal drafts coming from the National Parliament

It would be a desirable thing that **National Parliament** committees may request the government to submit reports on regulation impact analysis so that they can carry out their preliminary scrutiny and consultation.

If we have a look to the **Italian** Parliament for example, the rules of procedures of this House establish a pre-legislative evaluation to be executed by the committees of the Parliament. This evaluation focuses on the following issues:

- Is there a need to intervene by means of a legal act or are there other non-regulative solutions in form of self-regulation by private groups and institutions?
- Is there consistency with the Constitution, with EU legislation and respect for the responsibilities of local authorities?
- Are the objectives clearly defined?
- Are financial means available?
- What is the impact on the Public Administration, the citizens and the business?
- Is there clarity of words?

In **Estonia**, the requirement of an explanatory letter to accompany each draft bill submitted to the Government and to the Parliament is both established by government order and a decision of the board of the Parliament. This letter gives an assessment on the potential economic and social consequences and eventual organisational or institutional changes resulting from the application of the regulation.

A special unit of the Parliament the Department of Economic and Social Information is responsible for preparing RIA of the draft bills coming from the Parliament.

In **Germany**, bills stemming from the administration are regularly accompanied by an explanatory note about the financial, social, environmental and labour market impact.

The analytical service of the federal Parliament (Wissenschaftlicher Dienst) is often used by members of Parliament in order to scrutinize and criticise draft laws of the government.

In **Austria** the Federal Budget Law requires an explanatory note on the financial impact of a bill. According to a conclusion of the Council of Ministers the explanatory notes have to include also comments on the impact of the labour market and the environment. So, the situation is rather similar to that in Germany.

We all know that many of the regulations do not have any significant importance on the economy or the live of the citizens in general.

There must be therefore a potential benefit from RIA in terms of improved political outcomes sufficient to justify the expenditure of resources necessary to conduct it.

It should therefore be recommended that an elaborate RIA will be concentrated to the most critical issues of key social and economic sectors. RIA should then focus where the impact of the proposed regulation is the greatest and where the prospect of affecting regulatory outcomes through analysis is greatest.

If all this is done in a timely and professional way it avoids spending energy and resources on drafts too hastily prepared. This especially concerns the case when costs of poor regulation are hidden and only appear much later.

In this context it is important to underline that RIA should be used from the very beginning of the law drafting process instead of making it a justification at the end of the rule-making process.

Finally we should not forget the importance of a written guidance for regulators with respect to carrying out RIA. Without such guidance the effectiveness of an RIA programme will be severely hampered.

1.4 What are the Inherent Risks of RIA?

Before drawing final conclusions let us have a closer look on the inherent risks of RIA.

In my opinion the main risks in this context is situated at the level of political decision makers. I'm talking about the lack of political commitment. RIA will never work properly without sustained political commitment.

The best analysis will be of poor value if not taken into account by decision makers. This issue is of course of pure political consideration.

The next set of risks is clearly at the level of those being technically involved in RIA.

In this context the right choice of the right issue to focus on must be made before the RIA process is starting. Analytical methods must also be developed before the RIA procedure is applied. This is especially valid in the case of complicated cost – benefit analysis where it can sometimes be tricky to properly quantify non tangible benefits for the society.

In some cases evaluation methods can prove to be too costly and too complex for evaluation. The purpose of the regulation does not justify a costly and time-consuming RIA.

In other cases that will be the either lack of properly trained evaluators or a lack of resources that will hamper the execution of RIA.

RIA is often prepared at the end of the decision –making process instead of being done in the beginning. In this case the choice of alternative approaches to regulatory decision is impossible.

Often, drafters are set under time pressure to speed up the regulatory process whereas the analytical procedure would slow down this process.

In other cases interest groups oppose RIA in the case when the obvious outcome threatens their business interests.

Final Conclusions

I would like – at the end of this article - to summarise the most important statements made above. These statements apply both generally to the use of RIA, but also more concrete to the situation in **Azerbaijan**.

- The aims of RIA are clearly broader than to improve economic efficiency alone also most of its methods like the cost-benefits analysis have been derived from economics.

- RIA is a tool to improve the quality of government intervention in the form of regulations. Its purpose is to foresee and analyse the impacts both intended and unintended of proposed legislation. With impact I mean a country's economy, society, budget and existing laws, international agreements etc.
  Its result will form an input into decision making and can help to improve it.

- The main purpose of an *"ex-ante"* assessment is to help decision-makers to find alternative approaches for meeting policy objectives. The purpose is to minimise budgetary, economic and social costs while still meeting the pre-established policy objectives.

- It can also enhance democracy by fostering transparency in legislative and regulatory decisions.

- The execution of a RIA procedure for a determined category of draft laws from the **Azerbaijan** administration should be made mandatory by **Presidential decree.**

- To be useful, RIA should be institutionally linked to decision-making and law-drafting in line ministries and the department of analytical services of the National Parliament**.**

- A central quality control unit should be established within the **Azerbaijan** administration, preferably the **Presidential administration** or the cabinet of the Prime Minister.

- RIA is only useful if there is both a political and an administrative commitment to take the results of RIA into account in the decision-making process.

- RIA provides factual information on the expected outcomes of decisions. Decision-makers should take this information into account in addition to other considerations which affect government decision-making, such as constitutional requirements, political commitments, ideology or international agreements

The very last final conclusion which I would like to bring to your attention of the interested reader is to keep always in mind that applying RIA does not mean to apply some secret, magic formula. The sober thinking legal drafter will see that all the items listed in these documents simply stem from common sense. It is first and foremost practical logical thinking which must be applied in first instance.

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Protection of Consumer's Rights; Genetically Modified Organisms, Risks and Advantages.

By Jamil Feyzullayev, Long-term Legal Expert, Master's in International Law and Human Rights (Central European University, Budapest, Hungary)

Introduction

A genetically modified organism (GMOs) is an organism whose genetic material or structure has been altered using genetic engineering techniques by incorporating a gene that will express a desired feature. Thus, GMOs are organisms such as plants, animals and micro-organisms, the genetic characteristics of which have been modified artificially. This is done for the purposes of creation of a new property of the organism, for example, improved a quality of food or nutritional value, increased productivity and so on. Usually such term is most commonly used to refer to crop plants created for human or animal consumption using the latest molecular biology techniques.

The changes in the genetic codes that are made artificially will take a lot of time in the natural environments, therefore, it is possible to achieve desired results and create desired features of the products using, so called, genetic technology. In general, taking of the genetic material from one organism and incorporating it into permanent genetic code of another one it is possible to create new products such as, for example, potatoes with bacteria genes. Commonly, the modified foods are extracted from the plants. The transgenic products that have been grown since 1999 such as soybean, corn, canola, cotton, potato, wheat are placed on the market around the world for the human consumption.[1]

I. Benefits of Genetically Modified Organisms, Disadvantages and Risks

1.1 Advantages and Risks to Human Health

As mentioned above, using the genetic engineering allows to create such products which cannot be grown using the traditional methods. There are a lot of controversies and disputes around the world concerning genetically modified food and feed. The issues related to GMOs include long-term health effects, environmental safety, labeling and consumer choice, intellectual property rights, ethics, food security, poverty reduction, environmental conservation. The corporations and governments engaged in the genetic engineering of food claim that such the technology is very advantageous for humans, while many people believe that such technology is a potential and actual disaster.[2]

One of the main advantages of the creation and placing on the market of genetically modified foods is that such products are of the lower price and greater benefit what is very profitable as for producers, so for consumers of such foods. Such foods may become more durable in their spoiling and they can have a nutritional value. Moreover, the plants produced on the basis of genetically modified organism may have better crop protection. Thus, the resistance of such

[1] The first commercially grown genetically modified whole food crop was the tomato (it was called Flavr Savr), which was made more resistant to rotting by Californian company Calgene (See Belinda Martinea, "First Fruit: The Creation of the Flavr Savr Tomato and the Birth of Biotech Foods (Hardcover)"). Calgene placed these tomatoes in the market in 1994 without any special labeling. (see FDA Consumer Letter (September 1994): First Biotech Tomato Marketed, available at http://www.cfsan.fda.gov/~lrd/biotech.html)

[2] See "What is GMO? What is wrong with it?" available at http://en.wikipedia.org/wiki/Genetically_modified_food

crops against plants diseases caused by insects or any plant viruses and tolerance towards herbicides may be increased.[3]

There are a lot of ecological organizations and scientists who consider that creation of genetically modified foods and feeds will have negative consequences. They claim that, at long last, consumption of genetically modified foods will have a negative impact of human health of the coming generations. It is very difficult, and, even impossible to predict what effects the consumption of the genetically modified foods will have, but, there are some claims which seem to be quite reasonable. For example, new medical and biological preparations can be used by humans only after experiments on animals which take a number of years. However, many transgenic products are freely circulated on the markets, despite that they were created just a few years ago. The opponents claim that risk assessment procedures of the transgenic products are quite dubious.

As a result of the studies that have been carried out during the last decade number of risks related to engineering of genetically modified foods have been revealed such as risk to human and domestic animals health, environmental and wildlife risk and social-economic risk. Thus, the human health can be affected by a higher toxicity, allergenicity, antibiotic resistance, immune-suppression and cancer. The use of genetic engineering in agriculture may result in uncontrolled biological pollution, threatening numerous microbial, plant and animal species with extinction, and the potential contamination of non-genetically engineered life forms with novel and possibly hazardous genetic material.[4]

The genetically modified foods may contain toxins dangerous for the human health. Thus, in 1989, an epidemic outbreak of eosinophilia-myalgia syndrome took place in the United States. This illness is associated with the use of dietary supplements containing L-tryptophan. As a result, more than 1500 cases of EMS, including at least 37 deaths, have been reported to the national Centers for Disease Control and Prevention.[5]

The other example of the risk to human health is a development of life-threatening allergies that many children in US and European countries have to peanuts and other foods. It is also possible that introduction of a gene into plant will cause an allergenic reaction. Moreover, there is a possibility that in case of introduction of foreign genes into food plants will have a negative impact on a human health.[6]

At the present there are a lot of controversies about genetically modified organisms and transgenic engineering. Information about safety of genetically modified organism is very contradictive. Up to now there is still no single answer about safety of GMOs and their impacts on coming generations and environment.

1.2 Environmental Risks

At the moment, there are not enough researches and studies of the potential impact of GMOs on environment. It is now not possible to predict what consequences the development of GMO engineering will have in near future. But there are a number of potential environmental risks of

[3] See "20 questions on genetically modified foods", available at http://www.who.int/foodsafety/publications/biotech/20questions/en/
[4] See "Genetically Engineered Food" available at http://www.centerforfoodsafety.org/geneticall7.cfm
[5] See "Information Paper on L-tryptophan and 5-hydroxy-L-tryptophan", U. S. Food and Drug Administration, Center for Food Safety and Applied Nutrition Office of Nutritional Products, Labeling, and Dietary Supplements, February 2001, http://www.foodsafety.gov/~dms/ds-tryp1.html
[6] Deborah B. Whitman, "Genetically Modified Foods: Harmful or Helpful?", (Released April 2000).

the genetically modified organisms. There is a concern that genetically modified forms may cause catastrophic changes in ecosystems if they accidentally penetrate in wildlife. One of the concrete examples is that potentially the spread of the weeds can become uncontrollable if during cross-pollination weeds get from GMOs a gene of resistance to pests and pesticides. The weeds, in this case, may cause disappearance of many species of plants which cannot withstand them and they will occupy huge territories which will constantly spread. This may cause a terrific disbalance in wildlife and have unpredictable impacts. The GMOs may also be transferred by animal and insects for quite long distances what may also have unexpected impact on a biocenose which formed for many ages. Creation of GMOs also causes curtailment of differences of forms of plants, animals, mushrooms and microorganisms.

Every natural species has its own animals and pets which does not allow it to overspread and which also eliminates potentially diseased and infectious organisms. Impact of genetically modified plants toxins on predatory and parasitic insects may cause serious violations in the ecosystem, including uncontrolled outbreak of the amount of population of one species and extinction of other species.

II. EU Approach to Genetically Modified Organisms

2.1 General overview of the EU legislation on GMOs

In European Union it is required to obtain an authorization on the basis of the detailed procedures for placing on the market of the genetically modified organisms or food products derive from GMOs. This kind of procedure is, actually, a scientific assessment of the risks to health and environment. It is also required to ensure that GM products do not prejudice the consumer's interests.[7]

In EU legislation GMOs are identified by a code that is specific to GMOs. This code is called a "unique identifier", which makes it possible to identify easily a specific GMO on a product's labelling.[8] The code is uniform and is made up of letters and numbers, enabling each product type to be identified precisely. It contributes to the traceability of GMOs and to consumer information.

The EU legislation lists GMOs for human food and animal feed. Since 2003, all foodstuffs that are genetically modified organisms, that contain them or are derived from them, including foodstuffs for animals, must be labelled GMO. This allows consumers to make a choice when buying these products.

In EU there is horizontal approach to GMO legislation. Such approach was laid down by Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms and Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms, the latter one was subsequently repealed by Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms.

Directive 90/219 regulates research and industrial work activities involving genetically modified microorganisms. The directive lays down the measures for the contained use of genetically modified micro-organisms. According to this Directive it is required to regulate the contained

[7] "Questions and Answers on the Regulation of GMOS in the European Union", available at http://ec.europa.eu/food/food/biotechnology/gmfood/qanda_en.pdf

[8] Commission Regulation (EC) No 65/2004 of 14 January 2004, establishes a system for the development and assignment of unique identifiers for genetically modified organisms.

use of genetically modified microorganisms for the purposes of minimization of potential negative impact on human health and environment.

In 2001 the aforementioned Directive of the European Parliament and of the Council 2001/18/EC was adopted. This Directive allows deliberate releasing of certain GMOs into the environment. The newly adopted Directive established a number of innovations. Thus, this Directive regulates the deliberate release of GMOs into environment for the research and commercial purposes. However, the GMOs must go through very strict risk assessment before they can be released. The Directive defines the release of GMOs into the environment as "*any intentional introduction into the environment of a GMO or a combination of GMOs for which no specific containment measures are used to limit their contact with and to provide a high level of safety for the general population and the environment*". Thus, the Company may study the behavior and interaction of GMOs with other organisms and after that it may make a decision whether to place such products on the market or not. This Directive establishes more efficient and transparent procedures for granting consent for the deliberate release and placing on the market of GMOs. The authorization for the introduction of GMOs into environment can be issued by the competent national authority of the Member State within which territory such release is going to take place.

There is a single authorization procedure for all applications related to placing on the market of food consisting of or containing GMOs. Such procedures is established by the Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, which also regulates approval of GMOs and placing them on the market. Thus, according to this Regulation the products which fall within its scope must not:

- have an adverse effect on human or animal health, or the environment;
- be misleading for the consumers and users;
- differ from the food that it is going to replace to such an extent that its normal consumption would be nutritionally disadvantageous for the consumer.

Regulation (EC) No 1946/2003 of the European Parliament and of the Council of 15 July 2003 on transboundary movements of genetically modified organisms ensures the implementation of the provisions of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. The purpose of this Regulation is to transpose the Cartagena Protocol[9] on Biosaety into EU legislation. According to this Regulation, the Member States are required to take necessary administrative, legal and other measures for the purpose of implementation of obligations laid down by the Cartagena Protocol. This Regulation also establishes a common system of notification and information for transboundary movements of GMOs (notification of parties of import, information to Biosafety Clearing-House and identification and accompanying documentations standards). The Biosafety Clearing-House approves each GMO that is going to be moved across borders on a case-by-case basis. This Regulation ensures that movements of GMOs that may have adverse effects on the sustainable use of biological diversity and on human health take due account of the environment and human health. According to this Regulation the Member States must take necessary measures to avoid unintentional transboundary movements of GMOs.

2.2 Traceability and Labeling of GMOs

[9] The Member States and the Community signed the Cartagena Protocol in 2000. The aim of the Protocol is to ensure that the transfer, handling and use of living modified organisms resulting from modern biotechnology do not have adverse effects on the environment and human health, specifically focusing on transboundary movements.

In EU there is a requirement for mandatory food labeling of GM foods in stores, and the European Commission has established a 1% threshold for contamination of unmodified foods with GM food products[10]. Since 2003, all foodstuffs that are considered genetically modified organisms, foodstuffs which contain GMOs or are derived from them, including foodstuffs for animals, must be labelled GMO. Such labelling allows consumers to make a choice when buying these products.

Traceability of GMOs serves a number of goals. It provides the means to trace the products through the production and distribution chains. Traceability of GMOs also allows to monitor and verify the information on labels, monitor effects on the environment and the withdraw products that contain or consist of GMOs which are potentially dangerous for human or animal health and where unpredictable risks is established.

Thus, Regulation No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms GMOs stipulates that traceability will be required throughout the food chain. This measure has two main objectives:

- to inform consumers through the compulsory labelling of this type of products,
- to create a "safety net" based on the traceability of these products at all stages of production and placing on the market.[11]

This Regulation applies to all foodstuffs produced from GMOs, as well as to all genetically modified feedingstuffs, with the same protection as for foodstuffs. All products approved in accordance with this Regulation are subject to compulsory labelling. One of the main purposes of such requirement is to allow consumers to be better informed about GM products, whether for human or animal consumption. The consumer's safety is guaranteed as a result of the traceability of products consisting of or containing GMOs.

According to this Regulation operators, in case of product consisting of GMOs, must ensure that the following information is transmitted to operators receiving such product:

- an indication of each food ingredient produced from GMOs;
- an indication of each raw material or additive for feedingstuffs produced from GMOs;
- if there is no list of ingredients, the product must nevertheless bear an indication that it is produced from GMOs.

In many cases the products may consist of or contain mixtures of GMOs. In such cases the industrial operator may submit a declaration of use of these products, together with a list of the unique identifiers assigned to all the GMOs used to constitute the mixture. The Regulation also establishes a requirement for the products produced from GMOs. In such cases the operators must ensure that below information is submitted in writing to the operators receive such product:

- an indication of each food ingredient, produced from GMOs;
- an indication of each raw material or additive for feedingstuffs produced from GMOs;
- if there is no list of ingredients, the product must nevertheless bear an indication that it is produced from GMOs.

[10] See supra note 6.
[11] See Traceability and labelling of genetically modified organisms (GMOs), at http://europa.eu/scadplus/leg/en/lvb/l21170.htm

EU has very strict labelling regulations which ensure adequate protection of the consumer's rights. All food, any ingredients, produced from a GMO must be labelled. Thus, besides traceability requirements, products consisting of or containing GMOs and any food products produced from GMOs are subject to labelling requirements established by Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed.

The Regulation establishes so-called single authorisation procedure for all food and feed containing GMOs. In order to obtain a food authorisation, the industrial operator must apply for authorisation under this Regulation. The operator must submit a single application for food and feed uses and for cultivation. When a GMO has obtained authorisation, it can be used in food for human consumption and animal feed, and will also be authorised for cultivation or deliberate release into the environment.[12]

According to this Regulation if a foodstuff or one of its components contains GMOs, or if it is produced from such organisms, it should be labelled as GMO. This Regulation provides for the specific labelling requirements, thus, all genetically modified foods delivered to the final consumer or mass caterers within the Community must be labelled in accordance with requirements laid down by the Regulation. It is also required to provide labelling for foods which are offered by restaurants, canteens and takeaways with some exceptions.

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III. Regulation of Genetically Modified Organisms in the Republic of Azerbaijan

Currently, there are some genetically modified foods in the market of Azerbaijan. But the flow and distribution of GMOs are not regulated by the national legislation. There is no specific labelling requirement for foodstuffs produced from GMOs, as well as to all genetically modified feedingstuffs.

Distribution and consumption of genetically modified organisms in Azerbaijan may cause unforeseen consequences if not regulated properly. During the process of approximation of the legislation of the Republic of Azerbaijan with that of EU, a great attention must be paid to regulation of GMOs. It is very important to adopt legislation regulating genetically modified food and feed and cross-border movement of genetically modified organisms. The legislation must also provide for the assessment, authorisation and labelling of food and feed consisting of, containing or produced from genetically modified organisms.

Although, in March, 2005, Azerbaijan ratified the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, no legislation concerning supervision and control of transboundary movements of genetically modified organisms has been adopted.

The regulation of the genetically modified organisms and their transboundary movements, products, which appearing other than they are, endanger the health and safety of consumers, general product safety, and maximum levels for certain contaminants in foodstuffs are also not provided in the national legislation. The health and safety of the consumers in Azerbaijani are also endangered as there are no requirements concerning protection of human life and health, animal health and welfare, environment and consumer interests in relation to genetically modified food and feed. There are no procedures for the authorisation, supervision and labelling of genetically modified food and feed.

[12] See http://europa.eu/scadplus/leg/en/lvb/l21154.htm

In near future it is very important to adopt certain rules related to paling on the market of genetically modified organism as their distribution is becoming wider day after day. During the process of law and policy drafting EU experience and practice should be taken into account.

Conclusion

At the present stage of transgenic engineering development and scientific researches nobody can predict all consequences of the use of transgenic technologies in near future and that there will be no harm to human health and environment. But application of such technologies without clear understating of their possible impact may result in very tragic consequences for all humanity. Wide distribution of GMOs and gradual introduction of alien genetic organism into the cells of plants, animals and human will, surely, bring to pathological mutations and changes in natural organisms and their possible extinction.

In current development of the international trade it is not possible to prohibit distribution and placing on the market of genetically modified organisms taking into account that they bring enormous profits to companies and dealers. It is also getting more difficult to control the flow of such products. It is up to each state to decide whether to allow placing on the market of GMOs or not.[13] One of the best solutions, according to best practices now, is to establish very strict rules and requirements for distribution and placing on the market of GMOs, especially for labelling, in order to allow consumers make their own independent choice whether to use such products or not.

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[13] For example, in Switzerland the cultivation of GMO crop is not yet allowed.

Prohibition of Discrimination under the EU law: a Brief overview

By Nigar Huseynova, Long-Term Legal Expert

1.1 Gradual Development of Anti-discrimination Legislation

Traditionally, EU law has concentrated on discrimination between women and men and discrimination on the grounds of EU nationality. At the very beginning of European integration the economic and political forces fostering integration produced the first European Community anti-discrimination legislation in the fields of sex and nationality. The EU legislation on sex equality started from an obscure provision in the original EEC Treaty, article 119 (now Article 141), which provided for equal pay for men and women for work of equal value. At that moment this provision was not considered as a question of fundamental rights but was rather seen through the prism of economic rationale. Similarly, the original EEC Treaty prohibited discrimination on the ground of nationality (article 7 of the original EEC Treaty). The rationale of prohibition of discrimination on the ground of nationality is very different from rationale behind other grounds of discrimination and was from the beginning closely related to the importance of the free movement of persons to achieve a single economic market. From 1975, the EU has issued several directives on sex discrimination and a substantial body of secondary law related to prohibition of discrimination on the ground of nationality. Furthermore, the European Court of Justice has given a large number of judgments on discrimination cases. Its decisions have played an extremely important role in the development of equality and non-discrimination. The Court has contributed in developing important concepts of the EU ant-discrimination law, by giving interpretation to the vague and broad legal provisions. For instance as concerns sex discrimination the ECJ rejected suits against “the quota”, i.e. against the promotion of women where qualifications are the same, and developed the legal concept of indirect discrimination.

The laws forbidding discrimination on the grounds of race, religion, disability, sex and sexual orientation came into existence much later than the anti-discrimination laws on the above mentioned grounds. They developed following adoption of the Treaty of Amsterdam in 1999. The new treaty amended the EC Treaty by adding a number of legal provisions on fundamental rights, including the anti-discrimination provision under Article 13 of the EC Treaty. According to this Article the Community may adopt legislation, and take other necessary measures, against different forms of discrimination on the ground of sex, racial or ethic origin, religion or belief, disability, age or sexual orientation. Therefore, the Treaty of Amsterdam expanded significantly the legal competence of the European Union for combating discrimination and created a new legal space for the Union to regulate discrimination on the ground of racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

Introduction of a broad anti-discrimination clause to the EC Treaty promoted further development of the relevant secondary legislation. In 2000 the two directives have been enacted: The Race Directive prohibiting discrimination on the ground of racial or ethic origin, and the Framework Directive, outlawing discrimination based on the grounds of religion or belief, disability, age or sexual orientation. The new legislation has also promoted amendment of the existing secondary legislation on sex equality.

One of the weaknesses which have been identified in EU equal opportunities legislation has been its main focus on employment-related discrimination. While the European Union law currently requires states to prohibit discrimination on the grounds of gender, nationality or race in a broad range of areas, including access to goods and services, prohibition of discrimination on the grounds of sexual orientation, disability, age or religion or belief is limited to the area of employment and training. In order to expand the scope of anti-discrimination legislation in these

areas on July 2, 2008 the European Commission published its "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation." The aim of the proposed Directive is to extend the protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation to areas outside employment, complementing the EC legislation that already exists in this area. In particular this new directive would ensure equal treatment in the areas of social protection, including social security and health care, education and access to and supply of goods and services which are commercially available to the public, including housing.

1.2 Existing and Proposed Secondary Legislation in the Field of Discrimination on the Ground of Sex, Racial or Ethnic Origin, Religion or Belief, Disability, Age, or Sexual Orientation

The major pieces of the secondary legislation as regards prohibition of sex-based discrimination are the Equal Pay Directive, Equal Treatment Directive, and finally, the "Directive on Goods and Services". As regards other forms of discrimination, the main directives are: the Race Directive, which implements the principle of equal treatment irrespective of racial or ethnic origin and the so-called 'Framework' Directive, the purpose of which is to combat discrimination on the grounds of religion or belief, disability, age, or sexual orientation.

The Equal Pay Directive (EPD) (Council Directive 75/117/EEC of 10 February 1975) was designed principally to facilitate the practical application of the principle of equal pay. The EPD states that 'The principle of equal pay for men and women outlined in Article 141 of the Treaty...means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration'.

Amongst other things the EPD requires that:

- a job classification system used for determining pay must be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on the grounds of sex*(Article 1)*
- there must be no provisions which are contrary to the principle of equal pay in legislation, administrative rules, collective agreements, wage scales or individual contracts of employment*(Articles 3 and 4)*
- employees must be protected against victimisation for taking steps aimed at enforcing compliance with the principle of equal pay *(Article 5)*.

The Equal Treatment Directive (ETD) (Council Directive (76/207/EEC) of 9 February 1976 required all member states to ensure the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. In 1996, the European Court of Justice ruled in the case of ***P* v *S and Cornwall County Council*** that the ETD also covers discrimination on grounds of transsexualism. The ETD was amended by the Council Directive 2002/73/EC of 23 September 2002. The latter (the so-called "Amendment Directive on Sex") extends the ETD and adapted it to fit the current legal situation in the EU.

The "**Race Directive**" (Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin) adopted in June 2000 relates to the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origins. It applies in the areas of employment and occupation, education, health and social benefits, but also with regard to access to goods and services.

The "**Framework Directive on Employment**" (Council Directive 2000/78/EC) of 27 November 2000 offers protection against discrimination on grounds of religion, belief, disability, age and sexual orientation, and relates to equal treatment in employment and professional life. Working life is thus seen as a key area for equal treatment. "Racial" and ethnic origins are not mentioned here, since the Antiracism Directive already includes provisions concerning employment. Nor is sex covered, since special provisions apply in the EC Treaty as in the rest of EU law, especially via Directives.

The proposed Council Directive "On implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" is expected to prohibit direct and indirect discrimination as well as harassment and victimization based on the relevant grounds. For people with disabilities, non-discrimination it will involve general accessibility as well as the principle of "reasonable accommodation" which is already used in existing European legislation. It will, however, avoid imposing a disproportionate burden on service providers by taking account of the size and resources of the organization, its nature, the estimated cost, the life cycle of the goods and services and the possible benefits of increased access for persons with disabilities. The directive will only apply to private persons in so far as they are performing their commercial activities or professional. Also, Member States will remain free to maintain measures ensuring the secular nature of the State or concerning the status and activities of religious organizations. The directive will have no effect on generally accepted practices such as discounts for senior citizens (e.g. bus fares and entrance to museums) or age restrictions on access to certain goods (e.g. alcohol for young people) on grounds of public health. To ensure effectiveness of the proposed measures, national equality bodies will give advice to victims of discrimination while civil society organizations will also have the possibility to help victims in judicial and administrative procedures.

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Trademarks and the Likelihood of Confusion

By Aynur Baghirzade, Long-term Legal Expert

It is well known that similarity between trademarks may cause the likelihood of confusion between the goods of the different producers. One of the first purposes of the Trademark Law is to protect the producers and to ensure that their trademarks will not be used by any other person to confuse the consumers regarding their origin. However, this is not the only reason why it is so necessary to protect trademarks. Another, not less important reason to do so is to ensure that this will not lead to consumer confusion and consequently to the consumer deception. Except the cases of the direct sale of the counterfeited products where the well known trademarks are used there are also the cases when different trademarks of different producers have similarities and these similarities cause consumer confusion. It is very interesting the practice of the international law and courts in this direction.

Article 9 Right Conferred by a Community trade mark of the EU Council Regulation No 40/94 on the Community Trademark of December 20, 1993 establishes:

1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with or similarity to the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.

2. The following, *inter alia*, may be prohibited under paragraph 1:

(a) affixing the sign to the goods or to the packaging thereof;

(b) offering the goods, putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under that sign;

(d) using the sign on business papers and in advertising.

3. The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of matters arising after the date of publication of a Community trade mark application, which matters would, after publication of the registration of the trade mark, be

prohibited by virtue of that publication. The court seized of the case may not decide upon the merits of the case until the registration has been published.

First paragraph of Article 8 of the Council Regulation 40/94 stipulates the conditions for the refusal in trademarks' registration on the following grounds:

(a) if it is identical with the earlier trade mark and the goods or services for which registration is applied or are identical with the goods or services for which the earlier trade mark is protected;

(b) if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark.

So, infringement may be caused either by the matter of identity of the mark with the earlier registered mark (goods and services) or by the similarity which may cause likelihood of confusion. Consequently, the mere fact of similarity can not infringe the mark, there should be also the likelihood of confusion as an essential element in order to claim it.

It is interesting in this regard to observe the EU cases which clarify the issue of similarity between the trade marks.

In PICARO\ PICASSO[14] and SIR\ ZIRH[15] the European Court of Justice (ECJ) confirmed the doctrine of counteraction, as enunciated by the Court of First Instance (CFI) in Philips – Van Heusen/OHIM[16] . In its holdings, the ECJ clarified that the mere aural similarity of the marks in question will not create a danger of confusion under Paragraph 1 of Article 8 of the Council Regulation (EC) No 40/94 of 20 December 1993, except in limited circumstances. The ECJ stressed that a finding of the likelihood of confusion must be based on the overall impression created by the marks in question, taking into consideration all the factors relevant to the circumstances of the case, including the distinctive and dominant components of each mark. Great visual or great aural similarities do not automatically create a danger of confusion. Instead visual or aural similarities can be counteracted by conceptual differences between the marks that negate the likelihood of confusion. The requirement for such counteraction is that at least one of the marks has, from the point of view of the relevant public, a clear and specific meaning that the public can grasp immediately[17].

Actually, both the European and US Law differs infringements of the trademarks and similarity of the trademarks whereas the first definition can include the second or not depending on the fact of each case of the found similarity. Once a trademark has been registered, its proprietor has an interest both in defending the mark against use by others and in putting the mark to use for his commercial purposes. The mark is defended by means of infringement of the exclusive right that registration confers and exploited by means of the property that registration brings into being. Registration does not end the legitimate interests of others in the mark and may be challenged by means of revocation and declarations of invalidity.

[14] Case C – 361/04, Picasso v. Office for Harmonization in the Internal Mkt., 2006 O. J. (C 60/15)
[15] Case C – 206/04 P, Muhlens GmbH & Co. KG v. Office for Harmonization in the Internal Mkt., 2006 O.J. (C 131/22).
[16] Case T – 292/01, Philips –Van Heusen Corp. v. Office for Harmonization in the Internal Mkt., 2003 O.J. (C 304/44).
[17] The International Lawyer, a quarterly publication of the ABA/Section of International Law, Summer 2007, volume 41, number 2, p. 387

While under the EU laws registration is an essential factor for the exclusive rights to be challenged, this is not obligatory under laws of some other countries. Thus, in the United States it is not important to register the mark to get a protection in particular region or state but it is important to get registration in order to enjoy the federal protection.

It is useful in this regard, for example, to research the practice of laws of the United Kingdom as one of the EU countries and compare such practice with Azerbaijani laws. In the UK the provisions on protection of the exclusive right is described in Section 9 of the Trade Marks Act 1994 (TMA 1994) according to which the exclusive right takes effect from the date of registration (which is, in turn, the date of filing)[18]. However, no infringement proceedings may be begun before the actual date of registration, nor is any offence under Section 92 of the TMA 1994 committed by anything done before the date of publication of registration: Section 9 (3) of the TMA 1994. Under English Law the infringing act involves four elements: first, using a sign; secondly, using it in the course of trade; thirdly, use in relation to goods or services; and, finally, use in conflict with the registered mark.

The first element requires examination of what constitutes use of a sign. Section 10 (4) of the TMA 1994 provides that use of a sign includes affixing the sign to goods or their packaging, or offering or exposing goods for sale, putting them on the market, or stocking them for sale under the sign, as well as offering or supplying services under the sign. Using also includes importing or exporting the goods under the sign and using the sign on business papers or in advertising. In an important departure from the old law, section 103 (2) of the TMA 1994 makes it clear that references to use of a mark or sign include use otherwise than by means of graphic representation, as must be the case for sound or smell marks. Oral use in broadcasting for example, may, therefore, infringe, as may other uses that are neither visual nor graphic.

It is not only the marks which must be identical, but the goods or services to which they are applied, so that an ice cream syrup and sweet tasting spread were held not to constitute identical goods in British Sugar plc v James Robertson and Sons (1996).

The second element requires that the defendant make use of the sign in the course of trade. Under the old Law, this was given strict interpretation to mean use in the course of trade in the goods for which the mark was registered: Aristoc v Rysta (1945). In M Ravok v National Trade Press (1955), it was held that, where the defendants attributed the plaintiff's mark to a third party in their trade directory, the use was made not in the course of trade in goods for which the mark was registered but in the course of their own trade as publishers. This decision made it difficult for trade marks proprietors to prevent their marks to become generic. The same phrase appears in the TMA asked questions about the 1994 UK Trade Marks Act [1995] EIPR 67) has suggested that any non-private activity which has an economic benefit should be considered to be in the course of trade. In a Benelux case, a reproduction of the PHILIPS mark in an article about the Second World War was held to infringe because it attracted readers to the publication and was in the economic intercourse of the defendant's business. However, it seems unlikely that use such as Monet's reproduction of the red Bass triangle mark and Hockney's painting of CAMPBELL soup tin should infringe.

The third element requires use in relation to goods or services and, although the fears of traders also providing ancillary services that their trademark might be infringed by application to services have been catered for by Section 10 (4) of the TMA 1994, the case of trebor Bassett v Football Association (1997) illustrates the continuing difficulties. Rattee J struck out the defendants' allegation that the plaintiffs were infringing their trade marks by including

[18] Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, Trade Marks infringement and Challenges to Trade Marks, p. 379

photographs of footballers sporting the registered England logo on their clothing in packets of confectionery, on the basis that the logo was not being used at all by the plaintiffs, nor used as a sign in relation to their cards. Publishing LTD that the use of WET WET WET in the book title A Sweet Little Mystery – Wet Wet Wet –The Inside Story was not used in relation to goods, but the point was left undecided. In British Sugar plc v James Robertson and Sons (1996)[19], Jacob J said that WET WET WET mark was not being used in relation to goods covered by the registration, but only to refer to the book's subject matter. In one sense, the mark was very much used in relation to the book, as it appeared on the cover and this dictum seems to raise implicitly the need for the defendants' use to be use "as a trade mark" identifying the goods or services.

In the fourth element, whether an actionable conflict between the trade mark and sign used takes place requires a comparison of both the claimant's mark with the defendant's sign, and of the goods or services of claimant and defendant. This comparative test is the same in its structure as that which is applied to the relative grounds of refusal:

- Identical marks/identical goods or services;
- Identical marks/similar goods or services and similar marks / identical or similar goods or services;
- Identical or similar marks / dissimilar goods or services.

It is the defendant's sign which is compared to the claimant's "trade mark". This means that the form of the sign as it is being used, or about to be used, is considered. However, a trade mark may be registered in general terms (see Bravado Merchandising Services v Mainstream Publishing) and the claimant may not have begun using it, so that is any normal and fair use of the claimant's mark in relation to the goods for which it is registered which is compared to the sign, ignoring any extraneous material; such as the small size of the defendant's business: Origins Natural Resources Inc v Origin Clothing Ltd (1995). In Sabel BV v Puma AG (1998), however, the European Court of Justice (ECJ) took into account the acquired strength of Puma mark.

Under the English Law definition of Identical marks/identical goods or services[20] are understood as identity both of mark and the defendant's sign and of the claimant's and defendant's goods or services. In this case there is no further requirement of confusion or damage to reputation to be shown: Section 10 (1) of the TMA 1994. This allows the claimant to proceed by way of summary judgment against counterfeiters. The term "identical" is likely to be given its dictionary meaning of exactly alike, equal or agreeing. However, in Bravado Merchandising Services v Mainstream Publishing[21], the defendants' use of WET WET WET was deemed identical, although in a different typeface to that of the registration as it was held that the particular typeface or color used to depict the mark was not an essential part of the mark, unless and express indication that that was intended were given.

Under English Law definition identical marks/similar goods or services; similar marks / identical or similar goods or services are understood where the sign that is identical to a registered trade mark is applied to goods or services similar to those for which the mark is registered; or a sign which is similar to a registered mark is applied to goods or services either identical or similar to those within the registration. In this case, such sign may infringe. However, this will only be a case if there exists the likelihood of confusion on the part of the public, including the likelihood of association with the trade marks: section 10 (2) of the TMA

[19] British Sugar plc v James Robertson & Sons [1996] RPC 225
[20]Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, p. 383.
[21] Bravado Merchandising Services Ltd v Mainstream Publishing Ltd [1996] FSR 205

1994. To make out infringement, the claimant's mark and defendant's sign must be compared, as must the goods or services of claimant and defendant, to establish the necessary similarity, as well as potential confusion being established. In British Sugar plc v James Robertson and Sons (1996), it was said that the question of possible infringement does not arise unless the necessary two comparisons are made out; confusion alone will not suffice. But the ECJ, in Sabel BV v Puma AG (1998), considered a global approach to the question of similarity and confusion. The comparison and subsequent examination of confusion are made without considering any added matter or circumstances (Saville Perfumery Ltd v June Perfect Ltd (1941)), so that a disclaimer added by the plaintiff will not avoid infringement in the way that it would in a passing off claim.

In the question of the ***similarity of marks*** court makes comparisons between the trademarks of the claimant and defendant from different point of views in order to make a decision. The introduction of sound and smell marks, as well as other novel forms of sign, by the TMA 1994, introduces additional relevant factors, such as a marks' sound or other characteristics apart from any visual representation, and this is recognized by section 103 (2) of the TMA 1994. Factors the courts have taken into consideration include the "idea of mark", for example, a mark, such as a triple representation of an animal, incorporates the "idea" of a triple repetition, so that a sign repeating the same animal only twice might escape a finding of similarity. The idea of mark includes its meaning or a lack of meaning: Wagamama Ltd v City Center Restaurants (1995). The registered mark is considered as whole for its overall effect, rather than a letter by letter (or digit) comparison being made: ERECTIKO was refused registration under the 1938 Act as being too close to ERECTOR (William Bailey's Application (1935)). The first syllable of a word mark is the most significant. Both an aural and a visual comparison is made: But matter common to a particular trade (such as "cola", for example) will be disregarded. It is also borne in mind that the consumer will not necessarily have access to both mark and sign side by side for comparison and may remember the plaintiff's mark imperfectly or may mispronounce it. It is essentially a "jury question": the mark and sign are compared through eyes (and other senses) of a hypothetical customer, though the decision is one for the judge. Laddie J accepted that evidence of witnesses might be required to assist a judge in assessing the ways in which members of the target market will pronounce a word mark and of the mark's visual and phonetic impact on them in Wagamama Ltd v City Centre Restaurants (1995). In Pianotist's Application (1906), Parker J said, in relation to trade marks:

> You must take the two words.[22] You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks.

ORIGINS and ORIGIN[23] were held to be similar in Origin Natural Resources Inc v Origin Clothing Ltd (1995) as the public could not be expected to distinguish between the singular and plural uses of the word. The comparison was stated to be "more a matter of feel than science" by Laddie J in Wagamama v City Centre Restaurants, and WAGAMAMA and RAJA MAMA[24] were found to be similar. Adjective use of the word "European" in the European Ltd v The Economist Newspaper Ltd (1996) was not found to be similar in relation to the plaintiff's device mark for its masthead, even though the word was the essential feature on the plaintiff's mark.

[22] Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, p. 384.
[23] Origins Natural Resources Inc v Origin Clothing Ltd [1995] FSR 280
[24] Wagamama Ltd. V City Centre Restaurants [1995] FSR 713

The question of ***similarity of goods and services*** was considered in UK before the adoption of the TMA 1994. In British Sugar plc v James Robertson and Sons (1996), Jacob J likened the new test, warning against the temptation to use the new wording to extend a proprietor's protection too far from the specification of goods for which the mark was registered and thereby creating very wide and unjustified monopolies and the listed six relevant factors in the context of modern marketing methods:

a) the respective uses of the respective goods and services;
b) the respective users of the respective goods and services;
c) the physical nature of the goods or acts of service;
d) the respective trade channels through which the goods or services reach the market;
e) in the case of self-serve consumer items, where, in practice, they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
f) the extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

Consequently, spreads and ice creams toppings were not similar goods, nor were videos and television programmes in Baywatch Production Inc v The Home Video Channel (1997).

The ***likelihood of confusion*** **is necessary** to be present in order to find an infringement. The claimant may not have begun use of the registered mark and so no actual confusion need be shown (Origins Natural Resources Inc v Origin Clothing Ltd (1996))? But the evidence of actual customer confusion by customer complaints or survey evidence may be heard. Both expert, public and survey evidence was heard in the European Ltd v The Economist Newspaper Ltd (1996), but not regarded as useful. Where a mark is being used, it has been argued that the circumstances of use should not be ignored, in making a comparison between the defendant's actual use of the sign and any hypothetical normal and fair use of the registered trade mark by the claimant: Prescott, P, Analysis – infringement of registered trade marks: always a hypothetical comparison? (1997) IPQ 121. The preamble to the Directive states:

> …whereas the likelihood of confusion, the appreciation of which depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods and services identified…[25]

This can be interpreted to mean that the necessary presence of confusion depends on a number of factors, among which are level of recognition of the mark by the consumers, the extent of similarity between mark and sign, over and above the level that must be reached before any question of confusion arises, and the degree of similarity of the products concerned (above the threshold level), which will include the consideration of the claimant's actual use of the mark in trade. The relevance of all circumstances was illustrated by the case of Lancer Trade Mark (1987)[26]. The application by Mitsubishi to register LANCER for cars was opposed by Fiat, on

[25]Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, p. 386

the grounds of its similarity to LANCIA. Applying the TMA 1938, the Court of Appeal held that the two marks were visually distinguishable, but sufficiently phonetically similar to raise the issue of confusion. Taking into account the difference between in number of syllables of the two marks, the fact that LANCER had a recognized meaning in English but that LANCIA did not, the nature of the market in cars, an expensive and carefully considered purchase for the majority of the consumers, and the fact that LANCER was the name applied to a model car, whereas LANCIA was a name of a manufacturer, it was held that there was no real risk of confusion to a substantial number of persons.

When TMA 1938 insisted on confusion as to the source of the relevant goods or service, the TMA 1994 adds the likelihood of confusion on the part of the public which includes "the likelihood of the association with the trade mark". The leading case is Union v Union Soleure (1984):

…there is similarity between a trade mark and a sign when, taking into account the particular circumstances of a case, such as the distinctive power of the trade mark, the trade mark and the sign, each looked at as a whole and in relation to one another, demonstrate such auditive, visual or conceptual resemblance, that associations between sign and trade mark are evoked merely on the basis of this resemblance.

In Monopoly v Anti-Monopoly (1978), the two names MONOPOLY and ANTI-MONOPOLY were used on games of opposite nature, the one concerned with a player's attempts to create a monopoly, the other being anti-capitalistic in nature. It was unlikely that the two would be regarded as emanating from the same source, but ANTI-MONOPOLY was held to infringe as it was likely that a mental link with MONOPOLY would be made. It was strongly argued that the Directive and, therefore, the TMA 1994, embodied this principle in Section 10 (2) of the TMA 1994, the argument backed by the Statements attached to the Council minutes (see 13.5.3.). Such an interpretation is linguistically at odds with the section, for it would be strange to regard the narrower concept of confusion as "including" the wider concept of association. The issue of "non-origin association" was raised in Wagamama Ltd v City Centre Restaurants (1995) before Laddie J, who held that section 10 (2) covered "classic infringement", but not non – origin association. Considerable debate followed, as it was felt that the result was to ignore both the advertising and investment function of trade marks, and dilution of a mark in relation to similar goods or services: Kamperman sanders, A, "The Wagamama decision: back to the dark ages of trade mark law" [1996] EIPR 3; Sanders, A, "The return to Wagamama" [1996] EIRP 521; Gielen, C, "European trade mark legislation: the statements" [1996] EIRP 83.

Interpretation of the Directive in relation to the concept of confusion was referred to the ECJ in Sabel BV v Puma AG (1998)[27] in a case concerning the relative grounds for refusal. Puma opposed Sabel's application to register a device mark, consisting of a bounding cheetah and their name, in Germany, where Puma had registered a silhouette of a bounding puma. The ECJ considered two questions: the first as to the appropriate way in which to compare a composite device mark such as Sabel's and the second as to the correct interpretation of the "likelihood of confusion including the likelihood of association". They said, first, that the device mark must not be separated into its components , but be considered "globally" ; appreciation of the visual , aural, or conceptual similarity of the marks being based on the overall impression given by them, but bearing in mind their distinctive and dominant components, in the way that the average consumer would perceive the mark. Conceptual similarity (both marks focusing on a running feline) might give rise to a likelihood of confusion if the earlier mark was particularly distinctive,

[27] Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, p. 387

either inherently or through an extensive acquired reputation with the public. On the facts, however, Puma's mark was not particularly well-known and conceptually not very imaginative so that the marks' similarity was unlikely to give rise to confusion. On the second question, the ECJ steered a middle course between the two extremes of Wagamama. They said that the wording of the Directive (That a likelihood of confusion include a likelihood of association) precluded an interpretation that a likelihood of association be an alternative to confusion, association served only to define confusion's scope; and that this was confirmed by the 10th Recital in the Directive's preamble which establishes that the likelihood of confusion must be considered globally, taking into account all relevant circumstances. Confusion could therefore comprise "direct confusion" where the public confuse the sign and mark in question, or "indirect confusion" where the public are sufficiently confused to connect the respective proprietor's mark and sign (Advocate General Jacob referred to assuming an organizational or economic link, such as, perhaps, a license or franchise), but not "association in the strict sense" where the sign and mark's similarity causes the public to call the mark to mind without confusing the two (non-origin association). The decision does not remove potential protection against dilution in relation to similar goods or services because the ECJ left open the possibility of the indirect confusion being caused where a mark had considerable reputation or inherent distinctiveness.

Under ***Identical or similar marks/dissimilar goods or services*** are understood signs which are identical or similar to a registered trademark in relation to goods or services which are not similar to those for which the marks are registered, provided that the trademark has a reputation in the country, the use of the sign without due cause, and takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark: section 10 (3) of the TMA 1994. This provision provides the remedy for dilution of a mark, and other damage to reputation or the mark's economic value as a commodity (able to be merchandised, for example). There is no need to show public confusion, only damage to the value of the mark. Benelux law provides protection of the mark from dilution as does State and Federal law in the US. The opportunity to expand into new markets is protected by this new infringement but overprotection remains a danger if a trademark proprietor is to be able to monopolise the mark in all fields of goods and services.

To establish the dilution the claimant must show, first, identity or similarity of the defendant's sign to the registered mark in the same way as for section 10 (1) and (2) of the TMA 1994. In addition, it will be necessary to establish: secondly, the mark's reputation in the UK; thirdly, that the defendant's use was without due cause; and, fourthly, that use will damage to the mark's character or repute. It is only reputation, and not goodwill, in the UK which is required. The statute gives no guidance as to the extent of reputation required. One way to limit the potential for over protection inherent in this remedy would be to require and extensive reputation to be established. In the Benelux courts, the greater the reputation the more likely a dilution case is to succeed, and the Federal Trademark Dilution Act 1995 in the US applies only to "famous" marks, such as MARLBORO, COCA-COLA and NESCAFE[28]. Precedent for the criteria and evidence needed to establish a reputation exist in passing off law, and will develop in relation to well known marks. The International Trademark Association suggest that reputation can be shown by the degree of inherent and acquired distinctiveness of the mark, the geographical extent of trading, channels of trade used, and degree of recognition in the claimant's and defendant's trading areas and distribution channels, and the nature and extent of use of something similar by third parties.

[28] Principles of Intellectual property Law, Catherine Golston, Cavendish Publishing Limited, London, Great Britain, 1999, p. 389

Use by another with "due cause" will not infringe; in Benelux law, the defendant's use must be regarded as necessary to escape liability, but necessary uses in the UK are already absolved by the defences to infringement provided by Section 11 of the TMA 1994. Legitimate advertising comparing the products of claimant and defendant would appear to be a justifiable reason for use, as would ownership of other intellectual property rights, or prior use of the mark.

The fourth requirement of unfair advantage being taken of, or detriment caused to the distinctive character or repute of the mark, allows for two sorts of damage that have been identified as the result of a mark being diluted by use on dissimilar goods or services: "blurring" and "tarnishing" of a mark. Blurring occurs when the distinctiveness of a mark is detracted from by use on differing products, such as the use of KODAK for pianos, and BULOVA for gowns, which was found to infringe in the US, or the infringing use of MALBORO for cosmetics in Benelux. That there must be damage, or a likelihood of damage, is a pre-requisite: BASF plc v CEP (UK) Ltd (1996), although dicta on the ECJ in Sabel BV v Puma AG (1998) suggest that the claimant need not show deception of the public, and in Parfums Christian Dior v Evora BV (1998), the ECJ revealed a sympathy for the trade mark proprietors' desire to defend a prestigious image where no confusion would occur. This stands in contrast to the questionable decision in Baywatch Production Inc v The Home Video Channel (1997). The deputy judge Michael Crystal QC held in an unreserved judgment (following BASF plc v CEP (UK) Ltd (1996)) that, because section 10 (3) of the TMA 1994 introduces the concept of similarity of mark and sign, it followed that the likelihood of confusion was imported into the remedy, implying that marks are not similar unless they lead to the likelihood of confusion. This is justified by the anomaly that otherwise dilution in relation to similar goods or services would require confusion and be harder to establish that that in relation to dissimilar products. The Court of Appeal, in British Telecommunications plc v One in a Million (1999), doubted that confusion was necessary. Damage without customer confusion is possible, so that the mark owner may feel the need to abandon the mark or to initiate a remedial advertising in order to overcome adverse customer response to the blurring. In the case of blurring, damage is most likely where the mark carriers connotations of high quality or luxury. Tarnishing refers to the damage caused to a mark by use in circumstances that subvert the claimant's image by unpleasant associations. Thus, the use of AMERICAN EXPRESS on packets of condoms was actionable (American Express Co v Vibra Approved Laboratories Corp (1989)) in the US. The leading Benelux case is that of Claeryn /Klarein (1976). The owner of the CLAERYN mark for Dutch gin was able to prevent KLAREIN (which sounds exactly the same in Dutch) for a cleaning product. Parodies of trademarks, made normally for profit and not humor, may fall into this category of harm, as may diversion of a mark's value as a commodity; the BAYWATCH mark was being merchandised on a wide range of products, for example. Any requirement of source confusion or deceptiveness would frustrate this protection, however

The case law of both UK and USA establishes the rules how the trademark infringement cases should be considered by court, what features of the comparison between the sign and the registered trademark may say in favour of violation of the exclusive rights on trademark. However, this process is more complicated in the countries which do not belong to the case law family and which have few or no experience in trademarks' protection. Azerbaijan represents exactly the country where the court experience in consideration of trademarks' infringement cases is few. Though the Law on Trademarks and Geographical Signs establishes the rules for registration and protection of trademarks in the country, they are not enough to make the protection in the field perfect. For example, Article 32 of the Law of the Azerbaijan Republic establishes[29]:

[29] Law of the Azerbaijan Republic on Trademarks and Geographical Signs, June 12, 1998

Under the articles 25 and 26 of the present Law the use of trademark without consent of its owner is considered to be the violation of right for the registered trademark.

The use of trademark, containing geographical sign on wines and alcoholic drinks without consent of its owner is considered the violation of right for the registered trademark.

If the geographical sign is well-known, a translation of its name exists and the name is used with such expressions as «grade», «kind», «imitation» or others and persons without certificate use identical or similar trademarks in relation to homogeneous goods (including wines and alcoholic drinks), the qualities of which can mislead consumer, such a condition is considered to be the violation of right for a registered geographical sign.

Concerning the use of the registered trademark and geographical sign the following is prohibited:

- Actions resulting in the confusing of goods, rendered service or entrepreneur activity with others
- False ideas, undermining the authority of the goods, rendered service or entrepreneur activity at the undertaking of commercial activity
- Indices, the use of which can mislead the public about characteristics, quality, and usability of goods at the undertaking of commercial activity.

Article 33 of the Law of the Azerbaijan Republic on Trademarks and Geographical origins states the disputes which are to be considered by courts:

- issue of the certificate of registration of the trademark or geographical sign
- Violation of the sole right for trademark
- Cancellation of the registration of a trademark or geographical sign ahead of schedule or acknowledgment of it to be invalid
- Conclusion and implementation of a license agreement and agreement about cession of rights
- Illegal use of geographical sign

Commercial confidentiality of the trademark owner, connected to the manufacturing of goods or rendering of services is kept during consideration of disputes in court.

However, the Law does not specify the rules how the similarity between the sign and the trademark will be found, what are conditions to determine the infringement of the exclusive right on trademark, what are the guidelines to determine the likelihood of confusion by courts (whether there should be actual or hypothetical confusion), how to determine whether the mark is diluted or not.

So, the further development of the court practice as well as scientific creation of commentaries and rules for the judges (for example Decisions of the Plenum of the Supreme Court) are required in order to bring the protection in this field to the higher level.

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Data Protection Issues in Electronic Commerce. The European Regulatory Framework

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Abstract: This paper briefly examines issues concerning the protection of privacy on the Internet. It discusses the privacy risks, which are posed in the framework of e-commerce and, in particular, the issues of online data collection and online – profiling, credit scoring and online direct advertising (spamming). Also, it provides an overview of the regulatory framework in the European Union and examines the protection afforded by the EU-Directives in the context of e-commerce.

I. Introduction

The Internet is an explosive new medium, which opens up new ways of communication and information exchange between people. It also offers the potential to create new (virtual) markets for conducting commerce, which takes place on a worldwide network and across national frontiers. Electronic commerce (e-commerce) is, indeed, one of the most important applications of Internet technology. It is an outcome of the Internet revolution and its evolution is depending on the features of the new communications and information technologies and their consequences. Furthermore, e-commerce is a key factor to the development of a global digital economy and presents enormous opportunities for both businesses and consumers. It makes possible to trade at low cost across national frontiers and enables consumers to research, compare and finally, purchase products from their home and workplace.

However, the rapid growth of Internet and e-commerce has created increased threats to privacy, mainly due to the potential of modern technology to keep track of users' activities on the Internet. Concerns about privacy affect mostly consumers, whose personal data are collected via the Internet and analyzed in order to build detailed profiles of consumers, which are used to predict the individual consumer's needs and purchasing habits; these profiles enable the advertising companies to target advertising to individual consumers and to their specific interests. Even when personal information is collected directly from the consumer, there is always the risk of the misuse of the data, i.e., that this would be used for other purposes than of which it was collected etc.

Moreover, rating and scoring methods used to determine the creditworthiness of consumers infringe their right to informational self-determination, since the consumer has no influence, whatsoever, on this procedure and is subject to a decision based solely on automated processing of data, in the sense of Article 15 Directive 95/46/EC.

Another serious threat to privacy is the flood of unwanted electronic mail (Spam). Spamming, that is the practice of sending unsolicited bulk e-mails, most frequently of a commercial nature, is a major annoyance for consumers, who receive large amounts of unwanted e-mails and have to bear the cost of connection time, and a threat to ISPs, who are confronted with increased costs and with users' complaints.

Evidently, these information practices infringe consumers' right to privacy and hinder the development of e-commerce, since many consumers are opposed to such an extensive collection, storing, use and potential abuse of personal data and therefore, avoid electronic transactions. Therefore, data protection is an important factor in this context, for it is seen as necessary in order to guarantee the growth of e-commerce. In EU-level, the Directive 95/46/EC "on the protection of individuals with regard to the processing of personal data and on the free

movement of such data" represents the general framework for data protection. This Directive is complemented by the recently adopted Directive 2002/58/EC "on privacy and electronic communication", which contains specified provisions on the use of advanced technologies, used in order to monitor Internet users' activities on the Web, and also, on the use of automated calling systems for marketing purposes. These legal instruments provide a regulatory framework that aims at protecting fundamental rights and freedoms in particular with regard to the increasing capacity for automated storage and processing of data relating to Internet users. In this paper we will survey the protection afforded by these EU-Directives in the context of e-commerce. Before that we will give a technical description of the online collection of personal data.

II. Collection of Personal Information on the Internet

It is well known that Internet is not secure and that all transactions that take place on the net are identifiable. The online environment allows collection and use of information by commercial sites in a far more effective and efficient way than through conventional means. Information about consumers has been available long before the rise of Internet technology through offline sources, such as credit card transactions, phone orders etc. However, this new medium has revolutionized the collection and processing of personal information. In the online environment the possibilities for storing, comparing and linking information to create a detailed picture of a customer's interests (customer profiles) are enormous.

Web sites collect information about consumers for every purchase or supply of a service, such as a subscription, as a condition of payment by credit card or for shipping purposes. The consumer is under the obligation to provide personal details, in order to be authenticated, to give payment guarantees or provide his e-mail or physical address for the delivery of goods or services. Moreover, every visit on the net leaves traces that can be used, without prior knowledge of the user, to build a profile. By every visit in an online shop, every customer's step through the store is recorded; not only the products, which are observed, but also the rank, in which products are viewed and the relevant time, are being stored. Unless the consumer pays using e-cash or use privacy enhancing technologies to hide his/her IP address, there is no possibility for anonymity.

Web sites collect also information from consumers in exchange for a free service, such as free e-mail, stock-portfolios etc. Web sites known as "portals" offer personalized pages with selected information, once the user registers and provides his/her personal information. Some companies are offering free net access in exchange for monitoring users' activities for advertisers.

Data collection on the Internet takes also place without the prior knowledge of the Internet user. Once the connection with a Web site has been established, the Web site starts collecting information on the visiting Internet user. The Web site is informed about the destination IP-address and also, from which page an Internet user has been transferred. This information on Web site visits is generally stored in the 'Common Log File'. All the above-mentioned information can be used to create accumulated information on the traffic to and from a Web site and the activities of visitors. Generally, these include the following items:

- Operating system
- Type and version of browser
- *Protocols* used for Websurfing
- Referring page
- Language preferences
- *Cookies*

Other devices used to trace the activities of Internet users are the so-called “cookies”. These are small text files that are placed on a user’s hard drive by the Web site that the user is visiting; they store the preferences and other data about the visit to that particular site, allowing a site to identify the user on his/her next visit, check possible passwords, analyze the path during a session and within a site, record transactions, such as articles purchased, customize a site etc. It should be noted that cookies can be used across many different sites and that has led to the development of advertising network companies that track users’ surfing activities and develop profiles of their interests, which are then used to target specific advertising. Another method of tracking Internet users is the use of web bugs, which are invisible images that also place cookies etc.

Furthermore, one can name a whole range of ‘spyware’, i.e., software such as ActiveX, CGI-Scrit, Java and Javascript, Session-Ids etc., which can enter the users’ computer without their knowledge in order to gain access to information, to store hidden information or trace the activities of the user.

Consequently, these data collection methods are used from marketing companies, which collect data, e.g., by means of technological devices such as cookies and can then establish user profiles based on log file information and cookies. This information is used to customise advertisements depending on the habits and interests of consumers. Not only advertisements referring to the Web site owner of services or offers, but also those issued by third parties which have agreements to support the financial cost of running the server by displaying its publicity.

III. Regulations of Online Data Processing

1. Directive 95/46/EC

In the European Union, the collection and processing of personal data is governed by the Directive 95/46/EC. This Directive, which is applicable within EU-law and within the jurisdiction of the member states that have implemented it, applies unambiguously to Internet and e-commerce. According to Recital No 14 of the Directive 2000/31 on electronic commerce it is the data protection directive that applies solely for the protection of individuals with regard to the processing of personal data.

The general rules of the Directive, which deserve special attention hereto, are following:
The legality principle: The processing of personal data is allowed, when the conditions under which the processing is lawful are satisfied. As a basic rule, personal data may be processed only if the data subject has unambiguously given his/her consent (Article 7.a) or when one of the grounds mentioned in Article 7.b-f apply. In the context of e-commerce, processing may be justified on the ground that the data subject has given his/her consent. It could be said that any customer introducing his/her personal data in order to purchase a product or obtain a service, could be considered as consenting to the processing for this purpose.

The processing of personal data may also be allowed, if it is necessary for the performance of a contract to which the data subject is party, e.g. the provision of a service, or in order to take steps at the request of the data subject prior to entering into a contract (Article 7.b). Furthermore, the processing of personal data is justified where it is in the legitimate interest of a natural or legal person, provided that the interests of the data subject are not overriding (Article 7.f). This means that if the interest of a person in receiving personal data prevails over the data subject's interest not having his data processed or communicated data may be processed.

The finality principle: Personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes (Article 6.b). This principle is stressing the fact that processing of personal data in the online environment must serve a specific purpose, e.g. the delivery of a product, and should not take place for other purposes.

Furthermore, navigational data should in principle only be collected by ISPs insofar as they need to provide a service to the user; also, software programs, such as cookies, which are used to monitor the Internet activities of users, must only be used for specific purposes, e.g., to analyse the effectiveness of Web site design and advertising etc., provided that the users are informed about their purposes.

Data quality and proportionality: Personal data must be accurate and kept up to date (Article 6.c). They must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (Article 6.d). Consequently, information should only be collected if it is necessary for the transaction (the scope of the processing). Personal data must also be kept in a form, which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected (Article 6.e). Therefore, once data are anonymised, they can be used for other purposes, e.g., to measure the performance of a service offered by an ISP.

Transparency: The data subjects must be provided with information about the purposes of the processing for which the data are intended and the identity of the controller of the data (Article 10 and 11). This principle is of eminent importance, since the speed of data flows on the Internet has as a consequence that the requirements that the data subject be informed and made aware of the processing of his/her personal data are often ignored.

Rights of the data subject: Outside the rules concerning the information to be given to data subjects, they have the right of access to data (Article 12), the right to object at any time on compelling legitimate grounds relating to his particular situation to the procession of data relating to him/her (Article 14) and the right not be subject to a decision, which is based solely on automated processing of data (Article 15).

Restriction of transfer of personal data to third countries: The transfer of personal data to a third country is allowed only if the third country in question ensures an adequate level of protection (Article 25) or in very limited circumstances (Article 26).

Protection of special categories of personal data: The processing of special categories of data that is data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and the processing of data concerning health or sex life is prohibited, unless the data subject has given his/her explicit consent or the processing is necessary for explicit reasons (Article 8). Sensitive information should not be collected from consumers, even when they consent, except in limited circumstances, where the data are collected for legitimate purposes.

2. Directive 2002/58/EC

The recently adopted Directive 2002/58/EC of 12 July 2002 aims at adapting Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector to developments in the markets and new technology, mainly to Internet related issues as regards privacy.

The Directive lays down the obligation of the provider of a publicly available electronic communications service to take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security (Article 4, paragraph 1). Furthermore, in case of a particular risk of a breach of the security of the network, the provider of a publicly available electronic communications service must inform the subscribers concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, of any possible remedies, including an indication of the likely costs involved (Article 4 paragraph 2). ISPs who offer electronic communication services over the Internet should inform user and subscribers of measures they can take to protect the security of communications for instance by using specific types of software or encryption technologies.

Article 5 § 1 the Directive states that Member States shall ensure the confidentiality of communications, including both the contents and the data related to such communications (traffic data). Listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, shall be prohibited, except when legally authorised to do so in accordance with Article 15(1). It is made clear that software, which is used to trace data transmitted via the Internet (so-called packet sniffing software) shall be prohibited and that the storage of traffic data, in order to build up users profiles, without their consent, shall also be prohibited.

However, this prohibition does not prevent technical storage, which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality. This means that any automatic, intermediate and transient storage of this information may not be prohibited, in so far as this takes place for the sole purpose of carrying out the transmission in the electronic communications network (from an Internet Service or Access Provider) and provided that the information is not stored for any period longer than is necessary for the transmission and for traffic management purposes, and that during the period of storage the confidentiality remains guaranteed. The regulation of confidentiality does not affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication (Article 5 paragraph 2).

As regards the use of technological devices such as cookies, the Directive provides that only where such devices are intended for a legitimate purpose their use should be allowed with the knowledge of the users concerned. Article 5 paragraph 3 states that: *"Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller"*.

Therefore, users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment (PC). It is also worth mentioning that information and the right to refuse may be offered once during the same connection and also covering any further use that may be made of those devices during subsequent connections.

However, such devices can be a legitimate toll, e.g., in analysing the effectiveness of Web site design and advertising. Consequently, Article 5 paragraph 3 states that the aforementioned prohibition may *"not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications*

network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user".

Furthermore, the Directive regulates the use of traffic data, i.e., data needed by the protocols to carry out the proper transmission from the sender to the recipient, consisting of information supplied by the sender (e.g. e-mail address of the recipient) and of technical information generated automatically during the processing of the transmission (e.g. date and time). According to Article 6, *"traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to paragraphs 2, 3 and 5 of this Article and Article 15(1)"*.

This Article covers all types of transmissions of electronic communications and applies, therefore on the online environment. In particular, processing of header information, data such as the session login data or the list of Web sites visited by an Internet user must be considered as traffic data. Hence, online profiling on the basis of log file information is governed by the provisions of Article 6.

Consequently, paragraph 3 states that the subscriber or user has to give his consent if the provider of a publicly available electronic communications service wants to process his/her traffic data for the purpose of marketing or for the provisions of value added services. The service provider must inform the subscriber or user of the types of traffic data, which are processed for the purposes mentioned above, and the duration or such processing for the purposes of billing and interconnection payments and, prior to obtaining consent, for the purposes of marketing (paragraph 4).

3. Online Direct Marketing

Directive 2002/58 regulates also the use of automated calling machines, fax machines and e-mail for the purposes of direct marketing. Article 13 paragraph 1 defines that the sending of unsolicited e-mail may only be allowed in respect of subscribers who have given their prior consent. This means that the European legislator has made his choice, adopting an opt-in system. However, this provision does not apply, when a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC. Article 13 paragraph 2 of Directive 2002/58 states that: *"the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use"*.

The prohibition of unsolicited e-mail is unconditional in case of unsolicited commercial e-mail disguising or concealing the identity of the sender on whose behalf the communication is made, or when there is not a valid address to which the recipient may send a request that such communication cease (Article 13 paragraph 4).

According to paragraph 5 of article 13, the aforementioned provisions of paragraph 1 and 3 will be only applicable to natural persons. However, Member States shall also ensure that the legitimate interests of subscribers other than natural persons are sufficiently protected with regard to unsolicited communications.

4. Credit Scoring

Another issue that deserves attention is the issue of credit scoring. This method is used in e-commerce, where the assessment of the customers' credit-worthiness cannot be done by interview. The solvency of a person is assessed by means of a statistical - mathematical method, which estimates the creditworthiness of a person. In the context of e-commerce, such methods are used for example, in order to apply a payment option. In more particular, some Web sites offer a different payment method (e.g. cash on delivery or only on advance), depending on the city quarter of the consumers' domicile. However, the legitimacy of this procedure is questionable, since it infringes the provision of Article 15 of the Directive 95/46, which establishes the right of every person *"not to be subject to a decision, which produces legal effects concerning him or significantly affects him and which is based only on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, credit-worthiness, reliability, conduct, etc"*.

Conclusion

In the global information society, privacy risks are increased. Concerns about privacy affect mostly consumers, whose personal data are collected via the Internet without prior knowledge of the persons concerned. The EU-regulations, which establish general rules for the protection of personal data (Directive 95/46/EC) and specific rules for the protection of privacy in the electronic communications sector (Directive 2002/58/EC), constitute a regulatory framework that affords a high level of protection. The provisions of the European Directives impose the obligation of consumer-oriented commercial Web sites to provide consumers the choice as to how their personal data are used. This obligation extends to personal data and to data used for online profiling, such as traffic data and information contained in "cookies". In the field of online marketing, the European legislator has adopted for an opt-in regime that respects the privacy of Internet users.

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A Monitoring System for the European Neighbourhood Policy Action Plan for Azerbaijan

By Christina Wredberg, Short-term International Expert

The EU-Azerbaijan European Neighbourhood Policy Action Plan (ENP AP), which is based on the provisions of the EU-Azerbaijan Partnership and Cooperation Agreement (PCA), was adopted in November 2006 for a period of five years.

The Action Plan sets out ten Priority Areas as main objectives and states that their implementation" will help fulfill the provisions in the PCA and will encourage and support Azerbaijan's objective of further integration into European structures".

The Priority Areas outlined in the ENP AP are the following:

1. Contribute to a peaceful solution to the Nagorno-Karabakh conflict
2. Strengthen democracy in the county, including through a fair and transparent electoral process in line with international requirements
3. Strengthen the protection of human rights and of fundamental freedoms and the rule of law in compliance with international commitments
4. Improve the business and investment climate, particularly by strengthening the fight against corruption
5. Improve the functioning of customs
6. Support balanced and sustained economic development, with particular focus on diversification of economic activities, development of rural areas, poverty reduction and social/territorial cohesion; promote sustainable development including protection of the environment
7. Further convergence of economic legislation and administrative practices
8. Strengthening EU-Azerbaijan energy bilateral cooperation and energy and transport regional cooperation, in order to achieve the objectives of the November 2004 Baku Ministerial Conference
9. Enhancement of cooperation in the field of justice, freedom and security, including in the field of border management
10. Strengthen regional cooperation

The ENP AP formulates a political will by setting the framework for the future progressive integration of Azerbaijan and the EU, including the alignment of their legislation and standards in key areas of cooperation.

The document outlines a series of actions to be undertaken by the Azerbaijani side in order to come closer to the objectives set under the Priority Areas. Since the Priority Areas recoup a wide range of sectors, responsibility for implementing these actions rests with different ministries and state committees, numbering a total of 23, and that is not counting the Cabinet of Ministers, the Human Rights Commissioner, the National Bank of Azerbaijan, the State Oil Company and other institutions.

Follow-up of the implementation of the ENP AP on behalf of the Azerbaijan government

A key issue for the Azerbaijani side to date has been the follow up of the implementation of the ENP AP. Since the Priority Areas cover such a wide range of sectors coming under the responsibility of so many different ministries and state committees it has appeared increasingly relevant to put in place a mechanism that will assist the government in maintaining an overview of the progress achieved in the implementation of the Action Plan.

The Ministry of Foreign Affairs (MFA) and the Ministry of Economic Development (MED) carry specific responsibility for following up on the implementation of the ENP AP to the effect

that the MFA is responsible for the political aspects of the relations with the European Union (EU), and the MED is responsible for the technical and economic aspects of those relations.

The MFA is officially responsible for the follow-up of the implementation of the ENP AP on behalf of the Azerbaijan government and as such issues a yearly report on the progress of the implementation of the ENP AP. The "2007 ENP AP Progress Report" was issued beginning of 2008. The preparation of the "2008 ENP AP Progress Report" is currently underway and is expected to be completed during December 2008. The information for the Progress Report is collected by the MFA from the different ministries and state committees over a two-month period (September-November) and is thereafter collated and organised by the MFA's Division for Cooperation with the EU so as to realign it along the priorities set out in the ENP AP.

Due to the complex nature of the ENP AP, however, and the very wide variety of sectors covered by the different Priority Areas (economic, social, political), it is at times difficult to obtain a consistent overview of the progress accomplished in the different areas. This renders equally complicated the task of analysing the information obtained on the progress accomplished in the implementation of the document, and the development of recommendations for measures to be taken on the basis of the former as a means to coming closer to fulfilling the objectives linked to the ten Priority Areas.

This is part of the reason why the MED has formulated the intention of developing its own monitoring and feedback tool the purpose of which would be to:

- obtain a consistent and detailed overview of progress accomplished in different sectors related to the implementation of the ENP AP
- establish a feedback process to and from the different ministries and state committees responsible for the implementation of the ENP AP in their specific sectors of activity
- serve as an instrument allowing to develop recommendations for future measures to be taken in relation to the ENP AP implementation based on the information received
- allow for a more regular communication and feedback process on the ENP AP implementation process in various sectors
- enable, with time, a more consistent horizontal exchange on the progress accomplished between the different ministries and state committees
- render possible the sharing of this information with other stakeholders, i.e. the EC Commission, the Baku EC Delegation and others, as a basis for the development of a consistent and regular dialogue on the implementation of the ENP AP

In other words, the monitoring instrument should serve as a basis for an improved communication and feedback process between its users as well as a common reference tool.

The sources of information on the ENP AP implementation process

A key element in the development of the ENP AP monitoring system is the identification of the sources of information (or sources of verification). This is a necessary preamble to developing the criteria, or indicators, which will serve to measure whether the actions undertaken in a specific sector has given concrete results, and the extent to which these results have been achieved.

In view of this the MED, together with the National Coordination Unit (NCU) the latter having been designed as the future administrator of the system, decided to initiate the process of developing the system by securing access to reliable sources of information.

The identification process itself presents no greater difficulty since the principal sources of information on the ENP AP implementation process are those persons in the ministries and state

committees who are responsible for the implementation of the document in their respective sectors of activity.

In addition to the identification of these sources, however, comes the process of ensuring their reliability, regularity and relevance in accordance with the needs of the users, i.e. a consistent overview of the implementation process as a basis for deciding on the measures and possible corrective actions to be taken with a view to achieving the targets set under the ENP AP Priority Areas.

Some of the stumbling blocks in the present methods of following up on the ENP AP implementation process are linked to ensuring the reliability, relevance and regularity of the information flow. Information on the ENP AP implementation is collected only once a year, and that process in itself is relatively time consuming, both for those who provide the information and for those who collect it.

The reliability of the sources of information is relatively uneven since whereas the staff of some ministries have developed their own Action Plan for the implementation of the ENP AP in their specific sector of activities and their staff are acquainted with the contents of the AP and its implications, there are other ministries that do not possess the same type of agenda and whose staff are only vaguely familiar with the ENP AP and with the manner in which it recoups with their own work.

The relevance of the information obtained for the purposes outlined in the ENP AP is another area where there is scope for improvement, notably by the development of clearer criteria for obtaining the information, so that those who seek to obtain feedback on the progress of the ENP AP implementation process should know what to look for.

Therefore, as one of the initial steps in the development of the ENP AP monitoring system it was decided to identify one person in each ministry/state committee who will be responsible for gathering and transmitting information on the ENP AP implementation process.

ENP AP coordinators

The Cabinet of Ministers of Azerbaijan is responsible for the coordination of relations at inter-ministerial level. It is therefore desirable that any initiative aiming at the mobilisation of resources at the level of the ministries and state committees should be taken through the Cabinet of Ministers.

The procedure linked to the appointment of the persons in the ministries and state committees responsible for transmitting information on the ENP AP, here referred to as "ENP AP coordinators" is the following:

1. The Minister of Economic Development of Azerbaijan submits a request to the Cabinet of Ministers, which is chaired by the First Deputy Prime Minister, for the appointment of ENP AP Coordinators
2. The First Deputy Prime Minister issues a decree to the Ministers and Heads of State Committees to the effect that they are to appoint ENP AP coordinators among their staff; one possibility is to select the former among the staff of the international relations/cooperation departments, although the final decision in this matter is up to each ministry/state committee
3. The ENP AP coordinators are appointed by their respective Ministers/Heads of State Committee as a way to contribute to enhancing the prestige of the function both in their own eyes and in that of their environment, which should be conductive to increasing their motivation in carrying out the function

4. As a means of developing a sense of identity and ownership among the ENP AP coordinators, the latter will undergo training in matters linked to the European Neighbourhood Policy and the Partnership and Cooperation Agreement

The ENP AP coordinators will also, once they take up their function, act as internal and external sources of information on the ENP AP priorities in their respective ministries and state committees. They will, jointly with the NCU, develop procedures for gathering information on the ENP AP implementation from their colleagues in other departments and for transmitting this information to the NCU.

The principles of the ENP AP monitoring system

The development of the ENP AP monitoring system will take place in several consecutive phases based on the following basic principles:

a) Ownership: the users of the system should participate in its development from the very beginning. This goes for the NCU as the administrator of the system, as well as for its other users, the ENP AP coordinators. This is a factor which will contribute to ensuring that the system will actually be used.

b) Realistic: the users of the system must be convinced from the beginning that it will work. It is therefore important that the system be developed in a way that is compatible with the environment, political and otherwise, in which it will operate.

c) Compatibility with existing resources: the system should be compatible with the resources available to its users, both in financial terms and with respect to existing human resources. Its administration and management should therefore be realistic in terms of available resources.

d) User-friendly: the software tool developed on the basis of the monitoring system should be easy to use and not necessitate any additional resources in terms of personnel for its administration. In this case, one member of the existing staff of the NCU will be appointed administrator of the system.

e) Regularity of the feedback and information process: the system should ensure the regularity of the feedback on the ENP AP implementation process in order to enable its users to take corrective action if necessary and design additional measures and recommendations for the future process linked to the implementation of the ENP AP in different sectors. The regularity of the information process, in this case, will be enhanced through the closed circuit online software tool which permits prompt transmission of information on a regular basis according to the needs of the users. Moreover, the NCU-ENP AP coordinators team building process taking place during the system's initial development phases (training, agreement on joint procedures for collection, transmission and analysis of information) will be conducive to strengthening the communication processes between the different users of the tool.

f) Relevance of information obtained: the reorganisation of the ENP AP into Priority Area sub-sectors makes it easier to follow the thread in terms of specific actions required to attain a specific result applicable to that specific sub-sector. This in turn will facilitate the task of the administrator of the system in obtaining a clearer view of the actions required in a specific sector or sub-sector or the need for corrective action to be taken.

One of the most important functions of the system, however, is that of a joint communication tool and a basis for a continuous and ongoing dialogue both inside the Azerbaijan government and between the Azerbaijan government and the EC Commission.

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Azerbaijan Will Soon Sign A 14 Million Financing Agreement with the European Union

By Jo Declercq, Short-term International Expert

This 'Financing Agreement', stipulating that the EU will support the Azerbaijani energy sector with a grant of 14 million Euro, follows the signing, on 7th November 2006, of the 'Memorandum of Understanding on a 'Strategic Partnership between the European Union and the Republic of Azerbaijan in the Field of Energy' by H.E. Ilham Aliyev, President of the Republic of Azerbaijan, and by Mr. Vanhanen, President of the European Council, and Mr. Barroso, President of the Commission of the European Communities.

It has also to be seen in the context of the 'European Neighbourhood Policy' (ENP), which aims to avoid new dividing lines between the enlarged EU and the neighbouring countries to the east and on the southern and eastern shores of the Mediterranean. This policy is based on mutual commitment to common values, and to move beyond existing co-operation to deeper economic and political, cultural and security co-operation.

The EU is implementing this ENP since 2007 through a new financial instrument, the 'European Neighbourhood Policy Instrument' (ENPI) that replaces the TACIS Instrument. Contrary to TACIS, which was providing almost exclusively technical assistance (TA), this ENPI allows and even promotes other uses of the money, e.g. for budget support to a particular sector.

The ENPI has an average annual budget of 1.6 billion Euros, to be distributed over 17 countries. An indicative amount of 92 million Euros has been allocated for the period 2007-10 to Azerbaijan, with 19 million Euros in 2007, and 22 million in 2008. The 14 million Euro grant is part of the 2007 budget. It will be used to re-enforce the energy efficiency and the use of alternative energy sources in Azerbaijan.

While the procedures of the TACIS Instrument, focusing on TA projects of a value averaging 1.5 million Euro, is rather well known by Azerbaijani officials, the procedures of this new ENPI instrument, focusing on 'Budget Support', are rather new and may need some explanation. This is the purpose of this article.

First, we will explain the basics, and the seven key areas of the 'Sector Approach'. Second, we will analyse the 'Sector Budget Support' instrument, and finally, we will say a few words on Sector Budget Support in Azerbaijan.

1. The Basics, and the Seven Key Areas of Sector Approaches

For many years, development assistance was based on what is called the 'Project Approach': after analysis of a problem, (e.g. lack of food, or insufficient health services) and its causes, a 'donor' and a 'beneficiary' (mostly some Government Ministry or Body, but sometimes also a 'Non-Governmental Organisation' (NGO)) decided to do something about it in an organised way: they set up a project for a couple of years, that was going to solve, or at least tackle the problem. A special technique was used to structure the project activities: the logical framework. The logical framework was, and is, an interesting tool – for any organisation – to describe how it will achieve its objectives: it is basically putting in place a 'gradual' approach, where one can and should measure every step in the direction of the agreed objective: first you need resources (inputs), that you use (activities) and that will normally give some outcome (results). These results finally should lead to the objective.

This project approach was fine, but also had some drawbacks: there were countries that had so many donors, each of them with a multitude of projects, that the national Authorities no longer had a clear idea who was doing what and where. Many projects worked outside the Government and Ministry, and their objectives were not necessarily the same as the objectives of the National or Ministerial Development Plan. Another disadvantage was that projects, who wanted to do a good job, hired the best civil servants, who left their Ministry, attracted by the Euros or dollars offered. This lead to a weakening of the Ministry, exactly the contrary of 'capacity building', one of the main objectives of all these projects! The beneficiary countries also started to criticise the donors for spending too much money on foreign consultants, who wrote reports that were not always useful, instead of spending money on 'real things' like building roads, schools and hospitals. In short, both beneficiaries and donors were ready for a new approach: the sector approach.

The sector approach is build on a few guiding principles, that were announced in the so-called 'Paris Declaration' in 2005. They are:

- Support government ownership and leadership
- Work with government to strengthen institutional capacity and accountability
- Set the sector programme in context
- Take a long-term, strategy view
- Be pragmatic and flexible

The seven main elements of a Sector Programme are: (i) a sector policy and strategy, (ii) the sector budget and its medium term perspective, (iii) a sector and donor co-ordination framework, (iv) the institutional setting and existing capacities, (v) a performance monitoring system, (vi) a macro-economic policy which provides a stable environment, and finally (vii) a good public finance management system. We will now explain each of these in some more detail.

a. Sector policy and strategy

The *sector policy* is the first building block of a sector programme. It is a statement of the Government's objectives within a sector and a summary of how they will be achieved. It should obviously re-enforce and not contradict policies as set out in the National Development Plan. The *sector strategy* describes how the Government intends to implement the sector policy over a medium-term perspective, usually 3-6 years. It may set intermediate targets and objectives, or set priorities among policy objectives if some of them are not achievable in the short term. The sector strategy normally is completed by an '*Action Plan*', that goes in detail about activities, which will be responsible, how they will be financed and when they need to be completed.

b. Sector budget and its medium term perspective

A credible, comprehensive and transparent sector budget is essential for the proper implementation of the sector policy and strategy. It should be elaborated taking into account all revenues (including donors') and expenditure (including operational and capital expenditure, and all possible separate 'funds'). When a sector budget is coherent with the sector policy, and meets above basic requirements, the attention should then go on the 'technique' of 'policy-based budgeting' with a view to improving the allocative efficiency of internal and external resources over the medium term. Some countries have already a professional 'Medium Term Expenditure Framework' (MTEF); others are still at the beginning of this process.

In a first phase, looking at the annual budget will already be very helpful to see in how far the budget is a tool to implement the sector policy and strategy. Questions that can be asked are: (i)

how is the budget in reality prepared, (ii) is it consistent with the policy priorities, (iii) how is it financed, (iv) is budget implementation being controlled, (v) what is the size of the donor budget support, (vi) what kind of budget classification system is followed (IMF Finance Statistics Manual GFSM 2001, or UN Classification of the Functions of the Government COFOG).

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c. Sector and donor co-ordination framework

Co-ordination processes comprise two basic mechanisms: co-ordination of Government actors and other national stakeholders, and co-ordination of donors active in the sector. In practice, on many occasions, these two dimensions overlap, but it is important to keep them conceptually separate in order to protect domestic accountability and ownership. Connected to these two processes, a special attention is to be given to the sector programme 'management system', meaning the steering and decision-making arrangements set up for each sector. As well as being Government-led, the sector co-ordination arrangements need to be consistent with the structure of the national Government. This means that the line Ministry is the main responsible for the implementation of the sector programme and that the Ministry of Finance must be involved and have a clear role.

d. Institutional setting and existing capacities

The success of any sector programme depends on the underlying institutional drivers of and constraints to development, as well as the capacity of the involved organisations and persons. These factors will largely determine the pace of implementation as well as the robustness of the sector programme. Dialogue about the institutional setting and the present capacity based on a joint assessment of the situation is therefore an essential part of the SWAP.

How to assess the systemic capacity to implement the sector strategy? First, look at the outputs. What does the 'system' offer the public now? Present output is a good measure of capacity. Then look at the 'system' itself, its environment. And the processes between the different institutions. Both what is official, 'formal', and what is 'informal'. This three step exercise will give a good idea where the problems are and what can be done.

Enhancing the capacity of the 'system' to implement the sector policy is therefore obviously much more then providing training to local civil servants. The way Ministries and national institutions are managed, the way they inter-act, the way civil servants are hired, paid and monitored, are probably more important in terms of achieving the policy goals then individual capacities. The best expert cannot function in a dis-organised institutional framework. Therefore, systemic capacity development has to be mainly a domestic affair, not a donors' activity only.

e. Performance monitoring system

Every sector strategy and action plan should be accompanies by a Performance Assessment Framework (which ***monitors*** the implementation of the strategy/action plan (are all activities being implemented on time etc…), but also ***evaluates*** the strategy/action plan (did these actions and their results have the assumed impact that lead to the achievement of the objectives?). If national capacity is not yet sufficient, it may be wise to limit oneself to the establishment of a 'Performance Monitoring System' (PMS).

This PMS is necessary, not only for the Government to know if the action plan is being implemented, but also for the donors who spend their tax payer's money. If EC financial support to sector programmes takes the form of budget support with disbursement in tranches related to

achievement of 'conditionalities', it is equally important that the targets that are set are challenging but achievable and the resource implication for meeting that target understood by all.

Traditionally, four 'levels' of indicators are distinguished:

- *input indicators*: measure the financial resources provided and the administrative and regulatory measures taken
- *output indicators*: measure the immediate and concrete consequences of the resources used and measures taken
- *outcome or result indicators*: measure the use and satisfaction obtained by the outputs
- *impact* indicators: measure the consequences of the outcome in terms of the objectives of the strategy/action plan

f. Sound macro-economic situation and policy

Sector strategies/action plans need resources. If the macro-economic situation is weak or bad, there is a serious risk that these resources will not be available. A macro economic assessment will have to look at the three main macro-economic parameters: the fiscal situation, the monetary situation and the economic relations with third countries, reflected in the Balance of Payments. Past and expected trends of the main variables (growth rate, trade deficit, balance of payments structure, government fiscal deficit, rate of inflation, share of the social sectors in the government budget, employment rate, level of reserves, level of external indebtedness and the exchange rate) should be analysed.

g. Performing Public Finance Management (PFM) system.

Even if the national budget provides the necessary resources for the implementation of the sector strategy/action plan, success is not guaranteed. A further condition is that public money is well spending, and not 'diverted' to other uses. Therefore, a performing PFM system is crucial. The PFM in general, and in the sector especially, has to be assessed.

The EC's favoured tool to check how well the general PFM system works is the 'PFM Performance Measurement Framework' or PFM-PMF. It consists of the analysis of 28 indicators covering six essential dimensions of PFM systems: (i) credibility of the budget, (ii) comprehensiveness and transparency of the budget, (iii) policy-based budgeting, (iv) predictability and control in budget execution, (v) accounting, recording and reporting, and (vi) external scrutiny and audit. It also includes three indicators on donor practices. However, because everything is in constant evolution, also the PFM system, it is necessary to look at the dynamics: is their a reform underway, or is the situation getting worse?

This general PFM assessment may be, and sometimes should be, complemented by a sector-PFM assessment. However, in most cases, the general PFM will the most important element to look at.

Now we understand why donors, including the EU, have moved from a 'project approach' to a 'sector approach'. We also know what the seven key elements of a sector approach are. Next we will look in more detail how the EU is helping Governments to implement their sector policies.

2. The Sector Budget Support (SBS)

A 'Sector Policy Support Programme' (SPSP) is the instrument through which the EU assists Governments to implement sector policies. It can be offered in three ways, or modalities, but the preferred way, or modality, is through Sector Budget Support (SBS), while the other two

modalities (pool funding and funding through EC procedures, i.e. the old project approach) are only considered in special cases and will not be described here. In a first section, we will indicate what is strictly mandatory for a SBS (the eligibility criteria), and in a second section, we will describe the practical steps that are taken to put a SBS in place.

a. Eligibility Criteria

For a country's sector programme to be eligible for EU SBS, a minimum of three elements have to be present.

First, a well-defined sectoral policy has to be in place.

The main purpose of any SBS is to support a sector programme which stems from a sector policy. This eligibility criterion requires that this sector policy is assessed and that the result of the assessment is positive: principal donors have to share the objectives and approaches of a sector policy in order to engage as reliable partners for its implementation.

Second, a credible and relevant programme to improve public financial management (PFM) is in place or under implementation.

Resources transferred with SBS become part of the global resources of the partner country and are managed according to the partner country's own public financial management system. PFM is concerned with the planning, spending, reporting and auditing of public money as well as assessing the extend to which plans are implemented and whether a budget is comprehensive and transparently prepared and executed. As a result, the country's PFM system is a key factor in determining the efficiency and effectiveness with which budget resources contribute to achieving the objectives of the sector policy.

Third, a stability-oriented macro-economic policy is in place or under implementation

Although stability oriented macro-economic reform is not an objective of SBS, short and medium term macro stability is necessary for the successful execution of sector budgets and to ensure predictable and sustained sector funding.

b. Putting in place a SBS

Putting in place a SBS goes through a cycle consisting of five phases: (i) programming, (ii) identification, (iii) formulation, (iv) financing, (v) implementation and monitoring and (vi) evaluation. We will give some practical information on each of them.

i. Programming phase
Programming of EU assistance goes in a 3 step sequence: first, a Country Strategy Paper covering 7 years is produced, second, a National Indicative Programme, covering 4 years is written, and thirdly, an Annual Action Plan is agreed upon. The Annual Action Plan clearly states how much money is available, and already gives an indication what will/could be done with it and which sectors could be eligible for SBS. An assessment of the status of the sector approach and the consensus and readiness to develop a sector programme is made.

ii. Identification phase
During the identification phase, a preliminary assessment of the quality of the sector programme through the 7 areas of assessment is done. The three eligibility

criteria for 'candidate' sectors are going through a first screening and an '*Identification Fiche*' (IF) summarises the findings and – if possible – a SBS is proposed.

iii. Formulation phase
In the formulation phase, the three eligibility criteria are thoroughly screened, the other four areas are assessed (sector budget and its medium term perspective, co-ordination framework, institutional setting and existing capacities, performance monitoring system) and an '*Action Fiche*' (AF) is produced. If it is decided to go ahead with an SBS, this 'AF' is followed by the establishment of a 'Financing Agreement' (FA) indicating the 'Special Conditions', with 2 annexes: Annex I with the General Conditions (standard document), and Annex II with the detailed 'Technical and Administrative Provisions'. This Annex II clearly identifies the SBS, gives its rationale and a full description (in logframe format) and ends with implementation issues. It normally has 2 appendices, one describing the performance indicators used for disbursement, a second laying out the policy matrix.

iv. Financing phase
The objective of the financing phase is to reach an informed decision on whether to proceed with the SBS and, in the light of this, to conclude a financing agreement with the partner country. Following steps are undertaken: (i) finalisation of the AF/FA, taking into account comments from the Government and the EC Delegation, (ii) appraisal by the EC Directorate Quality Support Group and inter-service consultation, (iii) financing decision by the appropriate Financing Committee, and (iv) preparation and signature of the FA.

v. Implementation and monitoring phase
Implementation is the responsibility of the Government and the responsible line Ministry. Monitoring is the joint responsibility of the national Authorities and EC Delegation (assisted by the EU TA team that in principle accompanies the SBS).

vi. Evaluation phase
This is a joint assessment of the relevance, efficiency, effectiveness, impact and sustainability of the sector, the added value of the SBS in helping to achieve the sectoral goals as well as the appropriateness of chosen implementation modalities.

3. Sector Budget Support in Azerbaijan

a. The 'Energy Reform Support Programme (ERSP) for Azerbaijan (Budget AP 2007)

SBS in Azerbaijan is scheduled to start before the end of 2008, with the signature by the Azerbaijani Authorities of the Financing Agreement for the 'Energy Reform Support Programme (ERSP) for Azerbaijan. It consists of 13 million Euros in budget support proper, and 1 million Euros in complementary support (TA). It will cover a period of 4 years if conditions are met, it will be disbursed in three tranches: 3 million Euro in 2008, 5 million Euro in 2009, and 5 million Euro in 2010.

The expected results and main activities are:

- Adoption by the Government of Azerbaijan (GoA) of a comprehensive and fully integrated energy strategy

- Approval by the GoA of a detailed Action Plan for the promotion of Energy Efficiency (EE) and Renewable Energy Sources (RES) up to 2015, and (start of) implementation
- Drafting and submission to Parliament of legislation on EE and RES
- Establishment and practical launch of a new National Agency on EE and RES
- Determination of appropriate financial incentives for EE and RES

The SBS funds will be untargeted and channelled directly into the Unified Treasury Account of GoA. Once released, the use of funds will be at the discretion of GoA as all State budgetary resources, managed in compliance with Azerbaijan law.

b. Future SBS

The Annual Action Plan (AP) 2007 is ready for signature, the AP 2008 is prepared and under final discussions, and the AP 2009 is under preparation.

Analysis and discussions are ongoing to allocate SBS to the 'Justice Reform Programme' (AP budget 2008), to the 'Agricultural and Rural Development Support Programme' (AP budget 2009), and initial studies are being undertaken to identify SBS for AP budget 2010.

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ABBREVIATIONS

EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
ENP	European Neighbourhood Policy
ENP AP	European Neighbourhood Policy Action Plan
ERSP	Energy Reforms Sectoral Program
EU	European Union
GMO	Genetically Modified Organism
MED	Ministry of Economic Development
MFA	Ministry of Foreign Affairs
NCU	National Coordination Unit
PCA	Partnership and Cooperation Agreement
REA	Renewable Energy Sources
RIA	Regulatory Impact Assessment
SBS	Sectoral Budget Support
TACIS	Technical Assistance to CIS
TMA	Trade Marks Act