**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of conformity of Article 133.1 of the Civil Code of the Republic of Azerbaijan*

*to the Constitution of the Republic of Azerbaijan*

**20 September 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), F.Babayev, B. Qaribov, R.Qvaladze E.Mammadov (Reporting Judge), I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the representative of the inquiring party in the constitutional procedure R.Rahimov, Head of the Office of the Ombudsman of the Republic of Azerbaijan,

based on the inquiry of the Ombudsman of the Republic of Azerbaijan of 28 June 2004 (ref.# 1/3486-04)

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section VII of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of Article 133.1 of the Civil Code of the Republic of Azerbaijan to Articles 58, 59 and 71 Section II of the Constitution of the Republic of Azerbaijan. The constitutional proceedings were held in absence of a representative of the National Assembly (Milli Majlis) of the Republic of Azerbaijan as the respondent party.

Having heard a report of Judge Mammadov and a statement from the representative of the inquiring party R.Rahimov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The inquiry of the Ombudsman of the Republic of Azerbaijan provides several arguments for and requests the Constitutional Court of the Republic of Azerbaijan to review of conformity of Article 133.1 of the Civil Code of the Republic of Azerbaijan to Articles 58, 59 and 71 Section II of the Constitution of the Republic of Azerbaijan.

The Plenum of the Constitutional Court has the following to note in relation to this inquiry.

According to Article 133.1 of the Civil Code, if a legal entity is registered but shows no activity within a year of being registered, a competent executive authority cancels its registration entry in the state registry of legal persons. Such record can also be cancelled by an initiative of any founder of a legal entity in question or any third person. Cancellation of the entry in the state registry signifies disbandment of the entity in question.

Legal assessment of the said Article requires consideration of the Constitution and other laws of the Republic of Azerbaijan as well as international legal acts and case law of international courts.

According to Article 15 of the Constitution of the Republic of Azerbaijan, economic development in the Republic of Azerbaijan is based on mixed proprietorship and serves to increase welfare of the people. The government of Azerbaijan shall encourage economic development under conditions of market economy, guarantee freedom of enterprise and prevent monopolism and unfair competition. Sustained economic and legal reforms are implemented to ensure approximation of state governance, economic regulation and democratisation process to requirements of the Constitution of the Republic of Azerbaijan and international standards. It is precisely in this contemporary spirit that the new Civil Code developed, enacted and effective since 1 June 2000 regulates legal relations in Azerbaijan.

Under the new civil legislation a procedure for registration of legal entities in the normative notification manner does not require approval, including prior approval, of any third party. At the phase of state registration of establishment of a legal entity, a pertinent executive authority makes a decision concerning compliance with pre-requisites for establishment and recognition of a new a legal entity.

In accordance with Article 48.1 of the Civil Code, a legal entity shall be registered by a relevant executive authority. State registration information, including name of organisation for non-commercial entities, is included in the state registry of legal persons, which is generally open for common access. Article 132.1 of the same Code establishes that a registered person is included in the state registry of legal persons whereas documents submitted for registration are kept in the archives.

As seen from the above-discussed provisions, a purpose of maintaining of the state registry of legal persons is to include non-confidential information about legal entities in the state registry, which is generally open for common access. No other legal purpose of the said registry has been established in the law.

To further its aims, a legal entity as a participant of legal relations may engage in various activities stated in its charter (articles of incorporation) and not prohibited by law. Civil law of the Republic of Azerbaijan provides that every legal entity shall be incorporated either as commercial or non-commercial organisation (public associations, foundations, etc.). Depending on the principal purpose of activity, a legal entity may be either profit-oriented (a commercial entity) or not-for-profit and not distributing profit (a non-commercial entity) (Article 43.5 of the Civil Code).

Matters pertaining to establishment (incorporation) of a legal entity and its activities are closely related to provisions of Articles 58 (right to association) and 59 (right to free enterprise) of the Constitution of the Republic of Azerbaijan.

Article 58 of the Constitution of the Republic of Azerbaijan establishes that everyone has a right to associate with others. Everyone has a right to found any union, including a political party, professional union or other public association or join an existing association. All associations are guaranteed freedom of activity. No one can be forced to join any association or remain a member thereof. Associations aiming to overthrow lawful government throughout the Republic of Azerbaijan or in any part thereof by violent means are forbidden. Associations breaching the Constitution and laws of the Republic of Azerbaijan can be disbanded only upon decision of a court.

The decision of the Plenum of the Constitutional Court of 11 May 2004 “Review of the complaint of E.Alizade et al concerning conformity of several court decisions to the Constitution and laws of the Republic of Azerbaijan” provides detailed analysis of the association right and underlines constitutional guarantees to freedom of activity of associations. The decision emphasises that these guarantees extend also to intra-organisational liberties (freedom to adopt their by-laws, elect their boards, independently manage their assets, define and implement their action plans, etc.).

Conditioning of the right to association on functioning within a certain period of time and competence granted to relevant executive authorities to effectively disband a legal entity by striking a corresponding entry in the state registry of legal persons may lead to unsubstantiated limitation of the right to association. It should be noted in this regard that the period “Associations breaching the Constitution and laws of the Republic of Azerbaijan can be disbanded only upon decision of a court” in the constitutional guarantee of the right to association has paramount importance.

The Constitution of the Republic of Azerbaijan counts the right to association among main human and citizen rights and freedoms. In international legal acts this right is mentioned under the name of freedom of assembly and association. The European Court of Human Rights assesses this freedom from the point of freedom of thought and expression. In the current European legal system this freedom is accepted as mainly a political and humanitarian right. Although this right is not absolute, its limitation is only permissible when explicitly defined by law, requisite for workings of a democratic society, possessing high public importance and is done commensurately to lawful purposes of such limitation.

Article 11.2 of Protocol 1 to the European Convention of Human Rights and Basic Freedoms states: “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. this article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

In this sense, a matter raised in the constitutional inquiry at hand shall be look upon from the point of view of impossibility of limitation or abrogation of the constitutional right to association by a non-judicial authority.

Conditioning of the right to association for commercial entities on carrying out activities within a certain period of time and competence granted to relevant executive authorities to effectively disband a legal entity by striking a corresponding entry in the state registry of legal persons shall be approached from the point of the content and substance of the right to free enterprise.

In accordance with Article 59 of the Constitution of the Republic of Azerbaijan, everyone may freely use his / her resources, capacities and property to engage, individually or collectively, in free entrepreneurial and other non-prohibited economic activity within the bounds of the law. This Article sees economic activity as expression of individual freedom and enshrines the principle of free enterprise.

The Law of the Republic of Azerbaijan on Guarantees to Inheritance should be specially noted in relation to guarantees of the right to free enterprise. This Law establishes, inter alia, that everyone in the Republic of Azerbaijan and all non-state legal entities located within the territory of the Republic of Azerbaijan may freely use inherited movable and immovable property, money, foreign exchange and other duly inherited assets at their own discretion or freely invest them in productive, commercial and other non-prohibited economic activities without providing explanation, issuing declarations or producing any documents to anyone.

It should be noted that the President of the Republic of Azerbaijan has adopted several decrees aimed at ensuring freedom of economic activity and creating real guarantees against groundless interference of government agencies in business activity, especially the Decree of the President of the Republic of Azerbaijan No. 463 of 17 July 1996 “Regulation of state control over productive, service, financial and credit activity and prohibition of unwarranted inspections” and the Decree of the President of the Republic of Azerbaijan No. 69 of 7 January 1999 “Improvement of the system of state control and removal of artificial hindrances to business development.”

Moreover, it should be underlined that entrepreneurial activity as a kind of non-prohibited economic activity is inherently independent, risk-prone and oriented at gaining income through use of property, sale of goods and/or performance of works or services. It should be noted in this regard that if for whatever reason a legal person can not maintain its economic activity without making losses, the right to free enterprise entitles it to suspend or discontinue that economic activity, in which case a legal entity can not be externally forced to carry on.

Provisions of Article 133.1 of the Civil Code that allow a relevant executive authority to cancel an entry in the state registry of legal persons corresponding to a legal entity not functioning within a year since its incorporation lead to unwarranted limitation of the right to free enterprise by creating artificial hindrances to entrepreneurial activity.

It should be taken into consideration that because provisions of Article 133.1 of the Civil Code groundlessly curb the right to association and the right to free enterprise, they contravene Article 71 Section II of the Constitution of the Republic of Azerbaijan, which establishes that no one can limit realisation of human and citizen rights and freedoms.

In addition to the foregoing, the Plenum of the Constitutional Court sees the necessity of commenting on several other provisions of civil law that arouse questions in connection with the inquiry at hand.

The current legislation provides no criteria for establishing non-functioning of a legal entity within a year of its registration. Thus, it is not clears what grounds are used by pertinent authorities to cancel entries in the state registry of legal persons.

It is clear that activity of any commercial entity is influenced by a number of objective and/or subjective factors that may result in suspension of this activity for an uncertain period of time. When inhibiting factors are removed, economic activity may resume. But by this time, guided by the norms of the current civil law, an entry corresponding to this company in the state registry of legal persons will have been stricken for lack of functioning within a year since the official registration, and the legal entity officially disbanded so that the company will have to formally re-register.

Provisions of Article 133.1 of the Civil Code that allow a relevant executive authority to cancel an entry in the state registry of legal persons corresponding to a legal entity not functioning within a year since its incorporation lack correspondence to General Provisions of Chapter 4 of the same Code related to legal persons. It should especially be noted that these General Provisions do not use the term “disbandment of a legal entity” but refer to “dissolution of a legal entity” and “termination of legal capacity of a legal entity” and also prescribe procedure for executing these actions.

Hence, Articles 44.1 and 61.7 a legal entity is entitled to civil rights and carries civil obligations from the moment it is registered by the state. Legal capacity of a legal entity is terminated at moment its dissolution procedure is over. Dissolution of a legal entity is considered complete at the moment a corresponding entry is made to the state registry of legal persons, which signifies ending of existence of a legal entity. Evidently, legal capacity of a legal entity is terminated only after its dissolution is complete. Making an entry about dissolution of a legal entity in the state registry of legal persons is the last step of the dissolution process.

In accordance with Article 59.2 a legal person may be dissolved in the following circumstances:

by decision of its founders (shareholders) or of an entity assigned respective right by a charter of a legal entity, including for reasons of expiration of a term foreseen for existence of a legal entity or fulfilment of its purpose;

by a decision of a court invalidating registration of a legal entity due to law violations at the time of establishment of a legal entity;

by a decision of a court for acting without legally mandated special permit (licence), or engaging in activities prohibited by law, or otherwise flagrantly or repeatedly violating the law, or in case of a public association or foundation for regularly engaging in activities contradicting its chartered purposes.

As seen from the above provisions describing legal grounds for dissolution of a legal entity, it can be dissolved in two fashions: either voluntary or compulsory (regardless of the will of a legal person). Compulsory dissolution must necessarily be done by a court. This latter provision is not accidental as affirmation of importance of judicial resolution of disputes as a general rule and guarantees of unhindered and full judicial protection for everyone during this judicial process from the core of this provision. Giving executive authorities competencies of courts as implied in Article 133.1 of the Civil Code lacks correspondence with provisions of Article 59.2 of the same Code.

Article 133.1 of the Civil Code also provides that an entry corresponding to a legal entity in the state registry of legal persons can be cancelled by an initiative of any founder of a legal entity in question or any third person. In relation to this provision it should be noted that registration of a legal entity is done by will of all its founders. Contrary to that, Article 133.1 establishes procedure which accords preferential treatment to one given founder and is therefore discriminatory in relation to others. Possibility of cancellation of an entry in the state registry of legal persons by request of “any third person,” including a person that is not a party to legal relations maintained by a legal entity in question, is totally incomprehensible. It may have numerous negative consequences in economic relations as it may be used for instituting constitutionally-forbidden monopolism and unfair competition.

Therefore, as a result of the foregoing legal analysis the Plenum of the Constitutional Court has come to a conclusion that because Article 133.1 of the Civil Code of the Republic of Azerbaijan contravenes Articles 58, 59 and 71 Section II of the Constitution of the Republic of Azerbaijan, it shall be deemed void.

Guided by Article 130 Sections VII, IX and X of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. As Article 133.1 of the Civil Code of the Republic of Azerbaijan contravenes Articles 58, 59 and 71 Section II of the Constitution of the Republic of Azerbaijan, it shall be deemed void.

2. The Decision shall become effective from the day it is published.

3. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.

4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.