

Analysis

Regulations on the Procedure for Maintaining the Register of Noncommercial Organizations Performing the Functions of a Foreign Representative and Conducting an Inspection of their Activities¹

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Introduction

On August 27, 2024, the Cabinet of Ministers of the Kyrgyz Republic, by its Decree №518 (hereinafter referred to as “Decree #518”), approved the Regulations on the Procedure for Maintaining the Register of Noncommercial Organizations Performing the Functions of a Foreign Representative and Conducting an Inspection of their Activities (hereinafter referred to as “the Regulations”).² Decree #518 was adopted to implement the Law of the Kyrgyz Republic on Amendments to the Law of the Kyrgyz Republic on Noncommercial Organizations³ (hereinafter referred to as the “Law on Foreign Representatives”), which provides for the registration of noncommercial organizations (NCOs) receiving foreign funds and engaging in “political activity” in a special “Register of NCOs Performing the Functions of a Foreign Representative” (hereinafter referred to as “the Register”).

¹ On May 16, 2024, the Minister of Justice approved by its order the Regulations on the Procedure for Maintaining the Register of Noncommercial Organizations Performing the Functions of a Foreign Representative and Conducting an Inspection of their Activities. The Ministry of Justice and the Cabinet of Ministers did not provide official information for what purposes and when the Regulations of the Ministry of Justice were canceled. Nevertheless, considering that the normative legal acts of the Cabinet of Ministers have higher legal force than acts of the Ministry of Justice, noncommercial organizations must further be guided by the new Regulations, which will be discussed in this Analysis.

² See the text of Decree №518 and the Regulations here: <https://cbd.minijust.gov.kg/7-31405/edition/15185/ru>.

³ See the text of the Law on Foreign Representatives here: <https://cbd.minijust.gov.kg/4-5321/edition/6031/ru>.

In accordance with Article 22 of the Law of the Kyrgyz Republic on Normative Legal Acts (hereinafter referred to as the “Law on NLAs”), “*draft normative legal acts that directly affect the interests of citizens and legal entities [...] are subject to public discussion by publishing on the official website of the legislative body.*” The OSCE/ODIHR Guidelines on Freedom of Association (OSCE/ODIHR Guidelines) also highlight the need to consult associations during the process of introduction and implementation of normative legal acts that affect the interests of associations (paras. 32 and 106). However, the Cabinet of Ministers did not publish the draft for public discussion on the [Unified Portal](#), which is a violation of the legislative process.

On September 9, 2024, by Order of the Minister of Justice № 169 (hereinafter referred to as “MoJ Order #169”) on Measures for the Implementation of the Decree of the Cabinet of Ministers of the Kyrgyz Republic ‘On Measures for the Implementation of the Law of the Kyrgyz Republic on Noncommercial Organizations’ dated August 27, 2024, № 518, the following were approved:⁴

- the form of the Register;
- the form of the application for inclusion in the Register; and
- the form of the application for exclusion from the Register.

This Analysis was prepared by the International Center for Not-for-Profit Law (ICNL)⁵ at the request of NCOs concerned about the contradiction of certain provisions of the above-mentioned acts with the legislation of the Kyrgyz Republic, including the Law on Foreign Representatives, and international human rights standards.

Analysis

1. EXCESSIVE REQUIREMENTS FOR NCOS TO PROVIDE INFORMATION NOT STIPULATED BY THE LAW ON FOREIGN REPRESENTATIVES

According to the Law on Foreign Representatives, the Register includes the name of the NCO performing the functions of a foreign representative (NCO-FR) and information about its founders and head. However, according to Clause 8 of the Regulations, the following information about the NCO-FR, which is not stipulated by the Law, must be included in the Register:

- legal address;
- bank account details;
- taxpayer identification number (TIN) of the founder(s) and head; and
- information about employees (surname and initials of employees).

⁴ See the text of the Order here: <https://drive.google.com/file/d/1TJaZaV4pS7A3FdHElvZFGXh2fifUEHMz/view>.

⁵ ICNL is an expert organization providing assistance to state bodies and NCOs on legal regulation of civil society organizations, charity, and civic participation matters. The ICNL’s office address in Kyrgyzstan is 125/1-704 ul. Toktogul, Bishkek.

MoJ Order #169 further expands the list of information that the NCO-FR must provide to the Ministry of Justice (MoJ), requiring the following when submitting an application for inclusion in the Register:

- a link to an information resource (if available),
- surname, first name, middle name, TIN, position of the employee, and details of the appointment order/contract.

In addition, Clause 31 of the Regulations require NCO-FRs to notify the MoJ of the hiring or dismissal of employees within seven calendar days.

These additional requirements are not stipulated by the Law on Foreign Representatives and create an excessive burden on NCOs. The requirement to disclose personal data of NCO employees violates their right to personal data protection, enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 63 of the Constitution. The inclusion of personal data of NCO employees will lead to their stigmatization as “foreign representatives,” creating potential threats to their safety. The term “foreign representative” carries a negative connotation, falsely implying that individuals with this status are more likely to serve the interests of a foreign state or organization rather than the interests of Kyrgyzstan and its people.

Part 3 of Article 23 of the Constitution prohibits “*the adoption of bylaws that restrict the rights and freedoms of individuals and citizens.*” According to Part 2 of Article 6 of the Law on NLAs, “*a normative legal act must not contradict a normative legal act that has higher legal force.*” Additionally, according to the OSCE/ODIHR Guidelines (para. 108), any legal or other restrictions imposed on NCOs must be based on the Constitution or another law. Thus, the new burdensome requirements for NCOs, which are not included in the Law on Foreign Representatives violate the aforementioned norms of the Constitution, the Law on NLAs, as well as international standards on the right to association and protection of personal data.

It is also important to note that amendments to the Tax Code were adopted on July 23, 2024. According to Clause 3-1 of Part 1 of Article 51 of the Tax Code, a taxpayer (including all NCOs) is obliged to maintain the register of a tax agent for employees through their taxpayer's cabinet and ensure that up-to-date information is provided for employees.⁶ The register of a tax agent for hired employees includes up-to-date information about all NCO employees, including surname, first name, middle name, TIN, position, etc. Therefore, state bodies already have relevant data on employees for all legal entities, including NCOs. Since state bodies already possess all the necessary information about NCO employees, the requirements to provide such

⁶ See the text of the Order approving the form of the register of the tax agent for hired employees, as well as the procedure for filling out the tax agent register for hired employees in the taxpayer's personal account here: https://sti.gov.kg/stsStorage/websti/2024/8/23/stidocument_8429569f-a4fc-48e1-8dcb-944184c33301.pdf.

data are excessive, duplicative, and go beyond the powers granted to the MoJ by the Law on Foreign Representatives.

2. EXPANSION OF STATE BODIES' POWERS TO CONDUCT INSPECTIONS OF NCO-FRS AND THE ABSENCE OF PROTECTION MECHANISMS AGAINST ARBITRARY INSPECTIONS

The Law on Foreign Representatives grants a single state body—the MoJ—the right to “conduct inspections of NCO activities, including the use of funds and other property, to ensure alignment with the goals outlined in their founding documents.” However, in the Regulations, the Cabinet of Ministers expanded the list of state bodies authorized to inspect NCO-FRs. According to Clause 37 of the Regulations, inspections can also be conducted by:

- 1) taxation bodies – regarding compliance with financial transparency requirements and tax legislation;
- 2) the Ministry of Culture, Information, Sports, and Youth Policy of the Kyrgyz Republic – regarding the marking of materials produced or distributed by NCO-FRs;
- 3) prosecutorial bodies – regarding NCO involvement in “political activity,” as well as checking compliance with statutory goals and other legal requirements;
- 4) other state bodies whose jurisdiction and competence areas relate to the main activities of NCOs regarding compliance with their statutory goals.

Thus, in its Regulation, the Cabinet of Ministers exceeded the powers granted to it by the Law on Foreign Representatives, which does not provide for the involvement of other state bodies in inspecting NCO-FRs. As mentioned earlier, the excessive and burdensome requirements for NCOs that are not included in the Law on Foreign Representatives—under which the bylaw was adopted—violate Part 3 of Article 23 of the Constitution, Part 2 of Article 6 of the Law on NLAs, as well as international standards on the right to association. Considering that the Regulations were adopted without public discussion and contain many ambiguities, the implementation of the Law will violate the principle of legality and legitimacy, which require laws to be clear, especially in provisions defining the scope of actions of state bodies.⁷

Moreover, the Regulations allow inspections of NCOs based on application (even verbal ones) from state bodies, local self-governance bodies, and/or media outlets concerning alleged violations of the Law on Foreign Representatives or non-compliance of an NCO’s activity with its statutory goals. However, the Regulations lack clear mechanisms to protect NCOs from unjustified or arbitrary applications. It does not require verification of the accuracy of the information received before initiating an inspection, which could lead to abuse.

The Regulations also do not contain details regarding the inspection process. There is no clarity on important matters such as the duration and frequency of inspections, or how prosecutorial

⁷ ECHR, Hasan and Chaush v. Bulgaria [GC], Application #30985/96, Judgment of October 26, 2000, para. 84; ECHR, Aliyev and Others v. Azerbaijan, Application #28736/05, Judgment of December 18, 2008, para. 35.

bodies will monitor and assess NCO involvement in “political activity.” The absence of these important details creates legal uncertainty and could endanger the right of NCOs to an objective and fair assessment of their activities.

3. COMPLEX PROCEDURE FOR REMOVAL FROM THE REGISTER

According to the Regulations, in order to be removed from the Register, an NCO must terminate “political activities” and/or receipt of foreign funding for 12 months before submitting an application. After receiving the relevant application from the NCO, the MoJ has an additional 60 days to verify the information provided by the NCO. This procedure forces NCOs to remain in the Register for more than a year, even after they no longer meet the criteria of an NCO-FR.

The Regulations clarify that removal from the Register can only occur within five days after receiving confirmation that “political activity” has ceased and/or the organization has stopped receiving foreign funding. Further, the Regulations indicate that confirmation of the absence of “political activity” over the past 12 months is provided by the prosecutorial bodies, but it does not explain how such confirmation is made or the criteria to be used by the prosecutorial bodies to confirm the absence of such activities.

The Law on Foreign Representatives authorizes the MoJ to request and obtain information about the financial and business activities of NCOs from credit and other financial institutions. However, this provision contradicts Part 4 of Article 67 of the Law of the Kyrgyz Republic on Banks and Banking Activities, which states that “*information constituting banking secrecy is provided to any other persons [except for financial intelligence services and the authorized tax service] exclusively based on a court act.*” In accordance with Part 3 of Article 2 of the same law, “*in case of a conflict between the provisions of [the Law of the Kyrgyz Republic on Banks and Banking Activities] and the provisions of other laws of the Kyrgyz Republic for the regulation of banking relations, the provisions of [the Law of the Kyrgyz Republic on Banks and Banking Activities] apply.*”

Clause 7 of Part 1 of Article 59 of the Tax Code allows tax bodies to obtain information about the accounts and movement of funds of taxpayers (including NCOs), but only concerning taxpayers under inspection. Considering that the issues of removal from the Register are not related to tax inspections, the specified authority of the tax bodies is not applicable to confirming the presence or absence of an NCO’s foreign funding.

4. BURDENSOME PROCEDURE FOR APPEALING MOJ DECISIONS

NCOs can appeal MoJ decisions on refusal to remove an NCO from the Register or suspension of NCO’s activities through the procedure stipulated in the Law on the Basis of Administrative Activities and Administrative Procedures (Clauses 28 and 42 of the Regulations). This means that an NCO must first appeal the MoJ’s decision within the Ministry itself before it can apply to court.

According to the OSCE/ODIHR Guidelines (para. 36), NCOs should have access to effective legal remedies to challenge or seek review of decisions affecting the exercise of their rights. This implies the right of NCOs to file a lawsuit or appeal against any actions or inactions of the authorities and to seek judicial review of such decisions. To ensure the right to an effective remedy, judicial procedures, including appeals and decision reviews, must meet the standards of fair trial. Appealing an MoJ decision to the MoJ itself will limit NCOs' direct access to judicial review of MoJ decisions and is likely not to be considered an effective legal remedy.

5. OTHER SHORTCOMINGS AND UNCERTAINTIES IN THE REGULATIONS

Decree #518 specifies that applications for inclusion in the Register must be submitted to the MoJ within two months from the effective date of the Decree, that is, by November 9, 2024. However, Clause 6 of the Regulations requires the head of an NCO acting as a "foreign representative" to submit an application for inclusion in the Register within five working days from the start of such activity. This creates a contradiction between Decree #518 and the Regulations on the time limits for submitting applications for inclusion in the Register.

The Regulations also require NCO-FRs to submit an audit report from an independent auditor to the MoJ no later than May 1 of the year following the reporting period. This timeframe coincides with the mandatory audit period for joint-stock companies in the Kyrgyz Republic. Given that auditing companies are typically overloaded with mandatory audits of joint-stock companies from February to April, NCOs may face difficulties finding available auditors, as well as encounter higher service costs. This could lead to additional financial burdens on NCOs, forcing them to redirect funds that could otherwise be used for public benefit purposes toward paying for audit services.

Clauses 22 and 31 of the Regulations mention a "lease contract" (договор найма) concerning NCO employees. In the current legislation of the Kyrgyz Republic, the term "lease contract" (договор найма) refers only to property lease contracts and is not associated with labor relations. Since the legislation does not mention a "lease contract" in the context of employment, it is unclear what is meant by "lease contract" in the Regulations. This creates uncertainty and complicates the correct understanding and implementation of the Regulations' requirements.

Conclusion

The Guidelines (para. 22) state that legal provisions related to associations should be well-crafted. They need to be clear, precise, and certain. Moreover, to ensure that the content of the law gains the support of all interested parties, the process of adopting such provisions should be open, accessible to everyone, and based on the participation of all stakeholders.

However, many provisions of the Regulations remain vague and unclear. The Regulations impose excessive requirements on NCOs that are not stipulated by the Law on Foreign

Representatives. This creates an unreasonable burden on NCOs, violating employees' rights to the protection of personal data, and granting various state bodies powers that exceed those granted by the Law on Foreign Representatives. The lack of clarity in the inspection procedures creates a precondition for arbitrary inspections without adequate protection for NCOs against unjustified or politically motivated actions. The requirement to appeal MoJ decisions within the Ministry before applying to the courts restricts NCOs' access to judicial protection. It is recommended to revise the Regulations by holding public discussions and eliminating all shortcomings.

ICNL is grateful for the opportunity to provide its comments on the Regulations.