

## Analysis of Legislation

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# Requirements for Recipients of Foreign Funds in the Republic of Kazakhstan

APRIL 23, 2021

The purpose of this analysis is to review the key provisions of the 2016 legislation affecting Kazakhstani non-commercial organizations (NCOs), which introduced reporting requirements for the receipt and use of funds/assets from foreign sources, requirements for posting information about recipients of such funds/assets in an open database, requirements to specially mark products developed with use of funds/assets from foreign sources, and liability for violating these requirements<sup>1</sup> (hereinafter referred to as “Analysis”). This is a comparative analysis of provisions in the Law on Payments with international law and international best practices, followed with recommendations on how to improve such provisions.

ICNL prepared this Analysis at request of several NCOs,<sup>2</sup> after the Government of the Republic of Kazakhstan (GoK) conducted inspections of a number of human rights and advocacy NCOs in late 2020 and early 2021. According to Kazakhstani NCOs, the most recent implementation of the Law on Payments and application of penalties relating to its violation demonstrated that it can be used to restrict NCOs’ activities.

## Background

In late 2020 and early 2021, tax authorities penalized a number of Kazakhstani NCOs<sup>3</sup> for committing violations under Article 460-1 of the Code of Administrative Offenses

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<sup>1</sup> The Law of the Republic of Kazakhstan on Introduction of Amendments and Additions on Issues of Payments and Payment Systems (№ 12-VI3PK) (hereinafter, the Law on Payments) was adopted by Kazakhstan’s Parliament on June 29 and officially published on August 10, 2016. It introduced a number of amendments to various existing codes and laws of the Republic of Kazakhstan, such as the Civil Code, Tax Code, Customs Code, Criminal and Criminal Procedural Codes, Code on Administrative Offenses, the Law on the National Bank, the Law on Banks and Banking Activities, the Law on the Stock Market, and others. The most important provisions affecting NCOs are contained in the amendments to the Tax Code, Code on Administrative Offenses, Criminal Code, and the Law on National Security.

<sup>2</sup> Specifically, NCOs Kazakhstan International Bureau for Human Rights and Rule of Law, Echo, International Legal Initiative, Erkindik Qanaty, and Kadir Kasijet.

<sup>3</sup> <https://echo.kz/en/2-uncategorised/216-press-release-kazakhstani-human-rights-and-media-public-organizations-face-unjustified-and-disproportionate-fines-and-suspension-of-activities.html>.

of the Republic of Kazakhstan (CoAO).<sup>4</sup> This Article refers to violation of the requirements to submit information on the receipt of funds/assets from foreign sources or their expenditure. These requirements were introduced in the 2016 Law on Payments.

Kazakhstani NCOs, subjected to state inspections and penalties, expressed concern<sup>5</sup> about the restrictive and vague nature of the Law on Payments, unduly restricting freedom of association and imposing unclear and burdensome reporting requirements on NCO-recipients of foreign funds, as well as about disproportionate penalties for even technical violations of such requirements.

## Bases for Analysis

This Analysis does not reference all available sources of international law and standards, taking into consideration their large number. The Analysis uses the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> as the base for international law which guarantees the freedom of association. The UN Special Rapporteur, Council of Europe, Venice Commission, European Court of Human Rights, European Court of Justice, OSCE, and other international institutions have commented on, provided interpretation of, and defined international standards in protection of the freedom of association. In this Analysis, we used Guidelines on Freedom of Association<sup>7</sup> as the main reference source, since these Guidelines capture many of the international “soft” law sources and review of existing best practices.

ICNL’s Analysis focuses on 1) requirements for recipients of funds/assets from foreign sources, including reporting requirements of receipt and use of funds/assets from foreign sources affecting NCOs;<sup>8</sup> 2) administrative penalties for violation of these requirements; and 3) criminal penalties for violation of these requirements.

## Summary of Analysis

Application of the Law on Payments affects activities of NCOs and, as demonstrated by the recent inspections and penalties imposed on NCOs in implementation of this law, impedes their activities. When this happens, exercise of the freedom of

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<sup>4</sup> Article 460-1 of the Administrative Code: "Violation of the procedure for submitting information on the receipt of money and (or) other property from foreign states, international and foreign organizations, foreigners, stateless persons or their spending."

<sup>5</sup> <https://echo.kz/en/2-uncategorised/216-press-release-kazakhstani-human-rights-and-media-public-organizations-face-unjustified-and-disproportionate-fines-and-suspension-of-activities.html>.

<sup>6</sup> International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 (<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>). The GoK ratified the ICCPR in 2006.

<sup>7</sup> Joint Guidelines on Freedom of Association, 2015, OSCE/ODIHR and Venice Commission, <https://www.osce.org/odihr/132374>.

<sup>8</sup> The Law on Payments also envisions requirements for qualified entities, including NCOs, to mark products developed with the use of funds/assets from foreign sources. These requirements might also be problematic from the perspective of international law, if used to restrict activities of NCOs without a legitimate aim. However, at the time of this Analysis, we are not aware of such an application of these provisions, and therefore, do not include an analysis of them.

association as a fundamental human right is put into question, and possibly violated. The right to freedom of association is a right that “has been recognized as capable of being enjoyed individually or by the association itself in the performance of activities and in pursuit of the common interests of its founders and members.”<sup>9</sup> Therefore, provisions of the Law on Payments imposing requirements on activities of NCOs are examined from the perspective of compliance with international law, and the ICCPR in particular.

International standards recognize that restrictions of the right to freedom of association are only permissible in strictly limited circumstances. Article 22 of the ICCPR states that restrictions are permissible only when “1) prescribed by law; 2) necessary in a democratic society, and 3) in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” All three conditions are mandatory to determine whether a restriction on freedom of association is legitimate. In the case of the Law on Payments, as analysis shows, it is not possible to prove that restrictions (i.e., reporting and other requirements, enforced by harsh penalties) are “necessary in a democratic society,” and, thus, proportional to their legitimate aim.<sup>10</sup> On the contrary, the Law on Payments imposes requirements on a broad range of human rights and advocacy groups (which implement otherwise legitimate and publicly beneficial activity), based solely on their receipt of foreign funds, without evidence that such restrictions are needed for legitimate aims. The GoK failed to identify and inform the public of the particular circumstances making restrictions necessary, and instead, applied blanket restrictions, contrary to international law.<sup>11</sup> Penalties enforcing such requirements (for example, submission of undefined “inaccurate” information in reports) and including, for example, suspension of an NCO’s activities, also cannot be considered necessary and proportionate to the risks to interests of national security or public safety, or other legal aims, if such risks ever existed.

Furthermore, international law and standards protect the right of NCOs to seek, receive, and use resources from foreign sources. “In particular, states shall not restrict or block the access of associations to resources on the grounds of the nationality or the country of origin of their source, nor stigmatize those who receive such resources.”<sup>12</sup> Burdensome and confusing requirements for those NCOs which seek to access foreign funds necessary for performing their statutory activities might discourage them from

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<sup>9</sup> Section 16 of the Guidelines on Freedom of Association.

<sup>10</sup> Section 35 of the Guidelines on Freedom of Association: “The principle of necessity in a democratic society requires that there be a fair balance between the interests of persons exercising the right to freedom of association, associations themselves and the interests of society as a whole. The need for restrictions shall be carefully weighed, therefore, and shall be based on compelling evidence. The least intrusive option shall always be chosen. A restriction shall always be narrowly construed and applied.”

<sup>11</sup> Section 35 of the Guidelines on Freedom of Association.

<sup>12</sup> Section 32 of the Guidelines on Freedom of Association.

doing so, resulting in an inability to implement statutory activities, and therefore, exercise freedom of association.

Additionally, the Law on Payments was not developed in consultation with NCOs, which contributed to its key deficiencies. Article 25 of the ICCPR guarantees the right to participation. Moreover, Recommendation CM/Rec(2007)14 provides that “NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation.”<sup>13</sup> It is important that the GoK and members of parliament conduct meaningful consultations regarding the content of amendments to the Law on Payments and take NCOs’ recommendations into account before adopting them.

This Analysis only addresses the key issues with the Law on Payments, and not technical improvement of the legislation. The purpose of this Analysis is not to review and provide recommendations for improvement of every provision in the law or its implementing regulations. Kazakhstani experts previously prepared excellent recommendations, including the set of recommendations prepared with ICNL’s assistance,<sup>14</sup> focusing on important details of regulation, which would improve the environment for NCOs if adopted. As mentioned earlier, changes in legislation relating to activities of NCOs should be discussed and decided between the NCO sector and the GoK.

## Summary of Recommendations

Our first and foremost recommendation would be to remove all requirements (reporting and marking) on entities receiving funds from foreign sources, until a proper risk assessment of the NCO sector and other groups is implemented and specific legitimate aims and groups at risk are defined. The GoK should conduct consultations with NCOs and take their advice into consideration regarding any reporting or other requirements to be imposed on NCOs.

We recommend developing a risk assessment methodology based on the guidelines provided by the Financial Action Task Force (FATF), to identify types of NCOs at risk of being abused for the purpose of financing terrorism. The GoK should engage NCOs in developing and implementing this methodology. As a result of the assessment, stakeholders will be able to narrowly define any group of NCOs at risk, the risks themselves (in compliance with legitimate aims under the ICCPR), and the least intrusive options to address these risks.

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<sup>13</sup> Section 77 of the Guidelines on Freedom of Association.

<sup>14</sup> Рекомендации по изменениям в законы, регулирующие порядок уведомления о получении средств из иностранных источников и порядок использования таких средств по вопросам платежей и платежных систем, а также к связанным с ними подзаконным актам, 2016, in Russian, prepared by public association Foundation on Establishing Tax Culture (Фонд формирования налоговой культуры) and public foundation the Center of Legal Policy Research with assistance from ICNL. Foundation on Establishing Tax Culture prepared additional set of recommendations in 2016.

Furthermore, we strongly advise, instead of mandatory legal requirements, where a legitimate aim for restrictions (i.e., reporting and other requirements) on NCOs cannot be identified to the satisfaction of international law, that the GoK take action to promote voluntary, self-imposed measures for the NCO community to address issues of concern, or improve and increase NCOs' transparency and accountability before the GoK and the public.

If immediate removal of all requirements on NCOs under the Law on Payments is not possible, we would recommend the GoK review, jointly with NCOs, all provisions of the Law on Payments and related implementing regulations, to make them as clear as possible, and eliminate suspension of activity of an NCO as a penalty.

As an intermediary measure, it is recommended to revise, as soon as possible, the definitions of offenses under the CoAO, as well as penalties. These include:

1. Introduce a "notification" as a sanction, prior to applying other sanctions.
2. Provide a definition of "inaccurate" information.
3. Differentiate between offenses committed as a result of negligence and willful neglect; allow an exemption from penalties in circumstances where there is a reasonable cause.
4. Consider lowering the amount of penalties for offenses under Articles 460-1 and 460-2, given the negligible risk these offenses cause to public interest.

In regard to criminal penalties imposed under the Law on Payments, since the purpose of this Analysis is to review provisions of the Law on Payments affecting NCOs only, and we are not aware of how these criminal code provisions are implemented in practice, the recommendation would only be to exercise oversight over enforcement of these provisions. Changes will be needed if these provisions are used against NCOs and/or NCOs restrict their activities due to their stigmatization by the public and law enforcement bodies as recipients of foreign funds.

Details of the Analysis follow.

## 1. Requirements for recipients of funds/assets from foreign sources

### LAW PROVISIONS

According to the Law on Payments, legal entities (including NCOs) and individuals,<sup>15</sup> which receive fund/assets from foreign sources, are required to comply with the new requirements (qualified entities), if they perform the following activities:

- rendering legal assistance, including the distribution of legal information, protection, and representation of the interests of citizens and organizations, as well as consulting;
- conducting public opinion studies and polls (except for public opinion polls and surveys conducted for commercial purposes), as well as the distribution and publication of their results; and
- collecting, analyzing, and disseminating all types of information, except when such activity is carried out for commercial purposes.

Some Kazakhstani experts believe that an entity which conducts these activities may qualify for the reporting requirements, even if those activities were not conducted with the use of assets received from foreign sources (for example, when an organization does not have a written agreement with the foreign funder, and when it conducts qualified activities as statutory activities).

Qualified entities are required to:

- notify the tax authorities about the receipt of funds/assets from foreign sources (including foreign states, international and foreign organizations, foreign individuals, and stateless persons);
- submit information to the tax authorities about the receipt and expenditure of all funds/assets received from foreign sources; and
- mark all information and materials that are published, distributed, and/or placed using assets from foreign sources with information on the foreign donors, as well as explicitly note that the production, distribution, and/or placement of the information and materials was made at the expense of foreign sources.

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<sup>15</sup> Note: this law does not apply to state authorities, deputies and other high-profile officials, banks, certain large businesses, educational organizations, attorneys and notaries, diplomatic and equivalent representative offices of foreign states, consular institutions of foreign states accredited in the Republic of Kazakhstan, as well as their employees; or funds and assets received in the framework of international treaties, international contracts, and investments; and in some other cases determined by the government.

Reporting requirements shall apply in case of receipt of de-facto<sup>16</sup> any amount of funds/assets from foreign sources.

According to Kazakhstani experts, reporting requirements for NCOs are unclear, burdensome, and overall, difficult to comply with.

All information submitted to the tax authorities on the receipt and expenditure of foreign funds/assets is included in a publicly available database established by the State Revenue Committee of the Republic of Kazakhstan (SRC).

#### ANALYSIS

Issues include:

1. Application of requirements to a wide range of NCOs; and
2. Confusing and complex requirements

Below, we will review each issue.

##### 1. APPLICATION OF REQUIREMENTS TO A WIDE RANGE OF NCOS

The requirements under the Law on Payments apply to a broad range of NCOs, and, in particular, to human rights and advocacy groups, which all implement legitimate, public benefit activities. There is no legitimate aim under international law for applying these restrictive requirements to such a broad group.

While the same requirements apply to legal entities (including NCOs) and individuals, a scope of qualifying activities evidently captures and appears to focus on advocacy and human rights NCOs. Such NCOs often render legal assistance to their beneficiaries, distribute legal information (e.g., about legal rights), work with people to conduct public opinion studies, or collect, analyze, and disseminate various information in their area of activities.<sup>17</sup> Additionally, qualifying activity shall be implemented for non-commercial purposes (with the exception of legal assistance), which even further narrows the circle of entities required to comply with the reporting, marking, and other requirements.

Considering that there is no minimal threshold for an amount/value of received foreign funds/assets, and the extremely broad definition of the foreign sources, all advocacy and human rights groups which could have received 1 tenge from a broadly defined foreign source (for example, a foreign citizen), are subject to burdensome requirements. (See Analysis under Section 2. *Confusing and complex requirements*.)

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<sup>16</sup> The threshold, established in implementing regulation is 1 tenge, which is nominal.

<sup>17</sup> According to the Committee of Ministers of the Council of Europe, CSOs are “acting as a vehicle for communication between different segments of society and public authorities, through the advocacy of changes in law and public policy, the provision of assistance to those in need, the elaboration of technical and professional standards, the monitoring of compliance with existing obligations under national and international law, and the provision of a means of personal fulfilment and of pursuing, promoting and defending interests shared with others.” CM/Rec(2007)14, preamble.



At the same time, “Any restriction on the right to freedom of association and on the rights of associations, including sanctions, must be necessary in a democratic society and, thus, proportional to their legitimate aim. ... A restriction shall always be narrowly construed and applied ... All restrictions must be based on the particular circumstances of the case, and no blanket restrictions shall be applied.”<sup>18</sup>

In Kazakhstan, there has not been any risk assessment to determine which group of NCOs, if any, is particularly vulnerable to risks of abuse. On this matter, the Venice Commission stated that the “legitimate aim of ensuring transparency [cannot] justify measures which hamper [] the activities of non-commercial organizations operating in the field of human rights, democracy and the rule of law.”<sup>19</sup>

In light of national security and countering terrorism concerns, before taking legislative measures, in addition to the ICCPR, it is important<sup>20</sup> to consider FATF recommendations, in particular recommendation # 8:<sup>21</sup>

*“Not all non-profit organizations (NPOs) are high risk, and some may represent little or no risk at all.” (Section 7b)*

*“Recommendation 8 requires countries to undertake a domestic review of their entire NPO sector, or have the capacity to obtain timely information on its activities, size and other relevant features, and review the adequacy of laws and regulations that relate to the portion of the NPO sector that can be abused for the financing of terrorism. In undertaking this review, countries should use all available sources of information in order to identify features and types of NPOs which, by virtue of their activities or characteristics, are at risk of being misused for terrorist financing. In other words, a review of the entire sector would identify which subset of organizations fall within the FATF definition of NPO and then identify which NPOs in the subset would be considered higher risk for TF abuse.”*

*“13. An understanding of the domestic NPO sector and the terrorist financing risks it faces are critical to complying with Recommendation 8 in the 4th round of Mutual Evaluations. The risk-based approach is the foundation for countries to determine how best to mitigate terrorist financing risks, including*

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<sup>18</sup> Section 35 of the Guidelines on Freedom of Association.

<sup>19</sup> Venice Commission Opinion on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations) (2016) and Opinion on federal Law N. 121-FZ on Non-Commercial Organisations (“Law on Foreign Agents”), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on Making Amendments to the Criminal Code (“Law on Treason”) of the Russian Federation.

<sup>20</sup> The Republic of Kazakhstan is a member of the Eurasian Group on Combating Money Laundering and Financing Terrorism, which is a FATF-style regional body following FATF recommendations. The next mutual evaluation visit to Kazakhstan, when Kazakhstan will have to demonstrate compliance with FATF recommendations, will take place in April 2022. <https://eurasiangroup.org/en/general-information>.

<sup>21</sup> “Combatting the abuse of non-profit organizations: best practices (Recommendation 8)” June 2015, FATF, <https://www.fatf-gafi.org/media/fatf/documents/reports/BPP-combating-abuse-non-profit-organisations.pdf>.



*how to implement the comprehensive approach called for by Recommendation 8 and which elements of the NPO sector should be subject to oversight mechanisms.*

*14. In practice, conducting a domestic review of the entire NPO sector is a fundamental and necessary starting point for the proper implementation of Recommendation 8.” (Sections 13-14.)*

Imposing new requirements without a proper risk assessment within the NPO (NCO) sector does not support or improve the country’s compliance with FATF Recommendations, since it does not effectively address any risks to national security, including terrorism financing. Furthermore, government resources are wasted when used to control the activities of broad range of NCOs, distracting the GoK from addressing real important economic and social goals, including goals of national security and countering terrorism. It is more effective to exercise control over a specific high-risk group, identified as such through a proper assessment, than to try to exercise such control over the broader NCO sector, harming “good” NCOs and civil society at large, and setting the GoK up for a failure to comply with FATF recommendations.

As noted above, we are not aware of any risk assessment which would identify a risk group within the NCO community and require a greater level of mandatory public scrutiny and transparency. Without such an assessment, supported by factual evidence of existing abuse of public and state trust and legislation, imposing burdensome requirements on NCOs impedes with their activities, contradicts the ICCPR, and does not help with meeting FATF requirements.

In comparison to other countries, the scope for requirements for NCOs in Kazakhstan is unique and restricting freedom of association. For a comparison, in the US, NCOs at large, including exempt 501(c)(3) organizations (the US equivalent of charitable organizations), and human rights or advocacy groups, are not required to submit special reports or mark their products if they receive foreign funding.

In response to frequently voiced questions regarding US FARA legislation, indeed, legislation exists establishing registration and reporting requirements for entities and individuals performing functions of a foreign agent.<sup>22</sup> Under the US FARA, an agent of a foreign principal (a foreign agent, or FA) is any individual or organization which acts at the order or control or at direction of a foreign principal, who engages in political activities, or acts in a public relations capacity for a foreign principal, or solicits or dispenses anything of value within the US for a foreign principal, or who represents the interests of a foreign principal before any agency or official of the U.S. government. The critical characteristic of FA status is that any qualified activity shall take place at the order, control, or direction of a foreign principal. There is no foreign funding

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<sup>22</sup> The Foreign Agents Registration Act (FARA), <https://www.justice.gov/nsd-fara>.

requirement. FAs are required to mark their products only if such products are produced at the order, control, or direction of a foreign principal. For example, law firm Baker McKenzie, while registered as a FA<sup>23</sup>, does not have to mark their products at large, except for instances when it is performing functions of a FA. Reporting requirements also apply to activities of a FA, implemented at the order, control, or direction of a foreign principal. Out of 511 active FAs, only a handful are NCOs, while the majority of entities registered in compliance with the FARA are law firms, lobbying companies, and individuals representing foreign clients. Many US NCOs, such as ICNL, which receive foreign funding and implement various activities, for example, relating to research, legal and policy analysis, and informing the US public about these issues, are not required to register as FAs. FARA is not used to restrict civil society.

Many countries do not have legislation which imposes special requirements on NCOs receiving foreign funding (for example, UK, France, Germany, Netherlands, Bulgaria, Armenia, Georgia, and Kyrgyzstan). Several countries which do have special requirements include, for example, Azerbaijan, Belarus, Russia, Uzbekistan, Israel, and India.

The concern about Kazakhstan's legislation, which was highlighted by recent inspections of and penalties against human rights and advocacy groups, is that it is being used to restrict NCOs in violation with international law guaranteeing freedom of association.

## 2. CONFUSING AND COMPLEX REQUIREMENTS

### LAW PROVISIONS

Qualified entities, including NCOs, are required to:

- notify the tax authorities about the receipt of funds and/or other assets from foreign sources (including foreign states, international and foreign organizations, foreign individuals, and stateless persons), using the form, procedure, and terms established by the authorized government body;
- submit information to the tax authorities about the receipt and expenditure of all funds and/or other assets received from foreign sources using the form, procedure, and terms established by the authorized body; and
- mark all information and materials that are published, distributed, and/or placed using assets from foreign sources with information on the foreign donors, as well as explicitly note that the production, distribution, and/or placement of the information and materials was made at the expense of foreign donors.

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<sup>23</sup> [https://efile.fara.gov/ords/f?p=1381:200:9939081835630::NO:RP,200:P200\\_REG\\_NUMBER:6821](https://efile.fara.gov/ords/f?p=1381:200:9939081835630::NO:RP,200:P200_REG_NUMBER:6821).

Recipients are required to report their tax ID, name, data of receipt/use of assets, type of actual received assets (movable/immovable and (or) other), their quantity, cost, type of qualified activity for recipient, type (foreign citizen, foreign state) and name of the source that transferred the funds and (or) other assets, in the country of residence; the registration number of the source that transferred the funds and (or) other assets in the country of residence; and the date, document number of the receipt for funds and (or) other assets, method of payment (cash payment or wire transfer), and other information. In regard to reporting on expenditures, recipients are required to submit the tax ID of the recipient, tax period for which reporting is submitted, data on the expenditure of funds and (or) other assets by subjects from each source; dates of expenditure of the funds or sale of assets; the number of the document on expenditure of funds or sale of assets; amount of expended funds in the national currency at the market exchange rate on the date of submission of the reporting, and similar information. Information must be provided per source and per transaction.

#### ANALYSIS

Kazakhstani experts consider these reporting requirements complex, requiring qualified entities to provide extensive information. Additionally, they identified many confusing issues, which make it difficult to determine whether NCOs are obligated to comply with requirements and/or how to comply with reporting requirements. Some examples in the Law on Payments include:

- A confusing provision in Article 6 of the Tax Code, which describes one of qualifying activities as “provision of legal aid, including provision of legal information, defense and representation of interests of citizens and organizations, as well as providing them with consultations;” experts are concerned that term “as well as providing them with consultations” may be understood not just as legal, but any, consultations to citizens and organizations. There is still no official interpretation of this provision.
- “Conducting qualified activities for commercial purposes” is an important but unclear factor in determining which activities shall qualify, since there is no definition of “commercial purposes” in tax or other legislation in Kazakhstan. Legislation only uses term “entrepreneurial activity,” defined in the Civil Code of the Republic of Kazakhstan (Article 10), which, if applied in the context of Article 6 of the Tax Code is considered confusing.
- The meaning of provision defining another qualifying activity, “collection, analysis, and dissemination of information” is also unclear. The Tax Code does not define the term “information.” The Law of the Republic of Kazakhstan on Access to Information defines “information” extremely broadly, including, for example, any communication of any organization with a third person (such as a letter to the tax authorities, or employees using e-mail to communicate). In

terms of reporting, it is also not clear how activities constituting “collection, analysis, and dissemination of information” shall be identified as individual activities, or as an ongoing single activity.

- There are issues with the reporting forms approved by the SRC.

These are but a few examples of how law provisions defining requirements for NCOs are confusing and difficult to comply with. This is especially worrisome in light of severe sanctions for violation of these requirements.

A few examples above show that definitions of qualified activities are extremely vague and make it confusing for entities and individuals to determine whether or not they are required to comply with these requirements. Such vague wording is problematic because it does not allow NCOs and individuals to foresee what type of behavior would lead to future limitations for them.

Last but not least, local experts indicated on several occasions<sup>24</sup> that information collected in these reporting forms, to a large extent, is already collected through several other reports which NCOs are also required to submit. For example, NCOs are required to submit similar information to the Ministry of the Republic of Kazakhstan on Information and Social Development, to be posted in the online NCO Database.

## RECOMMENDATIONS

Our first and foremost recommendation would be to remove all requirements (reporting and marking) on entities receiving funds from foreign sources, until a proper risk assessment of the NCO sector and other groups is implemented and specific legitimate aims and groups at risk are defined. The GoK should conduct consultations with NCOs and take their advice into consideration regarding any reporting or other requirements to be imposed on NCOs.

We recommend developing a risk assessment methodology based on the guidelines provided by the Financial Action Task Force (FATF), to identify types of NCOs at risk of being abused for the purpose of financing terrorism. The GoK should engage NCOs in developing and implementing this methodology. As a result of the assessment, stakeholders will be able to narrowly define any group of NCOs at risk, the risks themselves (in compliance with legitimate aims under the ICCPR), and the least intrusive options to address these risks.

Furthermore, we strongly advise, instead of mandatory legal requirements, where a legitimate aim for restrictions (i.e., reporting and other requirements) on NCOs cannot be identified to the satisfaction of international law, that the GoK take action to promote voluntary, self-imposed measures for the NCO community to address issues of concern, or improve and increase NCOs’ transparency and accountability before the

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<sup>24</sup> For example, <https://echo.kz/en/2-uncategorised/216-press-release-kazakhstani-human-rights-and-media-public-organizations-face-unjustified-and-disproportionate-fines-and-suspension-of-activities.html>.

GoK and the public. Section 70 of the Fundamental Principles on the Status of Non-governmental Organisations in Europe states that “the best means of ensuring ethical, responsible conduct by NGOs is to promote self-regulation in this sector at the national and international levels. Responsible NGOs are increasingly conscious of the fact that the sector's success depends to a large extent on public opinion concerning their efficiency and ethics.”<sup>25</sup> There is an obvious difference between a legal requirement and a measure voluntarily self-imposed by a NCO, with the latter possibly being a proportionate measure to address issues, causing adoption of the Law on Payments.

If immediate removal of all requirements on NCOs under the Law on Payments is not possible, we would recommend the GoK review, jointly with NCOs, all provisions of the Law on Payments and related implementing regulations, to make them as clear as possible, and eliminate suspension of activity of an NCO as a penalty.

## 2. Administrative penalties for violation of the Law on Payments' requirements

### LAW PROVISIONS

The CoAO establishes administrative penalties for the following offenses:

- Failure<sup>26</sup> to notify the tax authorities, in compliance with terms and conditions provided under tax legislation, about receiving funds/assets from foreign sources, as well as failure to provide or non-timely provision of information about receiving such funds/assets, and about their expenditure- is punishable for NCOs by a fine of 100 monthly calculation indices<sup>27</sup> (MCI) (approximately \$677).
- Provision<sup>28</sup> of “unreliable” or “deliberately false” information is punishable for NCOs by a fine of 200 MCI (approximately \$1,350) and suspension of their activities.
- Repeated offenses<sup>29</sup> for either of the above violations within a year of the first offense is punishable for NCOs by a fine of 250 MCI (approximately \$1,900); and prohibition of their activities.
- Failure to mark publications with information about the source of foreign funding and state that the publication was produced at the expense of foreign sources is punishable by a warning for the first offense,<sup>30</sup> and a fine of 25 MCI

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<sup>25</sup> <https://www.osce.org/odihr/37858>.

<sup>26</sup> Section 1 of the Article 460-1 of the CoAO.

<sup>27</sup> As of January 1, 2021, one monthly calculation index is 2,917 tenge.

[https://online.zakon.kz/document/?doc\\_id=1026672#pos=2:-70](https://online.zakon.kz/document/?doc_id=1026672#pos=2:-70).

<sup>28</sup> Section 2 of the Article 460-1 of the CoAO.

<sup>29</sup> Section 3 of the Article 460-1 of the CoAO.

<sup>30</sup> Section 1 of the new Article 460-2 of the CoAO.

(approximately \$150) for any repeat offense within a year of the initial warning<sup>31</sup> (note: this penalty applies equally to all entities).

In January 2021, under Article 460-1 of the CoAO, the GoK fined NCOs Echo and International Legal Initiative 400 MCI (\$2,708) each and suspended their activities for 3 months. The GoK fined the Kazakhstan International Bureau for Human Rights and Rule of Law 800 MCI (\$5,416), with a suspension of activities for three months. The GoK fined another organization, Erkindik Qanaty, 100 MCI (\$677 USD).<sup>32</sup> In February 2021, the penalties for these organizations were revoked. The Chair of the SRC, in an interview commenting on imposition and revocation of these penalties, stated that offenses committed by NCOs had been a “formality,” but since the CoAO establishes penalties for violation of the procedure for submission of relevant reports, inspectors from the SRC were required to impose penalties after identifying such offenses. The Chair of the SRC also stated that SRC officials could not limit their response to identified offenses with a notification, because there is no such option in the CoAO.

#### ANALYSIS

In spite of the low risk of harm to the public interest associated with the offense in Articles 460-1 and 460-2 of the CoAO, such as submission of a reporting form with some mistake (without tax implications, even when by a technical mistake), these offenses envision harsh sanctions, with high value penalties and suspension of NCO's activity (the second worst only to involuntary termination of an NCO's activities). Suspension of an NCO's activities for extended period of time often equals liquidation. None of the offenses under Articles 460-1 or 460-2 qualify as compliant with the ICCPR, when applied to NCOs.

“In most instances, the appropriate sanction against NGOs for breach of the legal requirements applicable to them (including those concerning the acquisition of legal personality) should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality.”<sup>33</sup> The CoAO does not provide NCOs with the opportunity to correct an action, identified as an offense in Articles 460-1 and 460-2, immediately imposing harsh penalties.

Termination of an NCO's activities, and similarly, suspension of their activities, is possible only in extreme cases, when no other remedies to offenses are possible and only for limited reasons prescribed by international law. Article 22 of the ICCPR states that restrictions are permissible only when “1) prescribed by law; 2) necessary in a

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<sup>31</sup> Section 2 of the new Article 460-2 of the CoAO.

<sup>32</sup> <https://echo.kz/en/2-uncategorised/216-press-release-kazakhstani-human-rights-and-media-public-organizations-face-unjustified-and-disproportionate-fines-and-suspension-of-activities.html>.

<sup>33</sup> Section 72 of the Guidelines on Freedom of Association.



democratic society, and 3) in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” These standards also embody a proportionality test, meaning that the least intrusive means should govern the framing of restrictions. “In particular, any prohibition or dissolution of an association shall always be a measure of last resort, such as when an association has engaged in conduct that creates an imminent threat of violence or other grave violation of the law, and shall never be used to address minor infractions.”<sup>34</sup> None of the offenses under Articles 460-I and 460-II may be justified by legitimate aims identified under ICCPR, nor the sanctions are proportionate to the committed offenses, which may be considered “minor infractions.” The CoAO also fails to provide the least intrusive option (such as a notification or a nominal penalty) before immediately applying harsh sanctions. Further, imposition of sanctions as a financial penalty and a suspension of activity is mandatory in case of submission of “inaccurate” or false information, as the state authorities do not have any alternative if they identify “inaccurate” or false information in submitted reports.

As a technical matter of relevance, the disposition of offense under Article 460-I mandates a suspension of activities of an NCO in case of submission of “inaccurate” information. There is no definition of the term “inaccurate” anywhere in administrative procedure or tax legislation. This leaves full discretion to the state authorities to decide what is “inaccurate,” leaving them the option to recognize any simple mistake as “inaccurate” information.

In regard to international practice, in the US,<sup>35</sup> for example, as mentioned in *Section 3. Requirements for recipients of funds/assets from foreign sources*, NCOs do not have to submit reports, beyond tax reports (informational tax returns)<sup>36</sup> applicable to all taxpayers. Receiving funding from a foreign source does not create new reporting requirements. Regarding general submission of tax reports, no penalties apply if there is a reasonable cause for the failure to comply with submission procedure (i.e., when non-compliance resulted from circumstances outside of control of the taxpayer, or there are substantial extenuating circumstances), and the taxpayer demonstrated responsible conduct prior to and after the offense. In case this offense is committed due to negligence, there is a fine of \$50 per violation. In case of intentional disregard (willful neglect<sup>37</sup>), there is a penalty of \$25,000 per violation. While the penalty does not envision a notification, there is a procedure to remedy the offense to avoid paying

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<sup>34</sup> Section 35 of the Guidelines on Freedom of Association.

<sup>35</sup> There are several IRS publications, for example, General Instructions for Certain Information Returns (<https://www.irs.gov/pub/irs-pdf/i1099gi.pdf>); an overview is provided at the following address: [https://www.irs.gov/site-index-search?search=penalties&field\\_pup\\_historical\\_1=1&field\\_pup\\_historical=1](https://www.irs.gov/site-index-search?search=penalties&field_pup_historical_1=1&field_pup_historical=1).

<sup>36</sup> However, there are over 40 different forms of informational tax returns, required to be filed by the Internal Revenue Code for various taxpayers, individuals, and legal entities <https://www.thetaxadviser.com/issues/2020/jan/avoid-contest-information-return-penalties.html>.

<sup>37</sup> Can be defined as “conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.”



penalties. The Internal Revenue Service (IRS) cannot collect the penalty during a 90-day period, allowing taxpayer to appeal. As a rule, a penalty will not be applied if 1) the taxpayer does not commit such an offense regularly; 2) the taxpayer quickly corrected or eliminated the cause of the offense; or 3) if the amount of penalty is larger than the amount of incomplete tax obligation. A penalty is almost never collected if the taxpayer can demonstrate that it has a proper accounting system, set up to implement reporting requirements correctly.

#### RECOMMENDATIONS

1. Eliminate suspension of activity of an NCO as a penalty.
2. Introduce a “notification” as a sanction, prior to applying other sanctions.
3. Provide a definition of “inaccurate” information.
4. Differentiate between offenses committed as a result of negligence and willful neglect; allow an exemption from penalties in circumstances where there is a reasonable cause.
5. Consider lowering the amount of penalties for offenses under Articles 460-1 and 460-1, given the negligible risk these offenses cause to public interest.

### 3. Criminal penalties for violation of the Law on Payments’ requirements

#### LAW PROVISIONS

Changes into the Criminal Code, introduced by the Law on Payments, made the use of foreign funding to commit five crimes an “aggravating circumstance,” resulting in harsher penalties. Crimes include:

- deliberate<sup>38</sup> actions aimed at inciting social, national, ethnic, racial, class or religious strife, insult to national honor and dignity or religious feelings of citizens, as well as propaganda of exclusivity, superiority or inferiority of citizens on the basis of their attitude to religion, class, nationality, ethnic or racial bigotry, if these acts were committed publicly or through the media or information and communication networks, as well as through the production or distribution of literature or other media that promote the social, national, ethnic, racial, class or religious strife, committed by a group of persons, or a group of persons by prior agreement or repeatedly or with violence or with the threat of violence;
- propaganda<sup>39</sup> or public incitement for the violent seizure or violent retention of power in violation of the Constitution of the Republic of Kazakhstan,

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<sup>38</sup> Section 2 of Article 174 of the Criminal Code.

<sup>39</sup> Section 2 of Article 179 of the Criminal Code.

undermining state security, or violent change of the constitutional order of the Republic of Kazakhstan, as well as production, storage with the purpose of distribution, or distribution of materials with such content;

- propaganda<sup>40</sup> or public incitement to violate unity and wholesomeness for disintegration of the state, as well as production, storage with the purpose of distribution, or distribution of materials with such content;
- propaganda<sup>41</sup> of terrorism or public incitement to commit a terrorist act, as well as production, storage with the purpose of distribution, or distribution of materials; and
- organization<sup>42</sup> of mass disorder, accompanied with violence, riots, arson, demolition, destruction of property, use of firearms, explosives, or explosive devices, as well as armed resistance to public authorities.

#### ANALYSIS

The “use of funds received from foreign sources” is included side by side with other aggravating circumstances, such as crimes committed “by a group of persons,” or “by a group of persons by prior agreement,” for this matter “by or the leader of a public association (another aggravating circumstance peculiar and unique to Kazakhstan).

Committing these crimes, with or without foreign funding, results in the same criminal charges. The inclusion is, possibly, to raise alarm and cause suspicion towards recipients of foreign funding among the public and law enforcement bodies, effectively stigmatizing recipients of foreign funding.

#### RECOMMENDATIONS

Since the purpose of this Analysis is to review provisions of the Law on Payments affecting NCOs, and we are not aware of how these criminal code provisions are implemented in practice, the recommendation would only be to exercise oversight over enforcement of these provisions. Changes will be needed if these provisions will be used against NCOs and/or NCOs restrict their activities due to their stigmatization by public and law enforcement bodies as recipients of foreign funds.

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<sup>40</sup> Section 2 of Article 180 of the Criminal Code.

<sup>41</sup> Section 2 of Article 256 of the Criminal Code.

<sup>42</sup> Section 1 of Article 272 of the Criminal Code.