

The Society for Aiding Free Economy

REVIEW (Working Document) of

Changes Introduced to Registration Rules for Financial Aid Grants

Summary

The Regulations for Registration of Grant Agreements (Decisions), approved by Ordinance 216 of the Cabinet of Ministers of 5 June 2015, were recently amended by Ordinance 4 of the Cabinet of Ministers of 11 January 2017.

Furthermore, the Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan, approved by Ordinance 339 of the Cabinet of Ministers of 22 October 2015, were amended by Ordinance 12 of the Cabinet of Ministers of 24 January 2017.

The changes to the former were mostly of technical character, originating from the need to update the Regulations in light of the upcoming changes to the Rules, made on 24 January.

The key difference between the previous and current (as amended on 24 January 2017) versions of the Rules concerns changing the procedure for extending foreign donors a right to provide grants in Azerbaijan. The requirement for a foreign donor to obtain a right for providing grants remains intact, but an application for obtaining such right may now be also filed by a local NGO. The new Rules also define that the procedure shall be implemented by a single government authority (Ministry of Justice)

Problems not Addressed by the Recent Amendments

1. Foreign donors are still required to seek government's permission to be able to financially support NGOs in Azerbaijan

- Although the amendments of 24 January 2017¹ removed the previous provision that "grant agreements may not be signed with foreign donors prior to their obtaining of a right to provide grants", they still

¹ "The Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan," as amended by Ordinance 12 of the Cabinet of Ministers of 24 January 2017

subject foreign donors to an additional approval procedure for providing grants.² Specifically, a foreign donor can now sign a grant agreement with a local NGO without obtaining a right (effectively, a permit) beforehand; however, during a later phase of registering this grant agreement, the right of the donor to provide grants is still dependent on the judgment of a government agency (Ministry of Finance).

2. The approval procedure is contingent on unclear, vague definitions and wording, e.g. “financial & economic expediency” and “inexact substantiation of financial & economic feasibility”

- For a foreign donor to be able to provide grants in Azerbaijan, every such grant is still required to be separately assessed by a relevant government authority as to its financial & economic expediency. However, pertinent grant legislation (whether primary or secondary) does not contain a definition of “financial & economic expediency”.
- The Rules as amended on 24 January 2017 (Article 3.4) retain discretionary authority of an administrative agency to attest whether substantiation of “financial & economic feasibility” of a grant project is sufficiently accurate before a grant is approved, meaning that if substantiation is ‘inexact’ in agency’s opinion, it can refuse to bestow an approval necessary for providing a grant.

Applying undefined criteria and factors to the determination of ‘exactness’ or ‘inexactness’ of substantiation of “financial & economic feasibility,” a notion that is itself vague and undefined, gives a government agency unlimited and arbitrary discretionary powers and opens door to the sway of various extraneous factors and outside interests. Given that such vague concepts are impossible to prescribe in laws and regulations, making grant activity contingent on unclearly formulated dispositions about an unclear, stand-alone notion constitutes a very case (as established in the law) when discharge of

² Article 2.2 of “The Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan.”

regular duties by a government agency or an official may lead to the abuse of powers.³

3. Grounds for refusing a foreign donor are tantamount to an open ban.

- According to Article 3.3 of the Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan, as amended on 24 January 2017, “if needs in a field, which the grant purports to serve, are met by the government, this constitutes the basis for judging a grant financially & economically inexpedient”. Basically, such imperative norm requires an administrative agency to refuse any grant application if the government already provides any kind of financial or other assistance in a given subject matter. Furthermore, this norm is problematic because an administrative agency is thereby placed under a heavy political burden, which makes an unbiased decision practically impossible. Indeed, ruling a grant ‘expedient’ under this requirement is synonymous with an open admission by decision-makers in an administrative agency that the government is unable or unwilling to support a certain policy area. How reasonable is to expect such level of impartiality and independence from bureaucrats when they are presumed to refrain from criticising the government’s position?

³ The Constitutional Law on Normative-Legal Acts (2010), Article 64:

“64.1. Typical factors that may cause the abuse of powers by a government agency (or an official) in discharge of their duties in relation to normative-legal acts are the following:

64.1.1. having wide discretionary powers;

64.1.2. when an official competency is defined as a dispositive norm;

64.1.3. when an exercise of a right belonging to a person is made contingent on meeting unnecessarily excessive requirements;

64.1.4. when there is possibility of abuse of rights of natural or legal persons by a government agency or an official;

...

64.2. Discretionary competencies granted by a normative-legal act, which allow an official to use personal disposition in decision-making, must not be exercised arbitrarily.

...

64.6. Imposing unnecessarily high or excessive requirements; prescribing an open (incomplete) list of documents to be submitted by natural or legal persons, or of grounds for refusal under an administrative procedure initiated by a person; or using expressions open to subjective or judgmental interpretation in citing grounds for refusing the exercise of rights are impermissible in a normative-legal act.

...”

4. A requirement to legalise or apostillise grant agreements is superfluous

- According to Article 2.4 of the Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan, as amended on 24 January 2017, “documents produced in foreign countries shall be legalised or apostillised.” Although the current version of the Rules excludes a specific requirement to legalise founding articles of a foreign donor and project-related information, it does not clarify which documents need to be legalised or apostillised. In law, a requirement to legalise or endorse with an apostille is usually specified for official documents produced or approved by executive agencies or other competent authorities of other states, such as birth certificates, title deeds, powers of attorney, etc. However, in financial grant-making, the principal governing document is bilateral: either a grant agreement, or a grant decision. The necessity to seek official endorsement for bilateral documents setting terms between two natural or legal persons seems superfluous, unless parties to the agreement set this requirement between themselves, as procedure for government’s registration of a grant agreement (being a notification procedure) is supposed to verify compliance of the grant-making activity with the Azerbaijani legislation, rather than certify legality of instruments presented by parties or of their consensual relations.

5. Even though the registration of a grant agreement is supposed to be for information purposes only, the process has some complicating and pre-emptively prohibitive features

- The above-mentioned Rules, as amended on 24 January 2017, determine that in cases when an application for obtaining a right to provide grants includes, along with originals of a grant agreement and a substantiation of grant’s financial & economic feasibility, their electronic copies, the coordinating government authority shall send the copies to the Ministry of Finance electronically. However, this facility is not offered to civic organisations.
- A requirement to obtain a notification from the Ministry of Justice before making bank transactions in relation to a grant agreement

remains in force. Moreover, when terms of a grant agreement change, or implementation of a project supported by a grant is delayed, or in other similar cases, these variations need to be registered anew; hence, a new notification is required to be able to use grant funds. This onerous requirement restricts operational flexibility of civic unions and their ability to adjust to changing circumstances.

6. The amended Rules also introduce [a new complication](#): the Ministry of Justice shall now verify whether a foreign donor belongs to a list stipulated therein (Article 1.2)⁴

- Article 1.2 of the Rules for Obtaining a Right by Foreign Donors to Provide Grants within the Territory of the Republic of Azerbaijan includes a list of foreign donors, itemised as below:
 - international organisations and their representatives;
 - foreign governments and their representatives;
 - international charity, humanitarian, development and other civic-minded organisations;
 - financial and lending institutions;
 - foreign civic organisations, including foundations, associations, federations and committees, engaged in advancement of education, science, healthcare, arts and sports;
 - as well as foreign legal entities' branches and representative offices, which are officially registered in the Republic of Azerbaijan, i.e. branches and representative offices of foreign non-governmental organisations, which have signed agreements set out in the Law of the Republic of Azerbaijan on Non-Governmental Organisations (civic unions and foundations).

⁴ "2.5. Upon presentation of the documents specified in Article 2.3 of the Rules, the coordinating government authority shall verify their completeness and donor's conformity with the list stipulated in Article 1.2 hereof and send a grant agreement / decision and a substantiation of grant's financial & economic feasibility by registered mail to the Ministry of Finance for obtaining their opinion on grant's financial & economic expediency. Incomplete documents shall be returned to the applicant, and an extra period of 10 days set for remedying the deficiencies.

- Although the list is sufficiently extensive, it does not mention foreign NGOs (except international organisations) active in promotion of human rights, democracy and in other fields.