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MEMORANDUM

on the draft
Law of the Republic of Kazakhstan on Advertising
by
ARTICLE 19
Global Campaign for Free Expression

London
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I. Introduction

The Memorandum has been prepared by ARTICLE 19, Global Campaign for Free Expression, based on the request of the OSCE in Almaty. It contains an analysis of the provisions of the draft Law of the Republic of Kazakhstan on Advertising (draft law), received by ARTICLE 19 in July 2002. According to our information, the draft was officially developed by the Ministry of Justice jointly with the Ministry of Information and the Natural Monopolies Regulation Agency. It is now in the hands of the government. The draft law is analysed in comparison to international standards and, in particular, the guarantee of freedom of expression.

The draft law seeks to regulate advertising and relations between various actors involving in advertising, such as the advertiser, the producer and the agent. It imposes a number of wide-ranging content restrictions on advertisements, mainly designed to protect consumers, safety and children. It also provides for placement of social advertising at the cost of the advertiser, which must be at least 5% of the total volume of advertising.

The draft law is largely consistent with international and constitutional standards, including the guarantee of freedom of expression, and its goals are, by-and-large, legitimate. Although commercial speech, such as advertising, is clearly protected by the guarantee of freedom of expression, at the same time, wider latitude is permitted to States in restricting this form of expression. However, although the first article declares that the law is not applicable to political advertisements or advertisements not related to entrepreneurial activity, other articles seem to contradict this, not least the article on social advertising, and imply that the law does indeed cover some advertising of a broadly political nature.

Furthermore, the regime of content restrictions in the draft law is unnecessarily restrictive. Indeed, ARTICLE 19 recommends that the content restrictions be removed altogether, and a self-regulatory system be encouraged. In any case, a number of the content restrictions are excessively vague, something which should be avoided even in the context of commercial speech. In addition, some of the content restrictions are simply too broad to be justified, while others should probably be reconsidered.

This Memorandum provides an overview of international law in this area, focusing on commercial speech, and advertising in particular. It then sets out ARTICLE 19's main concerns with the draft law, along with recommendations for reform. It is intended as a contribution to the development of legislation on advertising that is fully consistent with international standards, while providing adequate protection to consumers against harmful advertising practices.

II. International and Constitutional Standards

The *Universal Declaration of Human Rights* (UDHR)[1] is generally considered to be the flagship statement of international human rights. Article 19 of the UDHR, binding on all States as a matter of customary international law, guarantees the right to freedom of expression and information in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),[2] a legally binding treaty which has been ratified by 145 States but which has yet to be ratified by Kazakhstan, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. These guarantees allow for some restrictions

[1] UN General Assembly Resolution 217A(III), 10 December 1948.
[2] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

on freedom of expression and information but only where these are prescribed by law, pursue a legitimate aim and are necessary in a democratic society to protect that aim.

Constitutional Guarantees

Freedom of expression is protected, subject to certain restrictions, in Article 20 of the Constitution of Kazakhstan which states:

> 1. The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.
> 2. Everyone shall have the right to freely receive and disseminate information by any means not prohibited by law. The list of items constituting state secrets of the Republic of Kazakhstan shall be determined by law.
> 3. Propaganda of or agitation for the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence shall not be allowed.

Further grounds for restrictions and conditions on those restrictions are set out in Article 39, which states:

> 1. Rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system, defence of the public order, human rights and freedoms, health and morality of the population.
> 2. Any actions capable of upsetting interethnic concord shall be deemed unconstitutional.
> 3. Any form of restrictions to the rights and freedoms of the citizens on political grounds shall not be permitted.…

The Importance of Freedom of Expression

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I) which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[3]

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The importance of freedom of expression in a democracy has been stressed by a number of international judicial bodies. For example, the African Commission on Human and People's Rights has held:

[3] 14 December 1946.

> Freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.[4]

Similarly, the Inter-American Court of Human Rights stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.[5]

This has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights.

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well established. For example, the European Court of Human Rights has often repeated the following quotation:

> According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[6]

These statements emphasise that freedom of expression is both a fundamental human right and also key to democracy, which can flourish only in societies where information and ideas flow freely.

Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[7]

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

> [I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and

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[4] *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998, Communications 105/93, 130/94, 128/94 and 152/96, para. 52.
[5] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.
[6] See, for example, *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93, para. 43.
[7] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *op cit.*, para. 34.

> ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[8]

This applies particularly to information which, although critical, is important to the public interest:

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[9]

This has been recognised by the constitutional courts of individual states around the world. For example, the Supreme Court of South Africa recently held:

> The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.[10]

Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the International Covenant on Civil and Political Rights lays down the benchmark, stating:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, approved by both the Human Rights Committee[11] and the European Court of Human Rights.[12] This test

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[8] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[9] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).
[10] *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.
[11] See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.
[12] See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, paras. 28-37.

requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessity". Although absolute necessity is not required, a "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.[13] In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

Commercial Speech

It is well established under international human rights law that commercial speech, and in particular advertising, is protected, so that restrictions on this form of speech must be justified, like all restrictions on freedom of expression, by reference to the three-part test outlined above. For example, a case from Canada before the UN Human Rights Committee challenged a ban on advertising in English in the province of Quebec, which had been justified on the basis that such a ban was needed to protect the French language speakers of that province.[14] The Human Rights Committee held that commercial speech such as the advertisements in question were protected by the right to freedom of expression. Furthermore, the ban breached that right in that it was not necessary to protect the French minority. It would have been enough to require that signs were also in French, without prohibiting English.

Several international and national cases have dealt with the issue of whether certain professions should be allowed to advertise. For example, in the case of *Casado Coca v. Spain*, the European Court of Human Rights had to consider a broad but not complete ban on lawyers advertising their services.[15] The Court distinguished between lawyers and other professions, noting their central position in the administration of justice as intermediaries between the public and the courts. In light of this, and the self-regulatory nature of the sanctions, the ban was reasonable.

However, the Court noted a key issue, recognising the importance not only to the advertiser, but to the public at large, of advertising. In practice in most countries, advertising is the main way in which the public find out about, and compare, services and prices. Advertising in general, therefore, is protected not only as an aspect of the right of expression of the advertiser, but also as an aspect of the right of everyone to receive information and ideas. The same point was made in the following terms by the US Supreme Court:

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[13] *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.
[14] *Ballantyne and Others v. Canada*, 31 March 1993, Communication Nos. 359/1989 & 385/1989.
[15] 26 January 1994, Application No. 15450/89.

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate ….[16]

In assessing the legitimacy of a restriction on advertising, then, the public interest in receiving the information must also be taken into account.

A number of cases before the European Court of Human Rights, as well as some national courts, have established the principle that States have a wider margin of appreciation in applying restrictions to commercial speech than, say, political speech. In the case of *Hertel v. Switzerland*,[17] at issue was a ban on an individual repeating allegations that microwave ovens were dangerous. The European Court of Human Rights noted that a wider margin of appreciation applied to commercial speech[18] but also warned that care needed to be taken in classifying speech as commercial since, in that case, the individual in question had acted out of concern for public health, rather than self-gain.

The difficulty of distinguishing clearly between commercial and non-commercial speech has been raised in a number of cases. For example, in *Vgt Verein gegen Tierfabriken v. Switzerland*, the European Court of Human Rights considered an advertisement that sought to dissuade viewers from buying pork, on the basis that the animals were kept in poor conditions and that the use of chemicals meant that they were bad for both one's health and the environment.[19] The Court considered the advertisements to be political speech, even though they involved commerce.

The US Supreme Court has, perhaps, been most sceptical of the distinction between commercial and non-commercial speech. In a leading case on this issue, *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al.*, the Court noted two key reasons why such a distinction was dubious. First, as in the *Tierfabriken* case, noted above, the line between commercial and non-commercial speech was always tenuous. The Court pointed, in particular, to the following examples where the line was highly ambiguous:

> …advertisements stating that referral services for legal abortions are available; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals; and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs.[20]

Secondly, the Court reasoned that advertising was closely related to the success of the whole system of economic decision-making and, in turn, to assessing how to regulate the free-market system:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private

[16] *Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 US 748 (1976), p. 763.
[17] 25 August 1998, Application No. 25181/94 (European Court of Human Rights).
[18] See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 (Supreme Court of Canada).
[19] 28 June 2001, Application No. 24699/94.
[20] Note 16, p. 764.

> economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.[21]

Although other courts may not be prepared to go quite as far as the US Supreme Court, it is clear that there are serious problems with any blanket distinction between commercial and non-commercial speech.

III. Analysis of the Draft Law

III.1 Scope of the Law

Advertising is defined extremely broadly in the draft law to cover any information, distributed in any form, about a person, entity, goods or even ideas, intended for the general public and designed to create an interest in that person, entity, good or idea, and to promote sale of goods or ideas (Article 2(1)). By contrast, non-advertising is defined restrictively as news, interviews or analytical material which does not survey or test for a product, which does not use superlative language and which does not resort to comparisons with similar products (Article 2(4)).

Article 1(4) of the draft law states clearly that it does not apply to political advertising or advertisements by natural persons which are not related to entrepreneurial activity. This presumably means that non-entrepreneurial advertising by organisations, including NGOs, is covered by the law, a significant non-commercial area. Furthermore, Article 18 deals with social advertising, which by definition relates to charitable activities, suggesting that non-entrepreneurial activity is covered by the law. Article 1(4) is further undermined by Article 8(1)(1), which deals with abusive comparisons, including on the basis of philosophical or political views, and by Article 16(2), which prohibits advertising of unregistered associations, parties and candidates for office, and religious organisations.

As noted above, the line between commercial advertising and informational activities of a more political and social nature is hard to draw and some courts have rejected the distinction altogether. Where a law seeks to impose wide-ranging content restrictions on advertising, as is the case with the draft law, it is of the greatest importance that the law distinguish clearly between purely commercial activities and political/social forms of expression. Restrictions which may be justifiable in relation to the former, may well be illegitimate in relation to the latter.

As the draft law currently stands, the definition of advertising includes the sale of ideas, which could be construed to include a wide range of political/social expression. Furthermore, while non-entrepreneurial activities by individuals are excluded from the ambit of the law, this is not the case for organisations, including political bodies and non-profit entities.

[21] *Ibid.*, p. 765.

In the view of ARTICLE 19, many wide-ranging content restrictions, as well as other limitations, in the draft law, regardless of their legitimacy in the context of purely commercial advertising, are not justifiable if applied to a wider range of expression. One example is Article 6(2), prohibiting advertising which is misleading. Although there are problems with this provision even in relation to commercial speech, it is clearly illegitimate in relation to other forms of expression.

Recommendations:

- The scope of the law should be clarified and it should be clear that only expression which is expressly designed to promote a purely commercial activity, whether undertaken by an individual or some other entity, is covered.

III.2 Content Restrictions

The draft law contains a wide array of restrictions on the content of advertisements. Although most of these are clearly aimed at protecting consumers, overall they are excessively broad and, in some cases, unnecessarily vague. Cumulatively, these restrictions reflect a paternalistic, protectionist approach towards the consumer which is out-of-date, given the transition to a free market system, and is in any case unlikely to be effective, as powerful advertisers find clever ways to promote their products without technically falling foul of the law.

The wide-ranging restrictions also fail to take account of the nature of advertising, which often employs satire, hyperbole or other devices to promote products. For example, Article 8(2) prohibits advertisements which denigrate treasures of art or historical monuments. This would arguably prohibit advertisements such as one recently in circulation in the United Kingdom, showing a winking Mona Lisa, or numerous advertisements involving the Statue of Liberty.

ARTICLE 19 generally recommends that all of the restrictions on the content of advertising in the draft law be reviewed and an assessment made as to whether each one really is considered necessary and whether it is legitimate. The analysis here is based on the right to freedom of expression but other considerations, such as the development of an active and competitive commercial sector are also relevant. In some cases, the restrictions may not strictly be contrary to human rights guarantees but the level of protection afforded may not be justifiable in comparison to the harm done to commerce.

In many countries, regulation of advertising is dealt with primarily as a matter of self-regulation. Self-regulation is particularly appropriate in this area, due to the complex nature of the restrictions and the fine distinctions between legitimate and illegitimate material. In such cases, the purpose of regulation is not primarily to punish, but to establish appropriate standards and to ensure compliance with those standards. Self-regulatory systems are better suited to making fine, complex judgements about borderline expression and generally employ a lighter regime of sanctions, more suited to the promotional, as opposed to correctional, thrust of the system. ARTICLE 19 therefore recommends that consideration be given to removing all content restrictions from the draft law and, instead, encouraging advertisers to establish a self-regulatory

system. Alternatively, or additionally, consideration should be given to replacing the content restrictions in the draft law with an administrative or self-regulatory system of content regulation for broadcasting.

The specific examples outlined below refer to some of the more serious problems with the system of content regulation in the draft law. The provisions noted below is by no means complete and the fact that a specific provision is not mentioned does not mean that ARTICLE 19 considers it to be legitimate.

III.2.1 Denigration

Several provisions in the draft law prohibit the denigration of people or things including prohibitions on:

- denigrating the honour, dignity or business reputation of competitors (Article 6(1));
- discrediting persons or entities which do not use the advertised product (Article 6(5));
- denigrating treasures of art and cultures or historical monuments (Article 8(2));
- denigrating State symbols, the national currency, religious symbols or a foreign currency (Article 8(3)); and
- discrediting the authority of parents.

In the view of ARTICLE 19, all of these are illegitimate. First, the law of defamation protects any individuals whose reputation may have been harmed. A delicate balance must be struck in such circumstances between the right to freedom of expression and the need to protect reputations,[22] and this is no less true in the context of commercial speech than otherwise. It is now clearly established that State symbols, currencies, treasures of art, etc. do not have a legitimate right to protect their reputation[23] and, in any case, as the examples provided above show, these prohibitions are excessively broad and fail to take into account the nature of advertising. Furthermore, it is unrealistic, and paternalistic, to seek to protect national treasures and cultural icons through restricting freedom of expression. Rather, positive means, such as education and promotion of culture, are the appropriate means to achieve this end. The same is true in relation to the idea of discrediting the authority of parents, a cultural value which cannot be maintained through restricting freedom of expression.

A further problem which most of these restrictions is that they are unduly vague. Does a claim that a product will enhance one’s vigour discredit those who do not use it? Does an advertisement suggesting that you are cool if you use a certain product, and your parents part of a tuned-out generation since they do not, discredit parental authority?

Recommendations:

- The provisions noted above should be removed from the draft law.

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[22] See *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (ARTICLE 19: London, 2000).

[23] *Ibid.*, Principle 2(b).

- If any of these provisions are retained, they should at least be amended so that the precise scope of the prohibition is clear and narrow.

III.2.2 Unreasonable Prohibitions

The draft law contains a number of restrictions on advertisements which are unreasonable or cannot be justified. These include the following prohibitions:

- on advertisements which "can mislead" (Article 6(4));
- on untrue statements to the effect that a certain product is the "best" or "most unique" (Article 7(15));
- on untrue statements as to the competence of the manufacturer (Article 7(16));
- on the activities of unregistered public associations, parties or candidates for election (Article 16(2)(4));
- on unregistered religious organisations (Article 16(2)(5));
- on giving guarantees as to the performance of financial securities (Article 17(4));
- which conceal at least one term of a financial contract (Article 17(5));
- on showing persons under age in hazardous places and situations (Article 20(4)); or
- which create among persons under age an unrealistic notion of the cost of the goods in question (Article 20(6)).

All of these restrictions are directed toward legitimate aims but they are simply too broad or limiting to be justified. They reflect an excessively paternalistic, protective approach towards the consumer which is both unrealistic and even harmful in a market economy.

Practically any advertisement could mislead consumers; the standard should at least be that the advertisement is likely to mislead. Similarly, advertisements making superlative claims which cannot, strictly speaking, be justified, are commonplace in developed economies and consumers have learnt not to take them at face value. The same is true in relation to statements about the competence of the manufacturer, although a prohibition on deliberate lies (already covered by the numerous other provisions in Article 7) would be legitimate.

ARTICLE 19 has some concerns about the idea of registering public associations, parties and religious organisations but it is beyond the scope of this Memorandum to discuss these. Regardless of this, it is not legitimate to prohibit these bodies from advertising. Advertising may be one way in which they can build the necessary public support and membership to become fully-fledged bodies.

The draft law contains a number of restrictions on advertising of financial services, many of which are legitimate. The prohibition on guarantees as to performance may be unreasonable, for example where the financial securities in question have guaranteed rates of return. The prohibition on concealing even one term of a financial contract is also unreasonable. Most financial services are subject to complex contracts with numerous clauses and it is not possible to mention all of these in an advertisement.

The prohibitions directed at underage children are also excessive. Many advertisements common in Western countries show children in "hazardous" positions and this in no way promotes dangerous behaviour. Many advertisements involve some creation of an unrealistic view of the price of the goods in question, either by exaggerating their usefulness or by making them seem affordable. This is part of the business of advertising, including where this is directed at children, and cannot be prevented by regulation.

Recommendation:

- The prohibitions noted above should either be repealed or amended in accordance with the comments provided.

III.2.3 Excessively Vague Restrictions

Many of the restrictions on advertising are excessively vague. Vague restrictions are problematical both because they fail to provide advertisers with sufficient notice of what, precisely, is prohibited and because they may be abused by being selectively applied for political reasons. Furthermore, in most cases, it is perfectly possible to draft restrictions in clear, narrow terms, so there is no need for vague provisions.

Many of the restrictions noted above are excessively vague. An example of another unnecessarily vague provision is Article 8(1)(1), prohibiting advertisements which violate "generally accepted norms of humanism and morality", a notion which is practically impossible of clear definition and which varies from person-to-person. This provision, which applies to abusive language and comparisons between racial and other groups, could easily be drafted in more specific, precise terms.

Other examples of vague provisions not already noted above include Article 16(2)(2), on propagating cults of outrage and violence, and Article 16(2)(3), on advocacy of racial, religious or other forms of hatred. "Propagating" is a vague term itself, as is the idea of a cult of "outrage" or even "violence". As regards hate speech, the ICCPR sets out a standard based on incitement to hatred, as opposed to the much broader and more vague term "advocacy" used in the draft law.

Recommendation:

- The vague provisions in the draft law should either be removed altogether or replaced by prohibitions which are clear and narrow in scope.

III.3 Permit Requirements

The draft law sets out onerous conditions for the placement of certain types of advertisements, such as outdoor signs (Article 14), advertising on vehicles (Articles 15(1) and (2)) and advertising via the postal service (Article 15(3)). In particular, pursuant to Article 14(3), outdoor advertising is allowed only with a permit issued by the relevant authority and in coordination with a range of agencies listed in that article. This applies to all outdoor advertising and would, presumably, cover even signs posted on private lawns or outside private businesses. The requirement of a

permit for such advertising, which is already subjected to strict safety requirements (see Articles 14(1) and (2)), is unnecessary, could be abused and places a significant fetter of the use of this form of advertising, common in countries around the world. The further requirement of coordination is even less justifiable.

Similarly, the requirements of permission for advertising on vehicles (Article 15(1)) and for postal advertising (Article 15(3)) are unnecessary and unreasonably restrictive. Both forms of advertising are very common in countries around the world and do not involve any risk of harm for which a permit might be justified. The idea of requiring a permit for bumper stickers, found on millions of cars all over the world, highlights the unreasonable nature of such a requirement.

Recommendation:

- The requirements of permits for outdoor advertising, advertising on vehicles and postal advertising should be removed from the draft law.

III.4 Other Concerns

Article 13(3) of the draft law provides that in case of computer services, advertising shall be provided only with the consent of the subscriber. While this may in theory be laudable, it is entirely impractical. An important part of the financing of Internet businesses is covered by advertising and it is not feasible to direct this only at customers who have consented to it. Furthermore, analogous requirements are not placed on other forms of advertising, such as those who subscribe to cable or satellite TV services.

Article 18(2) provides that social advertising shall constitute not less than 5% of all advertising, while Article 18(4) provides that this shall be at the cost of the advertiser. Despite the obviously laudable goals behind this provision, ARTICLE 19 has concerns about its viability for advertisers, its practicality and also about the implications in terms of freedom of expression. First, placing a 5% burden on advertisers is very significant; of equal magnitude to an additional 5% tax on a business. This is likely to have serious ramifications for advertisers in Kazakhstan and is a burden their competitors in neighbouring countries and around the world do not have to bear.

Second, at a practical level, there are likely to be endless problems regarding the precise scope of what qualifies as social advertising. Advertisers will be motivated to try to include advertising that somehow benefits them within their requirement for social advertising, so that despite the requirement that such advertising be “charitable” it may well be used for other purposes.

Finally, there are problems with requiring advertisers to actually provide social advertising. The right not to express oneself is included within the guarantee of freedom of expression, so any obligation to speak must be justified by reference to the three part test for restrictions. Although social advertising may generally be beneficial, it is hard to see how it could be justified as necessary to protect any legitimate aim.

Recommendations:

- The requirement of consent before advertising may be provided via computer services should be removed from the draft law.
- The requirement of providing 5% social advertising should be reconsidered either in favour of removing this requirement altogether or in favour of a lower limit.