ARTICLE 19

# Guide on reforming media regulation in Kazakhstan: State regulation of media

## Guide for journalists and policymakers in Kazakhstan

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Legal briefing

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# Introduction

ARTICLE 19 seeks to make a constructive contribution through this Guide to the promotion and protection of freedom of expression and media freedom in Kazakhstan. The Kazakhstan Government, at the highest level, has committed itself to reforming the restrictive media legislation in the country, including the restrictive legislation on defamation.

Welcoming these reform initiatives, ARTICLE 19 supports the local stakeholders and provides expertise on a range of legislative proposals in this area. This Guide aims to assist legislators and other stakeholders to ensure that any legislative proposals implement Kazakhstan international obligations in the area of freedom of expression.

In this Guide, ARTICLE 19 explains international standards in two key areas: a) licensing and registration requirements for the media and (b) state aid to media.

ARTICLE 19's comments are made within the framework of the international standards governing freedom of expression, with particular reference to Kazakhstan's treaty obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Kazakhstan signed the ICCPR in 2005 and is obliged to give effect to it through national legislation and practice. We also refer at times to ARTICLE 19's standard-setting publications for media regulation in the context of freedom of expression. These publications draw together best practice under international law, as formulated from statements from authoritative international bodies and jurisprudence from both international and national courts.

ARTICLE 19 hopes that international standards and comparative examples indicating the best practices of states on the protection of the right to freedom of expression and freedom of the media shall provide a useful source of reference for drafters of the new Kazakhstan legislation in this area.

# Licensing and registration

## Applicable international standards

Under international standards, restrictions on the right to freedom of expression must meet the conditions of so called "three-part test" which mandates that restrictions must be:

- Provided for by law; any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- In pursuit of a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals;
- Necessary and proportionate in a democratic society, i.e. if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.[1]

The same principles apply to electronic forms of communication or expression disseminated over the Internet.[2]

Regulation of the media presents particular problems. On the one hand, the right to freedom of expression requires that the government refrain from interference, while on the other hand, Article 2 of the ICCPR places an obligation on states to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that states are required also to take positive steps to ensure that rights, including the right to freedom of expression, are respected. This means that States have a positive obligation to adopt a legislative framework that enables diverse and independent media to flourish.

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently of government control. This ensures the media's role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest. This has important implications for regulatory

[1] UN Human Rights Committee (HR Committee), *Velichkin v. Belarus*, Communication No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).

[2] HR Committee, General Comment 34 on Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34, 12 September 2011, para 43.

models of the media. Importantly, in General Comment No 34, the Human Rights Committee (a body charged with interpreting the ICCPR) stated

> States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of [Article 19 paragraph 3 of the ICCPR]. Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge.[3]

Hence, the General Comment makes it clear that different forms of media should be regulated differently, as will be discussed in more detail in the next sections.

## Regulation of broadcast media

Broadcast media, i.e. television and radio, have traditionally been subject to state regulation as the broadcasting spectrum is a limited public resource. Hence, the state has an important, albeit limited, role to play in ensuring the spectrum is used and managed in the public interest for diverse and plural programing.[4]

Ensuring diverse and plural broadcast programming while safeguarding media independence is a complex task. It requires the state to establish an independent, transparent and accountable regulatory body to ensure broadcast frequencies are allocated fairly, according to a transparent broadcast policy designed to maximise media pluralism and diversity. This body should be fully independent from the state and political parties as well as the industry.[5]

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[3] *Ibid.*, para 39.

[4] See e.g., the US Supreme Court, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), or the Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 13 May 2013.

[5] See, e.g. the 2003 Joint Declaration, the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, 18 December 2003. For more information about guarantees on the independence of a regulator in practice, see ARTICLE 19, Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, March 2002; and standards developed by the Council of Europe - Committee of Ministers, Recommendation (2000) 23 of the Committee of Ministers to the member states on the independence and functions of regulatory authorities for the broadcasting sector, 20 December 2000; and Explanatory Memorandum to Recommendation (2000) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector; and Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008. Although these

The protection of pluralism should be the principal goal of State regulation of the broadcast media, which might otherwise easily be monopolised by the government or a small section of the population. Promoting pluralism means ensuring a diversity of broadcasting organisations, of ownership of those organisations, and of viewpoints and languages represented in the programmes they carry.

## Administration of broadcast licences

### Allocation of licences

In most countries, periodic calls for licence applications are issued, in accordance with the frequency plan, so that interested parties may compete for the licences being offered.

In order to ensure transparency, the process for assessing licence applications should be set out clearly and precisely in law. Time limits within which decisions must be made should be specified, in such a way that each of the applicants has an opportunity to be heard and the general public is able to submit comments. The criteria by which applications are judged should be announced in advance, and preferably set out in the primary legislation. Examples of common criteria are whether the applicant possesses the necessary technical expertise and financial resources to provide the proposed broadcasting programme. In line with the importance of promoting diversity, an important licence criterion is the extent to which the proposed broadcasting is likely to contribute to meeting the needs of diverse groups in society, taking into account existing content availability.

Blanket prohibitions on the basis of applicants' form or nature normally represent a breach of the right to freedom of expression. Licensing decisions should be made on a case-by-case basis, taking into account all of the circumstances, rather than being subject to rigid a priori rules. One exception is a ban on political parties holding licences, common in democracies, given the obvious potential that party-aligned stations will unfairly skew the political process. Applicants for a licence should not be required to pay a deposit, although a small fee to defray the costs of processing the application is justifiable.

Once the regulator has taken its decision, it should be communicated to the applicants, accompanied by written reasons. Anyone who has been refused a licence should be able to apply to the courts for judicial review.

are not binding on Kazakhstan, they illustrate the manner in which international and constitutional guarantees of freedom of expression have been interpreted globally.

## Licence terms

Licences usually come with several terms and conditions. These are of two types: general conditions – normally set out in primary or secondary legislation – and specific conditions, which are set individually for the licensee. All such terms and conditions should be relevant and consistent with the broadcasting policy, and this is particularly important for specific conditions, to prevent this being abused for political reasons. They should not intend to, or have the effect of making use of the licence unreasonably difficult or financially unattractive. In particular, the duration of the licence should be sufficiently long to allow broadcasters to recoup their investment. Once the term has expired, the licence should normally be renewed, unless doing so would be against the public interest, a concept which should be elaborated in the broadcasting law.

If a licence fee is charged, it should be reasonable and certainly not be so large as to undermine the commercial viability of the sector as a whole. A fee schedule should be published in advance, and arbitrary distinctions – such as charging higher fees for broadcasters who carry news – should not be allowed.

## Regulating broadcast content

Licensing is relevant to broadcasting content inasmuch as the provision of diversity of programme content is a licence criterion. At the same time, in most countries, broadcast regulators also have a mandate to develop codes of conduct to which broadcasters must adhere. Such codes can be legitimate, so long as they do not impose criminal or civil liability for programme content and are developed in close consultation with broadcasters and other stakeholders. No code should be imposed if an effective system of self-regulation is in place.

Broadcasting codes normally deal with a wide range of programming issues such as accuracy, privacy, and the treatment of sensitive themes like bereavement, sex and violence. A common and important rule is the requirement of balance and impartiality in the coverage of news and current affairs. Codes may also address questions of professional ethics, including the use of subterfuge to obtain information, the conduct of interviews and payment for information. An important area in which codes can serve a useful role is in ensuring balanced and impartial election coverage. Finally, such codes may deal with issues relating to advertisements.

The primary goal of a broadcasting code should be to set standards rather than to punish broadcasters for breaches. Sanctions should in the first instance aim at reforming behaviour, and so consist of a warning or requirement to broadcast a message recognising the breach. More serious measures, such as fines or suspensions, should be applied only after repeated and serious breaches, when warnings and milder sanctions have failed to redress the problem.

## Regulation of print media

Self-regulation is the preferred model of regulation for print and Internet-based media, which means that it should be left to the industry to develop and hold itself accountable for ethical media standards. This is often achieved through the establishment of Press Councils that are independent from the State, and open to all print media to join as members. The mandates of Press Councils vary, but they are generally tasked with formulating professional and ethical standards, and with receiving complaints regarding compliance with those standards.

### Licensing and registration requirements

Licensing schemes for the print media - which allow for permission to publish to be refused - is a breach of international guarantees of the right to freedom of expression. The establishment of a publication is clearly an exercise of the right to freedom of expression. A licensing scheme presents an obstacle to this activity, which may range from a minor bureaucratic hurdle to an impassable barrier. Such a scheme is, therefore, an interference with the right to freedom of expression, and must therefore meet the three-part test in order to be justifiable.

Licensing schemes are also problematic because they may easily be abused, for example to prevent opponents of the government from voicing their opinions. This is particularly true if the scheme is administered by a non-independent body and there are no clear criteria for the awarding of licences. Even an independently administered licensing scheme can induce media outlet to practice self-censorship, for fear of losing their licence.

For these reasons, the Human Rights Committee has repeatedly expressed its concerns at licensing requirements for the print media, holding that they constitute a violation of the right to freedom of expression.[6] The similar recommendations were made by special freedom of expression mandate holders in their joint statement.[7]

Distinct from licensing regimes are technical registration schemes, which still exist in some established democracies. A technical registration scheme is a purely administrative requirement for publications to provide basic information about themselves to the authorities, such as the location of their offices, and the names of their owners, with no discretion on the part of the government to refuse registration. The

[6] See, e.g. Concluding Observations of the Committee on the Rights of the Child: Uzbekistan, 7 November 2001, UN Doc. No. CRC/C/15/Add.167, para. 37.

[7] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on the Regulation of the Media, 18 December 2003.

purpose of a registration scheme is usually to ensure that individuals who intend to sue a publication for defamation can easily determine where to send their complaint.

Registration schemes ostensibly pose less of a threat to freedom of expression than licensing schemes, because they do not allow the government to deny registration on the right to publish. Nevertheless, they can and have been abused, leading international bodies to express reservations about their legality.[8]

To summarize, licensing schemes for the print media are inconsistent with international law because they fail to meet the 'necessity' test. Registration schemes are not illegitimate *per se*, but it is clear from the authorities cited above that any such scheme must minimally restrict freedom of expression and consist of a simple, automatic procedure. Finally, it is important to note that this terminological distinction between 'licensing' and 'registration' should not be confused.

## Digital media

The internet may be seen as occupying an intermediate position between the print media and broadcasting. In common with broadcasting, every operator on the internet requires the use of one or more unique addresses, similar to the frequencies of a radio or television station. But in common with the print media, there are no limits to the numbers of internet websites that can exist alongside each other. The supply of potential website addresses is infinite, while the number of potential broadcasting frequencies is not.

Hence, ARTICLE 19 believes that given the unlimited availability of addresses, there is no justification for requirement of licensing of the digital media. The special rapporteurs on freedom of expression confirmed this position in their 2005 Joint Declaration where they stated that

> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules

[8] See, e.g. HR Committee, *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, UN Doc. CCPR/ C/68/D/780/1997, para 8.1; the 2003 Joint Declaration, *op.cit.*; or the European Court of Human Rights, *Gaweda v. Poland*, App. No. 26229/95, 14 March 2002, para 43.

> of general application which apply without distinction to any kind of commercial operation.[9]

They also stated that the body responsible for allocating website addresses should be independent of government and other interests.[10]

Additionally, in their 2011 Joint Declaration on Freedom of Expression and the Internet, the special mandate holders stated that measures such as imposing registration and other requirements on service providers are not legitimate, unless such measures conform to the three-part test on lawful restrictions of freedom of expression under international law.[11] At most, a requirement to declare a business, rather than a requirement of registration, may be imposed.

## Regulation of media workers

It is well-established under international human rights law that licensing schemes for individuals who wish to work in the media, in particular journalists, are never an acceptable restriction on freedom of expression. Individuals should not be required to obtain official permission for media activities.

The ostensible purpose of licensing schemes is usually to ensure that the task of informing the public is reserved for competent persons of high moral integrity. In practice, however, the power to distribute licences can become a political tool, used to prevent critical or independent journalists from publishing. For this reason, and simply because the right to express oneself through the mass media belongs to everyone, irrespective of qualifications or moral standing, licensing schemes for media workers are considered to be in breach of the right to freedom of expression.

An important source of legal authority on the subject of licensing schemes for journalists is an opinion of the Inter-American Court of Human Rights rendered in 1985 in which the Court recognised that licensing was a restriction on freedom of

[9] The Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on the Internet, 21 December 2005.

[10] *Ibid.*

[11] The Joint declaration by the Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, On Freedom of expression and the Internet, 1 June 2011.

expression.[12] Other human rights bodies,[13] courts, national as well as international, have taken a similar point of view;[14] as well as special mandates for protecting freedom of expression.[15]

It is thus clear that, under international law, licensing and even registration of media workers is prohibited. In practice, licensing schemes for journalists are virtually unheard of in established democracies.

In this respect, it should be noted that international human rights bodies highlighted that journalism is a function shared by many different actors, including bloggers. Hence, the mandatory registration or licensing of bloggers is also incompatible with the right to freedom of expression.

On the other hand, in most established democracies, journalists have formed voluntary associations that issue press cards to their members. Possession of a press card is not mandatory to be able to practice journalism, but public authorities may give cardholders such as preferential access to the hearings of government bodies or courts, or permission to work in closed off areas, e.g. crime scenes. Individuals may *wish* to join such an organisation on a *voluntary basis*, or found new groups amongst themselves.

## Other restrictions

Other legal measures that prescribe the working methods of the media or media professionals are equally problematic. These include entry requirements on the exercise of professions in the media, such as a requirement to have attained a certain age, to possess particular academic qualifications, or to have a clean criminal record.

Such requirements are inconsistent with international law for the same reasons: they fail to recognise that the right to express oneself through the mass media belongs to everyone not only persons who the government considers particularly qualified or

[12] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5.

[13] General Comment 34, *op.cit.*, para 44.

[14] See, e.g. the High Court of Zambia, *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.

[15] The 2003 Joint Declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression on regulation of the media, restrictions on journalists and investigating corruption, adopted 18 April 2003.

suitable. They also deprive the general public of the right to receive information and ideas from diverse sources of their own choice.

ARTICLE 19 also notes that in most established democracies, there are ***no content restrictions of any kind under media laws***.[16] Instead, content issues should be regulated through laws of general application, such as criminal and civil codes. As the special freedom of expression mandated holders explained in the 2003 Joint Declaration:

> Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.[17]

Further, ARTICLE 19 is categorically opposed to legal measures that prescribe the working methods of the media. The media should be free to organise its internal working arrangements, and there should not be any limits or requirements, for example relating to the number of copies. Furthermore, goals of publications should not be prescribed as this may be open to abuse on the grounds that a publication did not have these goals.

[16] A good example to refer to is Sweden's Freedom of the Press Act (article 2), which prohibits censorship as follows:
*1.* No written matter may be scrutinized prior to printing, nor may it be permitted to prohibit the printing thereof.
*2.* Nor may it be permitted for a public authority or other public body to take any action not authorized under this Act to prevent the printing or publication of written matter, or its dissemination among the general public, on grounds of its content.

[17] The 2003 Joint Declaration, *op. cit.*

# State aid to the media

Financial support provided by public authorities to private media companies can contribute to maintaining or reinforcing pluralism and diversity in the media landscape. However, it also raises the concern that the government may be trying to gain control over media outlets.

As noted earlier, under human rights international law, States have a duty to create an enabling legal and regulatory environment that allows the development of a free, diverse and pluralistic media landscape where all media operators can fulfil their role in a democracy. In General Comment No. 34, the Human Rights Committed stated that public support to private media must be used to support the development of a pluralistic media, not to gain control over media outlets.[18] Furthermore,

> Care must be taken to ensure that systems of government subsidy to media outlets and the placing of government advertisement are not employed to the effect of impeding freedom of expression.

Similarly, in their 2002 Joint declaration, the special freedom of expression mandates insisted that

> Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting.[19]

Typically, state aid to media involves either indirect public support or direct public funding:

- ***Indirect public support*** usually includes preferential tax rates, postal and rail tariffs for distribution, and favourable telecommunication tariffs. The entire sector benefits from indirect subsidies, which often amount to large sums;

- ***Direct funding*** involves a loan or cash transfer by the State. It will support only qualified newspapers, usually papers with fewer subscriptions and lower advertising

[18] General Comment No. 34, *op.cit.*, para 40.

[19] The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration on freedom of expression and the administration of justice, commercialisation of freedom of expression and criminal defamation, December 2002; available at http://bit.ly/2w1I9Bm.

revenue, newspapers in a minority language, or with a certain amount of original editorial content.

In this section, ARTICLE 19 focuses on the best practices as for the direct funding type of state aid to the media.

## Recommendations on state aid to media

Subsidy systems are common and it is considered that many local and regional newspapers that qualify for subsidies would not survive without them. What is important, however, is to ensure that there is a fair and equal process for awarding these subsidies.

ARTICLE 19 recommends that state schemes for support to the media should be ideally administered by an independent semi-independent authority, located within or outside the state apparatus.[20]

Importantly, state aid should never serve to control, influence or otherwise restrict the editorial independence and freedom of any media actor organisation. We suggest that public support should necessarily pursue at least one legitimate objective of general interest of media policy, such as:

- the protection and promotion of pluralism and diversity, including cultural and linguistic diversity;
- support to accurate and reliable journalism;
- the respect, development and promotion of professional ethics, including the elaboration of internal charters of ethics, the creation of committees on ethics inside media companies, and participation in self-regulation mechanisms;
- the promotion of gender equality in the media;
- the promotion of equality, including a fair representation of minorities and vulnerable groups in the media;

[20] See ARICLE 19, Freedom of Expression and State Aid to Media (update), September 2017, or R, Kleis Nielsen &, G. Linnebank, Public Support for the Media: A Six-Country Overview of Direct and Indirect Subsidies, Reuters Institute for the Study of Journalism, 2011.

- the development of innovative journalistic practices and support to lifelong education for media professionals and other social communicators;

- the adaptation to digital technologies, including online distribution; and

- support for media literacy.

Therefore, ARTICLE 19 recommends that all forms of public support to private media comply with the following conditions:

- There needs to be a ***clear legal basis*** for every form of state/public support to the media;

- The relevant legislation must make clear that public support ***pursues one or various objectives of general interest***, such as, but not limited to, those listed above (i.e. promotion of pluralism and diversity or media literacy);

- The legislation must ***identify all applicable criteria*** that will preside over the allocation of public support, as well as clear information and guidelines on the applicable procedures and deadlines.

- ***Time limits*** on the duration of state aids should be clearly set out. These limits should be sufficient to provide beneficiaries with reasonable foreseeability of resources and plan their businesses accordingly, while also allowing for a periodical verification that public aid serves its purposes;

- The legislation must explicitly state that the allocation of public support will take place on the basis of ***fair and neutral criteria***, that it will never be used to promote official figures, that it will be non-discriminatory and will never be based on political content or viewpoints expressed by media actors;

- The legislation should also include a formal statement that ***public support shall never be used to undermine the editorial independence of media actors***, as well as provide for sanctions for public officials who would violate this principle;

- The legislation must provide for an ***independent body*** that is responsible for the allocation and oversight of direct subsidies to individual media actors;

- Individual decisions on the allocation of public subsidies must be ***subject to judicial review*** if a complaint is received;

– There must be ***transparency*** on the definition of public policy on state support to private media as well as on the allocation of public funds to media actors. Media stakeholders and civil society organisations need to be consulted during the elaboration of public policy on state aid. Public authorities, including independent bodies in charge of allocating direct subsidies, must publish annual reports on the use of public funds to support media actors;

– Media outlets that receive state subsidies should be ***audited*** annually and make their audited accounts public.

## Advertising by public bodies

Advertising in the media is not a form of state aid to the media but an important source of income for the media. States, in particular those which maintain large, state-owned corporations, often spend considerable sums on advertising through the media. Because many media outlets depend for a large share of their income on advertising, the state's decision on where to spend its money can have a significant impact on the viability of a publication or broadcasting network. Inescapably, there is a risk of political considerations coming into play in this decision.

Human rights bodies therefore expressed their concern over discriminatory advertising policies and a number of international instruments in the area of freedom of expression explicitly oblige governments to avoid or even prohibit discrimination on the basis of political orientation in public bodies' decisions where to advertise.[21]

While state advertising is closely related to state subsidies, it is a distinct issue and is not dealt with in this Guide.

[21] See, e.g. HR Committee, Concluding Observations: Lesotho, 8 April 1999, UN Doc. No. CCPR/C/79/Add.106, para 23; or the African Declaration of Principles on Freedom of Expression, adopted at the 32nd Session, October 2002, Principle XIV. For more recommendations on public advertising, see Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Principles on the Regulation of Government Advertising and Freedom of Expression, 2012.

**DEFENDING FREEDOM OF EXPRESSION AND INFORMATION**

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