



Strasbourg, 3 March 2021

CDL-REF(2021)024

Opinion No. 1008 / 2020

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

GEORGIA

EXPLANATORY REPORT*

ON DRAFT LAW OF GEORGIA ON

**“INTRODUCING AMENDMENTS TO THE LAW OF GEORGIA
ON ELECTRONIC COMMUNICATIONS”**

* Translation provided by the authorities of Georgia

Explanatory report

On Draft Law of Georgia on „Introducing amendments to the law of Georgia on Electronic Communications“

a) General information about the draft law:

a.a) Justification

a.a.a) Problem that the draft law aims to address:

The existing legislation does not provide the Georgian National Communications Commission with sufficient powers to effectively eliminate violations committed by authorized/licensed persons in the field of electronic communications. In particular, the Commission may impose a warning, fines on persons that committed a violation and if these mechanisms are insufficient – suspend authorization/cancel the license. In individual cases, warnings and fines are ineffective. If licensed/authorized persons fail to comply with the GNCC decision, the only mechanism is to suspend authorization/cancel the license. However, in individual cases, suspension of authorization/cancelling of a license may pose a threat to important interests of a licensed/authorized person, which leaves the commission without an effective mechanism for execution. This eventually harms the field of electronic communications. In addition, pursuant to Article 105 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, regulatory authorities for electronic communication services should be sufficiently empowered to regulate the sector effectively.

It is the aim of the draft law to fill the gap in the Law of Georgia on Electronic Communications (hereinafter, the law). In particular, the Law does not provide for effective mechanisms for execution of decisions made by the independent regulatory authority for electronic communications services – the Georgian National Communications Commission (hereinafter, the Commission). Article 45 of the Law provides for a warning, fines or suspension of authorization/cancelling of a license for failure to comply with the Commission decision. Even though these measures of responsibility (warning, fine) prescribed by the law, to a certain extent, have a function of ensuring execution, some of them are ineffective and insufficient. Additionally, suspension of authorization/cancelling of a license, as a type of responsibility, is often unfit as an execution mechanism, since application of such measure leads to suspension of activities of the authorized person, while in majority of cases, it is not the goal of the Commission decisions to suspend activities of authorized/licensed persons since thousands of natural and legal persons (including public authorities) are recipients of services of such authorized/licensed persons.

In practice, there have been cases when execution of the Commission decision was related to direct actions of the person concerned and only that person can ensure execution of the decision while all other means of execution are ineffective. For example, in cases of sale of the authorized/licensed person's direct or indirect shares/stocks by that person without prior consent of the Commission (which is prohibited and considered as null and void pursuant to Articles 25-27 of the Law of Georgia on Electronic Communications), the Commission may require the authorized/licensed person to demand the person to reversal of the transaction carried out without prior consent of the Commission and restore the initial situation. However, execution of such decisions (especially when it involves indirect shares/stocks of an authorized/licensed person) depends exclusively on the shareholder and the Commission does not have any effective leverage, legal mechanism to ensure execution of such decisions. Due to these circumstances, it is expedient to introduce amendments in the Law of Georgia on Electronic Communications and create adequate mechanisms, to empower the Commission with effective and adequate mechanisms to ensure executions of its own decisions.

a.a.b) The necessity of adopting the law to address the existing problem:

The proposed mechanism concerns granting new powers to the Commission as an independent regulatory authority. Powers of the Commission in the field of electronic communications, the procedure of holding the authorized/licensed persons responsible is prescribed by the Law of Georgia on Electronic Communications. It is therefore expedient to introduce relevant amendments in the Law of Georgia on Electronic Communications.

a.b) Expected consequences of the draft law:

As a result of adoption of the draft law, the Commission will be provided with special, additional powers through which the Commission can ensure executions of its own decisions and regulation of the field of electronic communications will become more effective.

a.c) Main idea of the draft law:

The draft law introduces amendments in the Law of Georgia on Electronic Communications by inserting Article 46¹ in the Law, entitled “Special measures for execution of the Commission decisions.”

According to the draft law, if fines imposed by the Commission on the authorized/licensed person, pursuant to Article 45 of the Law of Georgia on Electronic Communications fail to ensure execution of the Commission decision and if delayed execution and/or suspension of authorization/cancelling of the license may harm the state or public security, economic interest of the country or competitive environment in the market, the Commission is authorized to appoint a special manager who will ensure execution of the Commission decision. Additionally, use of such powers by the Commission is limited by such high standards as existence of a threat to state or public security, economic interest of the country or competitive environment in the market.

The Commission will appoint a special manager under its own individual legal administrative act – a decision adopted by the Commission collegially, similar to any other decision of the Commission, which will ensure that the decision is based on valid reasons and complies with high standards. The special manager of the Commission will be appointed for a fixed term, which can be extended under the Commission decision. However, in any case, the entire term may not exceed 2 years. The Commission defines the term by taking into account contents of the decision subject to execution by the special manager.

The decision to appoint a special manager will become effective immediately upon making of the decision by the Commission because a special manager is appointed only in cases when failure to enforce the decision poses a threat to the state or public security, economic interest of the country and competitive environment in the market. The decision will be published on the official website of the Commission (similar to other decisions of the Commission), as well as in the Legislative Herald of Georgia and will be immediately sent to the National Agency of Public Registry and the authorized/licensed person. These measures will ensure that all stakeholders are informed about appointment of a special manager in the company because after appointment of the special manager, powers of managerial bodies of the company will be limited and these functions will be transferred to the special manager.

Pursuant to the proposed amendments, a special manager can be any person without conflict of interest with the authorized/licensed person. Pursuant to the amendments, a person should be deemed to have a conflict of interest with an authorised person/licence holder if a person is an employee of an authorised person/licence holder or a legal entity related to it, direct or indirect possessor of holdings/shares, the member of a supervisory board or the board of directors, or there is an interdependence between the person and one of the persons mentioned in this paragraph. For the purposes of this paragraph, an interdependence between persons exists if these persons are interdependent persons determined by Article 19 of the Tax Code of Georgia. The special manager is also required to have certain professional qualifications – in particular, a

special manager may be a natural person with higher education in one of the following areas: finances, economy, business administration, legal or other corresponding education, which is needed for fulfilment of the special manager's powers.

Remuneration of the special manager and other expenses related to fulfilment of his/her powers will be allocated from the budget of the authorized/licensed person.

Under its decision, the Commission will define powers and responsibilities of the special manager. Within these powers, a special manager will be able to exercise full control over the authorized/licensed person, and entire powers of all bodies of the authorized/licensed person (including, director/board of directors, supervisory board, assembly of partners/shareholders) will be transferred to the special manager. The special manager will be required to act pursuant to the Georgian legislation and instructions and guidelines issued by the Commission. The special manager will be accountable before the Commission only. The special manager will submit his/her activity report to the Commission, based on the procedure and form and within the timeframe established by the Commission, on a regular basis and/or upon request.

Performance of any action on behalf of the authorized/licensed person, without consent of the special manager and/or Commission will be prohibited after appointment of the special manager.

Any decisions made/actions performed by the authorized/licensed person, by the special manager or in the name of authorized/licensed person, following appointment of the special manager of the commission, will be declared as null and void if they have not been made/performed within the scope of powers delegated by the Commission.

For execution of the Commission decision, the special manager will be authorized to:

- a) appoint and/or dismiss the director(s) of the authorized person/licence holder, the member(s) of the supervisory board (if any);
- b) file a lawsuit in court against an action or transaction carried out by an authorised person/license holder within one year before the appointment of a special manager and request their annulment if the said action or transaction has harmed or harms the economic interests of the country, the legitimate interests of authorised persons/licence holders in the field of electronic communications, users, or the competitive environment in the market;
- c) suspend or limit distribution of profits, payment of dividends or bonuses, increase of salaries by the authorized/licensed person;
- d) perform other functions of the authorized/licensed person body of governance (with the exception of managing stocks/shares of the authorized/licensed person, which will be carried out by the Commission itself, if needed);

Additionally, the Commission will be authorized to define under its decision that performance of individual or all powers of the special manager requires prior written consent of the Commission. The Commission will also be authorized to dismiss the special manager any time and on any grounds (including without any grounds) from office.

According to the draft law, in the case of the execution of the decision of the Commission and submission of information/documents on the execution to the Commission, a special manager should be dismissed by the decision of the Commission and the application of the special measures of the execution of the decision of the Commission against the authorised person/licence holder provided for by this article should be terminated.

When it comes to alienation of direct or indirect shares/stocks of the authorized/licensed person, from theoretical point of view, it is possible that appointment of the special manager or his actions will not ensure execution of the Commission decision. In such cases, the draft law provides for

the following: the Commission will alienate shares/stocks of the authorized/licensed person through an auction, if non-execution of the Commission decision or suspension/annulment of the license of the authorized/licensed person may harm state or public security, economic interests of the country or the competitive environment in the market.

The need to introduce such mechanism of insurance is caused by the importance of the subject of regulation itself. In particular, the regulation offered by the draft law concerns protection of critical infrastructure, functioning of which is extremely important both for the state and for the society. We must also note the reform in the field of protection of critical infrastructure, which is implemented by the state. At this stage, the reform focuses on the following two areas: 1. Creating a single legislative frame in the field of protection of critical infrastructure and elaborating national strategy and corresponding action plan; 2. Identifying critical infrastructure, introducing appropriate safety standards and regulating investment activities related to critical infrastructure.

Following implementation of corresponding reform, a national list of critical infrastructures will be created and it is highly likely that subjects of individual critical information system will be included on the list. This indicates once more importance of the area covered by the scope of the draft law.

In consideration of sensitive of the subject of regulation, the regulation proposed by the draft law, which entails the power of decision making by the Commission about sale of stocks/shares of the authorized/licensed person, serves the purpose of ensuring national safety interests. In addition, to a certain extent, it is introduced in the legislation as an extreme measure (ultima ratio) and in consideration of contemporary challenges of security, it is a highly necessary mechanism for accomplishing legitimate goals.

To conduct the auction, the commission will issue a decision to create a special commission and establish rules and terms of conducting an action. In addition, according to the draft law, the auction should be conducted in a transparent, impartial and non-discriminatory manner and within this process.

The sale price should be increased as much as possible and competitive environment should be maintained on the market. The Commission will be authorized to prohibit a person from participating in the auction or cancel the auction results, if purchasing the shares/stocks of the authorized/licensed person by the winner of the auction may pose a threat to the state or public security, economic interest of the country or competitive environment in the market.

The money received from alienation of stocks/shares of the authorized/licensed person will be transferred to the stock/share owners in proportion to their shares, while if a stock/share owner refused to receive the money, it will be deposited on a notary's account. Any expenses related to depositing of the funds will be paid from the deposited amount.

According to the draft law, within special measures for execution of the Commission decisions, the decision can be appealed in court within the period of 1 month.

Notably, such mechanism is not a novel notion for acts that regulate economic activities subject to regulation. In particular, both the Law of Georgia on Licenses and Permits, as well as the Law of Georgia on Activities of Commercial Banks envisage the institution of a special manager and special measures with different variations and functions. In light of this, it is quite logical and as noted, vitally important for the field of electronic communications, as economic activities subject to regulation, to have such regulations, especially considering the fact that persons authorized in the field of electronic communications often possess critical infrastructure of significant importance for security and economic development of the country. Such critical infrastructure is often subject to very strict regulations in different countries (e.g. the U.S., Canada, Israel, Spain), including in terms of owners (e.g. in these countries a citizen of a foreign country may not be the owner of electronic communications infrastructure).

a.d) Connection of the draft law to the governmental program and the action plan in corresponding area, if any (if the draft is initiated by the Government of Georgia) – there is none.

a.e) The principle for choosing the date of enactment of the draft law, and if the draft law is retroactive – corresponding justification:

The draft law will be enacted upon promulgation, since based on the legislative gap that exists in the practice, it is extremely important to provide the Commission with the powers provided for by the draft law as soon as possible, in order for the Commission to be able to execute its decisions without any obstacles.

a.f) The reason for examining the draft law in an expedited manner and corresponding justification (if the initiator is requested expedited examination of the draft law):

The need to examine the draft law in an expedited manner has been caused by the existing gap in the legislation, which hampers effective functioning of the Commission due to the lack of legal leverage for execution of the Commission decisions. Failure to execute decision of the Commission, the regulator of the very important field of electronic communications, may cause an irreparable harm for state and public security, economic interest of the country and regional competitiveness of Georgia in the market. Therefore, without granting the powers provided for by the draft law to the Commission in a timely manner, state and public interests, economic interest of the country and its regional competitiveness may suffer. It is therefore important to fast track the proposed draft.

b) Evaluation of financial implications of the draft in short-term perspective (the year of enactment of the draft law and following three years).

b.a) Source of funding necessary expenses for adoption of the draft law:

Adoption of the draft law does not require allocation of additional funds from the state budget, since all measures provided for by the draft law will be financed by the authorized/licensed persons that will be subjected to the special measures. As to court fees, these will be paid from the finances allocated to common courts from the State budget.

b.b) Impact of the draft law on the budget revenues:

Adoption of the draft law may positively affect State budget revenues. In particular, as a result of the draft law, the number of authorized/licensed persons that apply to court may be increased. As a result, the amount of state duty paid [fee for court services] will be increased. Therefore, adoption of the draft law may increase the budget revenues. The amount will depend on the number of lawsuits.

b.c) Impact of the draft law on the budget expenditures:

The draft law does not affect expenditure part of the state and/or municipal budget. In particular, as a result of adoption of the draft law, expenses may be increased for authorized/licensed persons that will be subjected to the special measures (e.g. payment of the salary of the special manager and expenses associated with exercise of powers by the special manager). However, these persons are legal entities of public law and therefore, this will not increase budget expenditures.

According to the draft law, a special auction commission can be set up under the Commission decision, which will conduct an action. However, the draft law does not envisage any compensation for members of the auction commission.

Expenses associated with holding an auction (e.g. publishing information, holding e-auction, if needed) will be paid from the finances received as a result of selling of the authorized/licensed person's shares/stocks. Therefore, this too will not increase the budget expenditures. Even though the draft law may increase number of lawsuits filed in court, it will not require any additional human, financial or other resources for courts (because it concerns execution mechanism, which is an extreme measure, implemented after other mechanisms available to the Commission – like fine – cannot ensure execution of the Commission decisions).

Other possible expenditures provided for by the draft law (e.g. special manager salary, expenses related to holding of an auction) will be paid from the budget of authorized/licensed persons (who represent legal entities of public law) and the Commission will not have to pay for any additional expenses from its budget.

b.d) New financial obligations of the state, indicating direct financial obligations to be received by an agency that exists in the state or within its system, as a result of the draft law (internal or external obligations);

Adoption of the draft law does not entail any new financial obligations of the state.

b.e) Anticipated financial implications of the draft for individuals that it applies to, indicating nature and direction of implications for physical and legal persons, that may be subjected to direct influence of the actions determined by the draft;

It is expected that actions provided for by the draft law will have the following direct effect:

As a result of adoption of the draft law, additional expenses related to implementation of special measures in connection to execution of the Commission decisions (including special manager salary and other expenses related to fulfilment of the special manager's functions) for licensed/authorized persons that will be subjected to the special measures. In addition, the draft law does not specify and concrete/fixed amounts in that regard (e.g. it does not specify the special manager's salary but rather, it will be defined by the Commission on a case-by-case basis).

The draft law also provides for certain powers of the special manager, including suspension or restriction of distribution of profits, the payment of dividends and bonuses to the authorized/licensed person, appointment and dismissal of director(s) of the authorized/licensed person. Exercise of such powers may lead to additional financial implications for persons involved (e.g. a partner/shareholder may not be able to receive dividends for a certain period of time, an employee of licensed/authorized person may not be able to receive a bonus, a dismissed director may not be able to receive salary, a newly appointed director may not be able to receive remuneration).

According to the draft law, if necessary, the Commission may sell stocks/shares of the authorized/licensed person in an auction. The auction will be held by a special auction commission created by the Commission. The draft law does not specify any compensation for members of the auction commission because it is assumed that the commission should be composed of the Commission employees, while the auction expenses will be paid from the money received as a result of selling of shares/stocks (auction-related expenses depend on the type of auction (electronic, non-electronic), duration, etc., which are defined under the Commission decision on a case-by-case basis).

According to the draft law, money received from selling of stocks/shares should be transferred to the share/stock holder, however if a stock/share owner refused to receive the money, it will be deposited on a notary's account. Any expenses related to depositing of the funds will be paid from the deposited amount.

b.f) Amount of taxes, fees or other types of payment (monetary payment) determined by the law in the budget and the principle for determining the amount:

The draft law does not determine any taxes, fees or other types of payments.

c) Relationship of the draft law with international legal standards.

c.a) Relationship of the draft law with the EU law:

The draft law is not in conflict with the EU law.

c.b) Relationships of the draft law with Georgia's commitments related to its membership of international organizations:

The draft law is not in conflict with Georgia's commitments related to its membership of international organizations.

c.c) Relationship of the draft law with bilateral and multilateral agreements and treaties of Georgia, as well as if there are any agreements/treaties that preparation of the draft law is related to – relevant article and/or provision:

The draft law is not in conflict with Georgia's bilateral and multilateral agreements and treaties. Additionally, the draft law is not related to any treaty/agreement.

c.d) EU's legal act, if any, that Georgia has an obligation to harmonize with, based on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, and other multilateral and bilateral agreements of Georgia with the EU, related to the draft law: there are none.

d) Consultations received during preparation of the draft law.

d.a) State, non-state and/or international organizations/actors, experts who have participated within the elaboration of the draft law, if applicable – there are none.

d.b) The assessment by participatory organizations (entities) and/or experts regarding the draft law, if applicable – there is none.

d.c) Experience of other countries in implementation of laws similar to the draft, overview of the experience that has been used as an example during preparation of the draft, if any – no such overview has been prepared.

e) Author of the draft:

The Administration of the Government of Georgia and the Georgian National Communications Commission.

f) Initiator of the draft:

The Government of Georgia.