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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

DRAFT JOINT OPINION

OF THE VENICE COMMISSION

AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE RECENT AMENDMENTS TO THE LAW ON ELECTRONIC

COMMUNICATIONS AND THE LAW ON BROADCASTING

on the basis of comments by

Mr Michael Frendo (Member, Malta)
Mr Christoph Grabenwarter (Member, Austria)
Ms Kateřina Šimáčková (Substitute Member, Czech Republic)
Ms Krisztina Rozgonyi (DGI Expert, Information Society Department)

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Contents

I. Introduction

1. By letter of 17 November 2020, the Venice Commission received a request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe for an opinion on the "recent amendments to the Law on Electronic Communications and the Law on Broadcasting in Georgia".

2. Mr M. Frendo (Malta), Mr C. Grabenwarter (Austria), Ms K. Šimáčková (Czech Republic) and Ms K. Rozgonyi (DGI expert) acted as rapporteurs for this opinion.

3. The rapporteurs regret that a visit to Tbilisi was not possible due to the COVID-19 crisis. Instead, the rapporteurs, assisted by Ms Silvia Grundmann, Head of Division at the Secretariat and Ms Martina Silvestri, Administrator held separate video conferences in February 2021, exchanging with representatives of civil society organisations, business community, the EU Commission, the Ministry of Economic Affairs and the Georgian National Communications Commission, as well as with majority and opposition in Parliament. The Venice Commission is grateful to the authorities and to the Council of Europe Office in Tbilisi for the support given in organising the virtual meetings.

4. This opinion was prepared in reliance on the English translation of the law, notably its Articles 46 and 11 provided by the authorities of Georgia through their website, the Legislative Herald of Georgia (https://matsne.gov.ge). The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs, the results of the virtual meetings held and written submissions from stakeholders. The present opinion was examined by the Commission members through a written procedure replacing the sub-commission meetings. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its xxxx online Plenary Session (xxx 2021).

II. Background

A. Amendments to the Law of Georgia on Electronic Communications in July 2020

6. On 17 July 2020, the Parliament of Georgia amended[1] the Law of Georgia on Electronic Communications[2] by inserting two new provisions: Article 46 - 'Special measures for the execution of the decision of the Commission' (hereinafter: Art. 46) and a new paragraph to Article 11 – 'Main goals and functions of the Commission in the field of electronic communications' (hereinafter: new Art. 11). The Law on Electronic Communications is of utmost importance to the fundamental conditions of communication in Georgia, since it lays down "the legal and economic framework for activities carried out through electronic communication networks and associated facilities, the principles for creating and regulating a competitive environment in this field, determines the functions of the national regulatory authority which is the Georgian National Communications Commission (GNCC), and the rights and obligations of natural and legal persons in the process of possessing or using electronic communication networks and facilities, or when providing services via such networks and facilities".[3]

[1] Law of Georgia No 7065 of 17 July 2020, https://matsne.gov.ge.
[2] Law of Georgia No 1591 of 20 November 2013, https://matsne.gov.ge.
[3] Article 1 – Scope of the Law of Georgia on Electronic Communications, https://matsne.gov.ge.

7. The GNCC is the main regulatory authority in Georgia, overseeing both the field of electronic communications and the field of broadcasting as a so-called 'converged regulator', having jurisdiction over electronic communication operators providing internet services and broadcasters alike. The new Article 46 significantly altered its regulatory power, empowering it to appoint a special manager to electronic communication providers in Georgia in order to remedy certain unlawful acts conducted by such operators.

8. The new Article 11 stipulates the enforceability of legal acts by the GNCC including decisions under Art. 46. Decisions taken under Art. 46 will have to be executed with immediate effect. Once an appeal is filed in the court, only the court can decide about the suspension of the execution of the decision upon a separate motion demanding such a suspension.

9. As to the Law on Broadcasting in Georgia, it had been proposed to change Article 8 – Legal acts of the Commission, Nr.7 which reads "7. Legal acts of the Commission may be appealed to a court as determined by legislation." with the following provision: "The legal act of the Commission may be appealed in court in accordance with the procedure established by the legislation of Georgia. Acceptance of the claim by the court shall not lead to the suspension of the legal act of the Commission, unless the court decides otherwise." However, no change to the Broadcasting Law took place after concerns expressed by industry representatives and civil society. Thus, decisions of the GNCC taken under the Law on Broadcasting enjoy no immediate effect if an appeal is submitted as there is a general suspensive effect under Georgian administrative law, while in the Law on Electronic Communications Article 11 introduces an exception for inter alia decisions under Article 46.

B. First application of the new law in October 2020

10. A first decision under new Art. 46 was taken in October 2020 in the case of Caucasus Online, one of the leading communications companies in Georgia. The GNCC appointed a special manager to reverse the 2019 sale of the company's 49% shares to Azerbaijan's NEQSOL Holding. The GNCC deemed this business transaction to be illegal and issued a decision on 1 October 2020 under Art. 46 appointing a special manager. This decision was based on the failure to notify the said business transaction to the GNCC for approval as mandatory under Art. 26 Law of Georgia on Electronic Communications, and the non-reversal of the transaction despite having been fined several times. In its detailed reasoning,[4] the GNCC invoked the need to preserve the competitiveness of the telecommunications market and thus not to revoke the company's authorisation to operate in order not to deprive more than 2.5 million users from access to the internet. Further reasons given were the need to secure critical infrastructure as Caucasus Online possesses the only main fibre optic Internet cable connecting Georgia under the Black Sea to Europe, providing an Internet connection also to Armenia and Azerbaijan and national security issues related to it.[5]

11. The owner of the parent company, NEQSOL Holding, turned to the International Centre for Settlement of Investment Disputes (ICSID) belonging to the World Bank Group. On 30 October 2020, his request for arbitration proceedings was registered. The tribunal has been set up and proceedings are currently pending.[6]

12. During the virtual meeting, the Georgian authorities informed the delegation that the special manager so far has not notified the business transaction nor has she been able to reverse it as the shares are held by a foreign company residing outside the scope of Georgian jurisdiction.

[4] Decision No. 20-18/747 of 1 October 2020, CDL-REF(2021)025.
[5] Decision No. 20-18/747 of 1 October 2020, CDL-REF(2021)025.
[6] Nasib Hasanov v. Georgia (ICSID Case No. ARB/20/44), https://icsid.worldbank.org/cases/pending.

13. Since the Republic of Georgia is a signatory to the European Convention on Human Rights (ECHR) and a participating State of the Council of Europe, it is bound by the various standards and instruments set forth by the European Court of Human Rights (ECtHR) and the Council of Europe (CoE).

14. As the proposed change to the Broadcasting Law did not take place, the scope of this opinion will be the amendments to the Law on Electronic Communications with a focus on the new Art. 46 – appointment of a special manager and Art. 11 as amended to provide for immediate enforceability of an administrative decision taken under Art. 46.

15. The new provisions to the Law on Electronic Communications will be benchmarked against the right to property (Art.1 Prot.1 ECHR) and freedom of expression/media freedom (Art. 10 ECHR) being sufficiently respected and safeguarded in view of Art. 6 ECHR.

III. Analysis

A. Art. 46 Law of Georgia on Electronic Communications

16. New Article 46 – Special measures for the execution of the decision of the Commission reads as follows:

> *1. The Commission shall be authorised to appoint a special manager in order to enforce the decision made by the Commission due to the violation of the requirement of Article 26 and/or Article 27 of this Law by an authorised person/license holder. A special manager may be appointed only if a fine provided for in Article 45(3) of this Law has already been applied to the authorised person/license holder at least once for the said violation and the execution of the decision of the Commission was not ensured, but the suspension of the authorisation/cancellation of licence may harm the economic interest of the country, legal interests of authorised persons/licence holders in the field of the electronic communication, and the competition on the market.*
> *2. The special manager shall be appointed by the decision of the Commission.*
> *3. The decision of the Commission on the appointment of a special manager shall enter into force upon its adoption at the meeting of the Commission.*
> *4. The decision of the Commission on the appointment of a special manager shall be immediately published on the website of the Legal Entity under Public Law called the Legislative Herald of Georgia and shall be sent to the Legal Entity under Public Law called the National Agency of Public Registry, and to the authorised person/licence holder. Upon the notification received, and on the basis of the request of a special manager the Legal Entity under Public Law called the National Agency of Public Registry shall update the data on the authorised person/licence holder in the register of entrepreneurs and non-entrepreneurial (non-commercial) legal entities, in which special manager shall be indicated.*
> *5. A special manager shall be appointed before the execution of the decision of the Commission.*
> *6. A special manager may be any natural person who does not have a conflict of interest with an authorised person/licence holder and meets the criteria provided for by this article.*
> *7. For the purposes of this article, a person shall 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.*

8. A special manager may be a person with a higher education in finances, economics or business administration, or with a legal education, or other relevant education required to carry out the powers granted to him/her, and needed to perform the functions assigned to him/her.

9. The remuneration of a special manager shall be determined by the decision of the Commission on the appointment of a special manager.

10. All expenses related to the remuneration of a special manager, the implementation of the powers granted to him/her by a special manager, as well as the expenses related to the performance of the assigned functions, shall be reimbursed from the budget of an authorised person/licence holder.

11. The Commission shall, based on the content of the decision to be executed, determine the powers and responsibilities of a special manager, within which a special manager may control the authorised person/licence holder and transfer the powers of all bodies of the authorised person/licence holder (including those of the board of director(s), the supervisory board, the meeting of partners, or the meeting of shareholders) to a special manager, which are necessary for achieving the goals provided for by paragraph 1 of this article (except for the alienation of the holdings/shares of the authorised person/licence holder).

12. In order to ensure the execution of the decision of the Commission, a special manager shall, within the framework determined by the decision, be authorised to carry out the following actions:

a) appoint and/or dismiss the director(s) of the authorized person/licence holder, the member(s) of the supervisory board (if any);

b) to 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 its avoidance 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 restrict the distribution of profits, the payment of dividends and bonuses to the authorised person/licence holder, the increase of salaries;

d) perform other functions of the managing body of the authorised person/licence holder (except for the alienation of the holdings/shares of the authorised person/licence holder).

13. After the appointment of a special manager, carrying out any action on behalf of an authorised person/licence holder without the consent of a special manager and/or the Commission shall be prohibited.

14. Any decision/action made by a special manager shall be void if this decision/action is not made/taken within the scope of authority granted by the Commission.

15. A special manager shall act within the framework of the instructions and directions issued by the legislation of Georgia and the Commission. A special manager shall be accountable only to the commission. A special manager shall submit a report on his/her activities to the Commission on a regular basis and if requested by the Commission in accordance with the procedure, form and time limit established by the Commission.

16. The Commission shall be authorised to dismiss a special manager at any time on any grounds. In such case, the Commission shall be authorised to reappoint a special manager.

17. The Commission shall be authorised to determine with its decision that exercising of certain or all powers of a special manager shall require the prior written consent of the Commission.

18. 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 shall 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 shall be terminated.

19. Except for the case provided for by paragraph 1 of this article, a special manager may also be appointed if the authorised person/licence holder fails to meet the specific obligations determined by Article 34 and/or Article 35 of this Law for the purpose of the

execution of the decision made by the Commission. A special manager may be appointed only if a fine provided for in Article 45(3) of this Law has already been applied to the authorised person/license holder at least once for the said violation and the execution of the decision of the Commission was not ensured, but the suspension of the authorisation/cancellation of licence may harm the economic interest of the country, legal interests of authorised persons/licence holders in the field of the electronic communication, and the competition on the market. In the case provided for by this paragraph, a special manager shall be appointed and his/her powers shall be determined in accordance with Article 22(14) and (16-20) of the Law of Georgia on Licenses and Permits.
20. A decision made by the Commission in accordance with this article may be appealed in court within 1 month.

1. Requirements of Article 1 of Protocol 1 ECHR

17. Article 46 No.12 gives the GNCC the right to install a special manager with a large scope of powers such as to appoint/dismiss the company's director, members of the supervisory boards, and regular employees, to suspend or restrict the company's rights to distribute profits, dividends, bonuses or make changes to salaries, to file a lawsuit in court against the contracts or deals made a year before her appointment and demand their annulment. In view of such far reaching powers, it is necessary to examine the concept of the special manager against the requirements of Article 1 of Protocol No. 1 to the ECHR, the right to property, which reads

"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

18. According to the European Court of Human Rights (ECtHR), an applicant can allege a violation of Article 1 of Protocol No. 1 only insofar as the impugned decision relates to his or her "possessions", within the meaning of this provision. The wording "peaceful enjoyment of his possessions" and "droit au respect de ses biens" in the authentic language versions of the Protocol express a broad international legal concept of property comprising all "acquired" rights that constitute assets.[7] The right to property is an entitlement to every natural or legal person to the peaceful enjoyment of his possessions. 'Property' is interpreted broadly in this context by the ECtHR and covers a range of economic interests, including tangible or intangible interests, such as shares.[8] Importantly, the ECtHR also reiterates, that corporate bodies fall within the scope of the right, and may invoke Article 1 of Protocol No. 1.[9]

19. According to the ECtHR, Article 1 of Protocol No. 1 contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. These rules are not 'distinct' in the sense of being unconnected: the second and third rules, which are concerned with particular instances of interference with the right to the peaceful enjoyment of property, are to be construed in the light of the principle laid down in the first rule".[10]

[7] ECtHR 26.6.1986, No.8543/79 and others, Van Marle/Netherlands, § 41.
[8] For a presentation of the Court's case-law see European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of property, updated on 31 August 2020, available at https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.
[9] See ECtHR Sporrong and Lonnroth v. Sweden, A52 (1982).
[10] See ECtHR 29.3.2006, No. 36813/97, Scordino/Italy, § 78.

20. The broad entitlements given to the special manager on the basis of Art. 46 Nr. 11 by which a special manager, once appointed, may control electronic communications providers essentially deprive shareholders of electronic communication companies of influence of corporate/business performance. Moreover, the special manager could also act against the shareholders by filing a lawsuit in court against an action or transaction carried out by an authorised person/license holder within one year before his/her appointment based on Art. 46 Nr. 12 b). Also, shareholders might be deprived of the distribution of profits, the payment of dividends and bonuses based on Art. 46 Nr. 12 c). These deprivations are restrictions to the right to property as provided by Article 1 Protocol No. 1 of the ECHR.

21. Article 1 of Protocol No. 1 requires that any interference by a public authority with the peaceful enjoyment of possessions should be lawful.[11] The second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law". The principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable in their application.[12]

22. This right to property can be subject to certain limitations in the public interest and subject to the conditions provided for by law. The state has an appropriate margin of appreciation in implementing social and economic policies that have the effect of interfering with the right to property, in line with the ECtHR's case law.[13] The first criterion to admissible limitations to the right to property by the State is the legality of such actions which have to be prescribed by law and in line with the national legal context.

23. The Venice Commission notes that the Constitution of Georgia in Article 6 on Economic freedom and Article 19, Right to property, affords respective constitutional protection in accordance with the ECHR as illustrated in Article 19(3) of the Constitution which states that expropriation of property is only admissible in cases of pressing social need as directly provided for by law, based on a court decision or in the case of urgent necessity established by the organic law, provided that preliminary, full and fair compensation is paid. Consequently, the Georgian Constitution acknowledges and protects the right to property in a manner equivalent to the protection afforded by Art. 1 Prot. 1, which is the basis of the assessment of the Venice Commission.

a) Legitimate aim of the new Art. 46

24. States enjoy a wide margin of appreciation in determining what is in the public interest, in particular under Article 1 of Protocol No.1 and especially when implementing social and economic policies. It is only the deprivation of possessions which is manifestly without reasonable foundation that does not satisfy the public interest requirements.[14] The ECtHR recognises that, "because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest".[…] It is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property, including deprivation and restitution of property. Here […] the national authorities accordingly enjoy a certain margin of appreciation."[15]

[11] The former King of Greece and Others v. Greece [GC], no. 25701/94, § 79, ECHR 2000-XII, and Latridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II.
[12] Beyeler v. Italy [GC], no. 33202/96, §§ 109-110, ECHR 2000-I.
[13] James v. the United Kingdom, A98 (1986) ECtHR.
[14] ECtHR 28.7.1999 (GC), No. 22774/93, Immobiliare Saffi/Italia, § 49; Jahn v. German, § 91; James and Others v. the United Kingdom, §46; The former King of Greece and Others v. Greece, § 87; Zvolský and Zvolská v. the Czech Republic, § 67.
[15] ECtHR Maria Atanasiu and Others v. Romania, op. cit., §166; See also ECtHR Kopecký v. Slovakia [GC], op. cit. §37.

25. According to the explanatory report, the draft law aims to address the following problems: "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."[16]

26. The provision is deemed necessary "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. 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)."[17]

27. During the virtual meeting the authorities informed the delegation that they interpret the requirement of Art. 45 in such a way that the fine for each of the percentages indicated would

[16] Explanatory report on Draft Law of Georgia on „Introducing amendments to the law of Georgia on Electronic Communications" CDL-REF(2021)024.
[17] Explanatory report on Draft Law of Georgia on „Introducing amendments to the law of Georgia on Electronic Communications" CDL-REF(2021)024.

have been applied once (therefore three fines) and that, notwithstanding, the decision of the GNCC remains unenforced.

28. Concerning legitimacy, it is necessary to assess whether the limitations serve the interest of the public. Art. 46 claims to serve the safeguarding of the competitive environment in the internet service market in Georgia and to protect users of electronic communication services from threats stemming from non-notified non-eligible mergers and acquisitions in the electronic communication market or failures to comply with the obligations set by the GNCC to operators of critical electronic communication infrastructure (networks) with a significant market power. While these claims on setting and enforcing of economic policies of Georgia might be legitimate, there is no evidence of any *ex ante* impact assessment demonstrating how and to what extent the appointment of a special manager to electronic communication providers was to mitigate the potential distortions to market competition.

29. During its virtual meeting the authorities informed the delegation that in the first case Art. 46 was applied, the special manager has not yet been able to redress changes to ownership as a result of the acquisition of shares and the fact that the new shareholder is not subject to Georgian legislation.[18] The Venice Commission further observes that the law does not provide for the possibility to set up an auction of shares as described in the explanatory report. Consequently, the special manager albeit possessing all managerial powers, is not in a position to reverse the business transaction which is, according to the authorities, deemed to endanger competition and national security interests alike. Given these circumstances the Venice Commission notes that Art. 46 has not served the stated aim which the legislator claims to have been the justification for this provision.

b) Proportionality

30. The principle of proportionality between the means employed and the aim sought to be achieved must be respected.[19] This requires that the measures of deprivation of possessions be suitable to achieve the aim pursued. An interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure applied by the State, including measures depriving a person of its possessions.[20]

31. In order to prevent potential distortions on the electronic communication market of Georgia stemming from mergers and acquisitions such business transactions are subject to prior notification as is the case in many countries under competition law rules. Non-notification constitutes a violation, rendering the transaction void and can be subject to fines. The Georgian authorities claim that these legal consequences are not sufficient, hence the need for Art. 46 allowing for the appointment of a special manager with far reaching powers.

32. The Venice Commission observes that the impacts of non-notified and/or non-eligible transfers of ownership cannot be mitigated simply by managerial actions. If the aim was to regain control over mergers and acquisitions by the state, then Art. 46 should have addressed ownership conditions and sought for restitution thereof. Furthermore, the essential deprivation of the right to property of shareholders of electronic communication providers was not the least-restrictive-mean to serve the economic policies of Georgia on competitive markets. If the aim was to address

[18] See above, II.Background B.
[19] ECtHR 28.5.1985, No. 8225/78, Ashingdane/United Kingdom, § 57.
[20] ECtHR 29.3.2006, No. 36813/97, Scordino/Italy, § 93.

potential anti-competitive market behaviour, then tailored *ex ante* regulatory interventions by the GNCC could have better served this objective. If a merger or acquisition would have resulted in a situation whereby authorised/licenced persons under the control of joint beneficial owners were to agree on non-competitive behaviour towards users and/or other market players, then the GNCC was equipped with regulatory powers to consider such persons as having joint significant market power and set specific obligations accordingly.[21] Such obligations would have ensured transparent operations, prohibited discrimination and enabled access to infrastructure for other persons.[22] Furthermore, the GNCC could have ensured the fulfilment of obligations by means of direct coercion in accordance with the General Administrative Code of Georgia in cases of direct risks to the public health and safety.[23]

33. Furthermore, the Venice Commission observes that the criteria to be fulfilled for appointing a special manager are not sufficiently precisely defined in Art. 46 where they are listed as "suspension of the authorisation/cancellation of licence may harm the economic interest of the country, legal interests of authorised persons/licence holders in the field of the electronic communication, and the competition on the market." As a result, the margin of appreciation of the GNCC in the interpretation of such a vague basis for the institution of the special manager creates a situation of legal uncertainty. Consequently, an appointment decision under Art. 46 is not foreseeable. In view of the appointment of a special manager leading to a de facto expropriation of the former owner, this severe interference with Art. 1 Prot. 1 ECHR requires more precision and more responsibility to be taken by the legislator. Notably the term "the economic interest of the country" is overly broad and cannot be left to the discretion of the executive without any guidance given by the legislator.

34. During the virtual meeting with the authorities, reference was made to "critical infrastructure" as being an issue of vital economic interest to the country and that in certain jurisdictions the acquisition of shares concerning a critical infrastructure by foreign nationals is prohibited by law for the sake of national security. The Venice Commission acknowledges the problem the Georgian legislator is faced with when business transactions lead to changes in ownership, being perceived as losing "critical infrastructure". The Commission however observes that to date no legal definition of "critical infrastructure" and no prohibition of acquisition of shares for foreign nationals exist and that the term "economic interest of the country" seems to have a wider scope than the term "critical infrastructure".

35. The special manager appointed by the GNCC under Art. 46 enjoys extraordinary powers akin perhaps to the position of a court-appointed administrator regarding a bank or financial institution that has had its licence suspended or removed or of a court-appointed liquidator in relation to a company in distress. The Venice Commission is not aware of such a power in the hands of a regulatory authority in the field of communications in the European context. The powers are so vast and over-reaching that the only limitation seems to be the alienation of the shareholding, leaving the shareholders with no say in the decision-making structures or processes within the company.

36. This is even more concerning as it seems that there is no time limit to the appointment. The delegation was informed that the initial draft had foreseen a term of up to two years but such a limitation is not contained in the current Art. 46. According to Art. 46 para. 18 the GNCC shall dismiss a special manager "in the case of the execution of the decision of the Commission and submission of information/documents on the execution to the Commission". But as the special manager is not in a position to reverse the respective business transaction in each case, it seems in the end that this is a matter totally at the discretion of the GNCC and could be seen by domestic courts as a *de facto* takeover of the company by the regulator.

[21] See Article 22 No. 11 of the Law on Electronic Communications.
[22] See Article 29 of the Law on Electronic Communications.
[23] See Article 28 No. 3 of the Law on Electronic Communications.

37. Based on the above analysis, the Venice Commission is of the view that Art. 46 in its current version is not in line with the right to property, since its legitimacy is not demonstrated and the proportionality test is not met.

2. Article 10 ECHR – Freedom of Expression and the Media

38. The Venice Commission notes that nowadays electronic communication services and traditional broadcasting activities are converged and increasingly transformed into technologically neutral and complex digital content offerings. Multimedia activities are the new norm across the world in the all-digital and online media environment, and are thus relevant for the analysis of Art. 46 in the context of freedom of expression and the media.

39. Article 10 ECHR – Freedom of expression reads

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

40. Broadcasting is a form of expression and subject to the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through the broadcast media. Also, it entails the right of broadcasters to be free of State intervention, political or commercial interference and the right of the public to maximum diversity of information and ideas in broadcasting.[24] Thus, Art. 46 arguably touches upon the right to freedom of expression enjoyed in the form of broadcasting activities as provided for by Article 10 ECHR.

41. In this context, the Venice Commission considers it necessary to recall the Strasbourg Court's case law on pluralism in the audio-visual media sector as it is relevant to our todays digital reality where media and internet are converged. This case law is best expressed in the case of *Centro Europa 7 S.R.L. and Di Stefano v. Italy,* Appl. 38433/09: "As it has often been noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself (see *Manole and Others v. Moldova*, no. 13936/02, § 95, ECHR 2009, and *Socialist Party and Others v. Turkey*, 25 May 1998, §§ 41, 45 and 47, Reports 1998-III). In this connection, the Court observes that to ensure true pluralism in the audio-visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

[24] For a comprehensive overview of the ECtHR case law see Guide on Article 10 of the European Convention on Human Rights, Freedom of expression, First edition – 31 March 2020 available at Guide on Article 10 - Freedom of expression (coe.int).

42. Freedom of expression, as secured in Article 10 § 1, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress (see *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103). Freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Lingens*, cited above, §§ 41-42).

43. The audio-visual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 79, ECHR 2004-XI). The function of television and radio as familiar sources of entertainment in the intimacy of the listener's or viewer's home further reinforces their impact (see *Murphy v. Ireland*, no. 44179/98, § 74, ECHR 2003-IX). A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, §§ 73 and 75, ECHR 2001-VI; see also *De Geillustreerde Pers N.V. v. the Netherlands*, no. 5178/71, Commission's report of 6 July 1976, Decisions and Reports 8, p. 13, § 86). This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it (see *Informationsverein Lentia and Others*, cited above, § 39). The Court observes that in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audio-visual system is characterised by a duopoly."[25]

44. The Venice Commission further recalls that already in 2007, the Committee of Ministers reaffirmed that "in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member States should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed."[26]

45. Art. 46 applies to "an authorised person/license holder". According to the definition of terms used in the Law,[27] an authorised person is "any entrepreneurial person, as well as any non-entrepreneurial person registered by the Georgian National Communications Commission and providing electronic communication networks (electronic communication network operator) and/or electronic communication services (provider of electronic communication services)."[28] Meanwhile, a licence holder is a person who was granted with a special authorisation to "the right

[25] ECtHR 7 June 2012, Centro Europa 7 S.R.L. and Di Stefano v. Italy, Appl. 38433/09, paras. 129 ff.
[26] Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content.
[27] Article 2 of the Law on Electronic Communications.
[28] Article 2 f of the Law on Electronic Communications.

to use a radio frequency spectrum for a specified period of time and under special conditions".[29] Thus, any entity (business or non-profit) which holds a licence or is authorised to operate or to provide services through a public electronic communication network falls under the scope of the new Art. 46.

46. Georgian electronic communication service and network providers – who are subject to new Art. 46 - often also operate broadcast services or offer services to broadcasters. During its virtual exchange with the authorities, the delegation was informed that there are 31 authorised/licensed persons with dual authorisation/licensing in the field of broadcasting and electronic communications. The authorities further informed that Art. 46 should not be applied to the broadcasting activities of a dual provider in order not to interfere with freedom of the media. This would be achieved by limiting the powers of the special manager in the appointment decision of the GNCC under Art. 46. Therefore, the special manager could only act within the mandate as set out in the appointment decision of the GNCC and the regulator could not appoint a special manager in relation to broadcasting matters.

47. The Venice Commission observes that Art. 46 foresees extensive powers for the special manager and, even if it is excluded by the regulator in the formulation of the mandate in interfering directly in editorial content it can still, for example, interfere in human resources issues and therefore could, for example, change controlling editors in the broadcasting station thereby influencing editorial policy. The possibility to limit the mandate of the special manager at least for the sake of safeguarding editorial independence was not used in the first decision taken under the new Art. 46. In this regard, the Commission wishes to underline that the appointment, or even the possibility of a special manager to be appointed to a communications' company which also has a broadcasting licence can have a chilling effect on the editorial independence of the broadcasting side of the operation.

48. The Venice Commission notes that the authorities are sensitive to the need for protection of freedom of expression and the media. The Commission, however, observes that Art. 46 being overly broad and vague, gives the GNCC the power to equip the special manger to take all managerial decisions from top to bottom without being subject to the previous checks and balances as prescribed by corporate law, such as control by the board of directors. The broad managerial powers of the appointed special manager could also include making decisions to either suspend or terminate broadcasting activities of the electronic communications' provider itself, or suspend or terminate an agreement concluded between an electronic communications' provider and a broadcaster to service the later.

49. As a consequence, either because of joint ownership or as a result of converged operations, the GNCC is authorised to appoint a special manager to operators in the field of electronic communications to the effect that the special manager would also be entitled to interventions with broadcasting activities, e.g. being able to take employment decisions that could interfere with the editorial independence of broadcasters.

50. Moreover, there is a risk of interference with net neutrality. The special manager appointed by the GNCC has unlimited authority to make managerial decisions on the electronic network operations such as interconnections, access, and generally the provision of electronic communication networks. Thus, the state could interfere with providing these services which should be provided on a neutral basis and under neutral conditions to various digital content providers on the internet.

51. This could potentially infringe with the principle of net neutrality. Net neutrality foresees that all internet traffic should be treated the same regardless of content, and is an essential principle from the perspective of ensuring broad access to information to all individuals, a

[29] Article 2 z of the Law on Electronic Communications.

matter to the enjoyment of the right to freedom of expression. The principle of network neutrality is to ensure the protection of the right to freedom of expression and to access to information, and the right to privacy in terms of equal treatment of internet traffic, pluralism and diversity of information, privacy, transparency and accountability.[30]

52. The Venice Commission is of the opinion that Art. 46 ought to have contained a specific and clear provision that it does not apply to the broadcasting operations of the communications operator, but this provision was not included in the formulation of this otherwise very detailed amendment.

53. The Commission notes that, albeit not intended by the legislator, new Art. 46 puts media freedom at risk of state interference and therefore necessitates explicit safeguards prescribed by law. The provision in its current version creates a spill over effect on broadcasting and has the strong potential to cause a chilling effect on the editorial independence of the broadcasting side of electronic communications operations. It is therefore necessary to amend new Art. 46 in such a manner as to clearly stipulate that the provision in no manner applies to the broadcasting operations of the electronic communications operator.

3. Other observations

54. During the virtual visit the delegation learned that in addition to the structure in question, the cable under the Black Sea, Georgia has other internet connections, e.g. via satellite. The Venice Commission observes that less intrusive measures than interfering with the right to property and creating a risk to freedom of the media appear to have been possible, such as enhancing existing internet access, e.g. by duplicating the structure in question, or creating incentives for the private sector to do so.

55. The Venice Commission has been informed that the legislative amendments to the Electronic Communications Law were fast tracked, that is the three parliamentary readings were expedited which limited the possibility of civil society and other interested stakeholders to contribute to the democratic dialogue. Furthermore, the Regulatory Impact Assessment (RIA) which is a standard mandatory procedure was not conducted,[31] as the Government used its discretion not to resort to it for sake of expeditious legislative procedures. The explanatory report states the necessity of speedy procedures without giving reasons for it. During its virtual visit, the delegation did not receive any other explanations than that it was necessary to close a legislative gap. This need alone cannot justify fast tracking complex legislation as it is the very nature of any legislation to close existing gaps. In this particular case, the Venice Commission notes that the reason for the said legislation had been a particular case which at the time of the virtual visit in February 2021 has not been solved by the new provisions as the business action could not be reversed due to lack of jurisdiction.

[30] See especially the Recommendation CM/Rec(2016)1 of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality. For the broader context, see CDL-AD(2019)016 Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections, adopted by the Council of Democratic Elections at its 65th meeting (Venice, 20 June 2019) and by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019) and most recently CDL-AD(2020)037 Study - Principles for a fundamental rights-compliant use of digital technologies in electoral processes, approved by the Council for Democratic Elections at its 70th meeting (online, 10 December 2020) and adopted by the Venice Commission at its 125th Plenary Session (online, 11-12 December 2020), explaining the importance for net neutrality as essential for an open democratic dialogue which is particularly crucial during election periods.

[31] Government of Georgia Ordinance No 35 of 17 January 2020 "On the Approval of Regulatory Impact Assessment (RIA) Methodology' says that the "Law on Electronic Communications" falls under the set of organic laws in Georgia whereby the conduct of a detailed regulatory impact assessment (RIA) and cost-benefit analysis (CBA) would normally be mandatory.

56. In this context, the Venice Commission recalls its Rule of Law Checklist, were it states that "obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of authorities, but also because the quality of legislation makes it difficult to implement. Therefore, assessing whether the law is implementable in practice before adopting it […] is very important."[32]

57. Consequently, the Venice Commission recommends to conduct the Regulatory Impact Assessment (RIA) and conduct consultations with all stakeholders prior to rectifying Art. 46, seeking a comprehensive solution in line with Art. 1 Prot. 1 and Art. 10 ECHR.

B. Article 11 of the Law on Electronic Communications as amended

58. Art. 11 of the Law on Electronic Communications as amended in July 2020 introduces the immediate enforceability of the decision taken by the GNCC to appoint a special manager. Consequently, appealing the appointment decision of the GNCC enjoys no suspensive effect. Instead, now a separate motion is necessary under Art. 11 as amended.

The new amendment reads:

> ***Article 11***
> *Article 11 – Main goals and functions of the Commission in the field of electronic communications*
> *1. In the field of electronic communications, the Commission shall independently regulate the activities of authorised persons and/or the use of the radio frequency spectrum and/or numbering resources, also it shall adopt legal acts, monitor and control their execution, impose sanctions, within the powers determined by this Law, for identified violations in accordance with this Law and the Administrative Offences Code of Georgia.*
> *Newly inserted: 11. The legal act of the Commission may be appealed in court in accordance with the procedure established by the legislation of Georgia. Acceptance of the claim by the court shall not lead to the suspension of the legal act of the Commission, unless the court decides otherwise.*

59. The Venice Commission observes that the concept of immediate effect of certain administrative decisions is common to a number of jurisdictions, e. g. in Austria, Germany, Malta and the Czech Republic. The problem does not lay in the provision *per se* but in the accumulated effect of the deficiencies of Art. 46, being overly broad and vague and thus leading to legal uncertainty and giving the GNCC an uncontrolled power from the outset, impacting on the right to property and media freedom as analysed above. Therefore, the provision needs to be assessed in the light of the right to a fair trial, as enshrined in Article 6 of the ECHR and interpreted in the case law of the Strasbourg Court. Article 6 is applicable "…in all circumstances where the determination of an individual's civil rights and obligations (the civil component of the article) or any criminal charge (the criminal component of the article) against an individual is at stake."[33]

1. Article 6 ECHR - Right to a fair trial

60. Article 6 reads as follows with regards to the civil limb

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the*

[32] See European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist 2016, II. A. 4. p. 12 ff Law-making powers of the executive.
[33] See the 'Guide on Article 6 of the Convention – Right to a fair trial (civil limb)' by the Council of Europe (Updated to 31 August 2020); available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf, p. 13.

interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

61. The right to a fair trial is applicable towards proceedings of public administration bodies, such as the Georgian regulator, the GNNC. Consequently, the right to meaningful and timely review vis-à-vis the decisions of such authorities is a matter to administrative justice. The acts and decisions of administrative authorities have a direct impact on the daily life of individuals … and (…) "contribute to creating conditions for security, stability and public trust, which are prerequisites for the development of stable and democratic societies."[34] Accordingly, respect for the rule of law implies that the administrative justice system should provide for appropriate legal redress mechanisms which could prevent potential harms caused by administrative decisions.

2. Reasonable time requirement

62. Appropriateness involves the reasonableness of time necessary to a fair trial. The ECtHR reiterates in this regard, that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.[35] Member states are required to organise their judicial systems in such a way that their courts are able to guarantee everyone's right to a final decision on disputes concerning civil rights and obligations within a reasonable time.[36] Since it is for the member States to organise their legal systems in such a way as to guarantee the right to obtain a judicial decision within a reasonable time, an excessive workload cannot be taken into consideration.[37] Administering justice without delay is at the core of any judicial system as otherwise its efficiency and credibility are at risk of being jeopardised.[38] The ECtHR held that when there is a practice incompatible with the Convention resulting from an accumulation of breaches of the "reasonable time" requirement, this constitutes an "aggravating circumstance of the violation of Article 6 § 1."[39]

63. The Venice Commission sees a high risk under the current circumstances in Georgia, that the deficits of Art. 46 could be aggravated by delayed and non-timely court procedures, since heavy workload was reported by Georgian judges as the biggest challenge affecting quality of court's decisions.[40] Lengthy judicial proceedings against the GNCC's decision to obtain a suspension of the appointment of a special manager could therefore have serious consequences for the enjoyment of property rights and could also lead to interrupted broadcasting activities for an unpredictable period.

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[34] See the 'Casebook on European fair trial standards in administrative justice' by the Council of Europe (2016); available at: https://rm.coe.int/16807001c6, p. 9.

[35] See 'The right to trial within reasonable time under Article 6 ECHR - A practical handbook (2018)' by the Council of Europe; available at: https://rm.coe.int/the-right-to-trial-within-reasonable-time-eng/16808e712c; also Frydlender v. France [GC], No. 30979/9627, June 2000, § 43; Rumpf v. Germany, No. 46344/06, § 41, 2 September 2010.

[36] ECtHR Comingersoll S.A. v. Portugal [GC], No. 35382/97, § 24, 6 April 2000; ECtHR Lupeni Greek Catholic Parish and Others v. Romania [GC], No. 76943/11, § 142, 29 November 2016.

[37] Vocaturo v. Italy, No. 11891/85, § 17, 24 May 1991; ECtHR Cappello v. Italy, No. 12783/87, § 17, 27 February 1992.

[38] ECtHR Scordino v. Italy (no.1) [GC], No. 36813/97, § 224, 29 March 2006.

[39] ECtHR Bottazzi v. Italy [GC], No. 34884/97, § 22, 28 July 1999; ECtHR Scordino v. Italy (no.1) [GC], No. 36813/97, § 225, 29 March 2006.

[40] "According to judges, improved independence of the judicial system is one of the biggest gains following 2012. They also believe that insufficient number of judges and their heavy workload is the biggest challenge, affecting quality of court's decisions and how long it takes to make these decisions."; See the Overview of the Survey Results as reported by the Coalition for Independent and Transparent Judiciary: 'The Judicial System Past Reforms and Future Perspectives (2017)' p. 16; available at: http://coalition.ge/files/the_judicial_system.pdf.

64. Furthermore, the Venice Commission observes that lengthy proceedings do not only weaken the effectiveness of the justice system but also undermine its credibility in general, thus having the potential of leading to an erosion of public trust into the entire state. During the virtual meeting with members of civil society, the delegation was informed about a further erosion of trust due to the developments regarding the nomination process of Supreme Court judges, without awaiting the relevant Venice Commission opinion and not fully addressing the continued shortcomings in this process, a problem that was also highlighted in February 2021 by the European Union.[41]

3. Role of the special manager in legal proceedings

65. According to Art. 46 para. 20 of the Law on Electronic Communications, the GNCC's decision to appoint the special manager may be appealed in court within one month. However, it is questionable whether the authorised person/license holder would be able to actually do that when Art. 46 para. 13 of the Law on Electronic Communications prohibits him/her to carry out any action without a consent of the special manager and/or the GNCC.

66. The powers of the special manager also include the power to institute or to withdraw proceedings and the question arises as to whether directors of the company, denuded of their rights are able to actually contest the decision of the regulator, the GNCC and, if they so contest, whether the case will fall under the purview of the special manager who in any case responds solely to the regulator and therefore one would have the situation where the plaintiff is an agent of the defendant. The law lacks clarity in this regard, creating serious issues of uncertainty and concerns about the recourse to judicial review.

67. During its virtual meeting with the authorities, the GNCC has indicated that the shareholders remain able to institute a case in the courts in this regard. However, the shareholders do not have easy and speedy access to necessary information and documentation to file a claim in the same manner as is the case with directors and managers of a company. On the basis of the equality of arms principle, it is therefore recommended to provide explicitly that the person/s entitled to lodge the appeal should be given free access to information and documents necessary for the appeal.

68. Furthermore, the Venice Commission observes that it remains unclear under which conditions remedies are available against fines imposed for non-compliance with certain obligations under Article 27, Article 28, Article 34 and Article 35 and who can contest such fines. Also, clarity is needed as whether the special manager may withdraw appeals already launched against fines imposed. According to Article 46 No. 1, decisions of the GNCC in relation to warnings and fines are taken in "simple administrative proceedings". There is no provision in the law on remedies against decisions taken in simple administrative proceedings. Admittedly, Article 11 No. 1 as amended provides for appeals against acts of the GNCC before the courts. However, it is not clear whether this provision also applies to fines imposed by the GNCC. This question arises against the background of a changing wording: Article 11 para. 1 refers to "legal act(s)", which are distinguished from "sanctions" in the first sentence of Article 11 para. 1. It doesn't seem clear therefore, that sanctions imposed by the GNCC – which also include the fines mentioned in Article 46[42] can also be challenged before court. This appears to be relevant in view of the fact that the appointment of a special manager depends on the repeated imposition of fines. However, if the fines prove to be unjustified in an appeal procedure, a special manager could not be appointed. If, on the other hand, there is no effective legal remedy to appeal the

[41] 2021 Association Implementation Report in Georgia, p. 1, https://eeas.europa.eu/headquarters/headquarters-homepage/92853/2021-association-implementation-report-georgia_en, for details see p. 7 of the report and the respective urgent opinion CDL-AD(2019)009 Georgia - Urgent Opinion on the selection and appointment of Supreme Court judges, endorsed by the Venice Commission at its 119th Plenary (Venice, 21-22 June 2019).

[42] See Chapter VII - Liability and Monitoring of Activities in the Electronic Communications Sector of the Law of Georgia on Electronic Communications.

fines, a special manager (with the far-reaching powers described below) could be appointed, although the preconditions for the appointment are perhaps not met. In this context, it has to be mentioned, that imposing such a fine may amount to a criminal sanction in the meaning of Article 6 ECHR which requires – at least at the level of appeal – a decision by an independent court.

69. In view of the accumulated impact of new Art. 11 on property rights and media freedom and deficits as legal safeguards in line with Art. 6 ECHR, the Venice Commission recommends removing the change introduced to Art. 11 and return to the general suspensive effect afforded by domestic administrative law against administrative decisions, including those of the GNCC. If the GNCC deems an immediate enforcement of its decision necessary, the regulator can submit a reasoned motion to the respective court.

IV. Conclusion

70. The Venice Commission is well aware of the difficult situation the Georgian legislator is faced with trying to resolve a highly sensitive matter. The Venice Commission acknowledges the aim of the legislator not to endanger access to the internet for end users and thus not wishing to revoke an operating licence in cases of alleged infringements of domestic law. Nevertheless, the current solution chosen by the legislator in Art. 46 and Art. 11 of the Law on Electronic Communications leads to far reaching consequences to the right to property and media freedom as well as to the right of a fair trial. Therefore, the Venice Commission invites the legislator to carry out a full and thorough re-examination of the two amendments, taking into consideration the following recommendations:

As to Art. 46 Law of Georgia on Electronic Communications

71. Conduct the Regulatory Impact Assessment (RIA) and conduct consultations with all stakeholders.

72. Rectify Art. 46, seeking a comprehensive solution in line with Art. 1 Prot. 1 and Art. 10 ECHR.

73. Specify the scope of Art. 46 by introducing legal definitions for “economic interest of the country”, “critical infrastructure” and “security interests”

74. Amend the new Art. 46 in such a manner as to clearly stipulate that the provision in no manner applies to the broadcasting operations of the electronic communications operator.

As to Art. 11 Law of Georgia on Electronic Communications

75. Revoke the amendment to Art. 11 and return to the general principle of domestic administrative procedure law that appeals have suspensive effect.

76. Stipulate clearly who, in the case of the appointment of a special manager under Art. 46, has the right to appeal the appointment decision and extend the timeframe for lodging such an appeal; on the basis of the equality of arms principle, provide explicitly that the person/s entitled to lodge the appeal should be given free access to information and documents necessary for the appeal.

77. The Venice Commission remains at the disposal of the authorities of Georgia for further assistance in this matter.