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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT
OF GEORGIA

ON THE VIEWERS' RIGHT OF ACCESS TO COURT
AGAINST DECISIONS
OF AN INDEPENDENT BROADCASTING AUTHORITY
CONCERNING THE PROGRAMME SCHEDULE

Adopted by the Venice Commission
at its 78th Plenary Session
(Venice, 13-14 March 2009)

on the basis of comments by

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I. Introduction

1. By message of the Court's Head of Staff of 23 October 2008, the President of the Constitutional Court of Georgia, Mr Papuashvili, requested an *amicus curiae* opinion on the limitation of the viewers' right of access to court against decisions of an independent broadcasting authority regarding the rescheduling of programmes in compliance with the conditions of the broadcasting license (notably broadcast programmes with sexual or erotic content only at specified times).

2. The Venice Commission appointed Mr Grabenwarter as rapporteur in this issue.

3. The present *amicus curiae* brief was adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009)

II. Comparative material

4. The Commission has collected information on the domestic remedies concerning the rescheduling of programmes in case of an alleged breach of the licensing requirements in some European countries.

Austria

5. The constitutional foundation of the Austrian broadcasting law is - amongst others - the Federal Constitutional Law on the protection of the broadcast's independence.¹ It lays down several principles of broadcasting such as objectivity and impartiality of coverage, diversity of opinion, a fair balance of programs and so forth.

6. Statutory laws relating to broadcast, that is the ORF-Act² in respect of public television and the Private Television Act³ in respect of private television, add further programme principles and requirements regarding the content of broadcasting:

ORF-Act

Section 10 (1) All programmes of the Austrian Broadcasting Corporation must respect the human dignity and fundamental rights of others with regard to presentation and content.

(2) The programmes must not incite others to hatred on grounds of race, sex, age, disability, religion and nationality.

(3) The programme policy shall strive at quality, innovation, integration, equal rights and understanding.

(4) Comprehensive information is to help form free individual and public opinion in the service of the responsible citizen and thus to contribute to the democratic discourse of the general public.

[...]

(11) Broadcasts shall not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.

(12) In the case of radio and television broadcasts which are likely to impair the physical, mental or moral development of minors, the selection of the time of transmission or other measures shall ensure that minors will not normally see or hear such broadcasts.

(13) The unencoded transmission of broadcasts under paragraph 12 shall be preceded by an acoustic warning or identified by the presence of a visual symbol throughout the entire duration. The Federal Government may issue regulations governing the detailed design of optic or acoustic identifiers.

¹ Federal Law Gazette No. 396/1974.

² Federal Act on the Austrian Broadcasting Corporation, Federal Law Gazette No. 379/1984 as amended by Federal Law Gazette I No 83/2001.

³ Federal Law Stipulating Provisions for Private Television, Federal Law Gazette I No. 84/2001.

(14) Programmes whose content largely aims at minors must not contain appeals to call value added services.

7. Private Television is subject to similar provisions and restrictions.⁴

8. Two specific administrative authorities are assigned to exercise the supervision of those provisions: the KommAustria⁵ as concerns private television corporations and the Federal Communication Board (FCB)⁶ as concerns the public Austrian Broadcasting Corporation (ORF). Only the FCB acts independently. However, decisions of the KommAustria may be challenged before the FCB.

9. According to Section 36 (1) ORF-Act, the FCB supervising the ORF shall take decisions upon complaints

- (a) by a person claiming to be directly aggrieved as a result of a violation of the law;
 - (b) by a subscriber who pays or is exempt from paying radio and television fees within the meaning of the Radio and Television Fees Act if the complaint is supported by at least 300 other subscribers;
 - (c) by a person who claims with good cause that his/her specific personal interests have been affected as a result of a violation in television programs of the provisions of Section 10 paragraphs 1, 2 and 11 to 13 [...], provided that the alleged violation is of decisive relevance in the light of the aims of the allegedly violated provision, such as in those cases where the moral development of juveniles is seriously impaired or where there has been a massive violation of the protection of human dignity, and if the allegations made in this complaint are not the subject matter of another complaint raised under subparagraphs a and b or lit. c, and
 - (d) by a company whose legal or economic interests are affected by the alleged violation.
- [...]

10. The Private Television Act sets up a comparable framework how to initiate the administrative proceedings before the KommAustria.⁷

11. Complaints shall be filed with the regulatory authority within six weeks as of the date of the alleged violation of the respective act.⁸ Within another six weeks as of the decisions of the FCB complaints may be lodged both to the Administrative Court as well as the Constitutional Court.

Belgium

12. In Belgium, there exists a "Flemish Council of Radio and Television" which supervises the content of television programmes in order to check that they do not represent a danger for the physical or psychological development of minors, which is done on the basis of ethical and moral criteria.

13. This Council is competent, in particular, to control that the radio and television broadcasters comply with the prohibition to broadcast programmes which can seriously adversely affect the physical, mental or moral development of minors, notably programmes containing pornographic or gratuitously violent scenes. Such prohibition is equally valid for programmes which do not meet the above definition but may nevertheless impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission of such programmes or

⁴ Section 30 et sqq Private Television Act.

⁵ Kommunikationsbehörde Austria.

⁶ Bundeskommunikationssenat.

⁷ Section 61 (1) Private Television Act.

⁸ Section 36 (4) ORF-Act; section 61 (2) Private Television Act.

programme services will not be able to receive them. When such programmes are aired uncoded, they must be preceded by an acoustic warning.

14. If the Council finds that there has been a breach, it may send a warning to the broadcaster in question, with a request to put an end to the breach. The Council may also impose administrative sanctions or ask the Flemish government to intervene.

15. Decisions by the Council may be appealed for annulment, as acts of an administrative authority, before the Conseil d'Etat by any person who can prove to have an interest.

Estonia

16. According to Art 6 of the Broadcasting Act, the broadcasters have the right to freely decide on the content of their programmes and programme services in compliance with the law and the conditions of a broadcasting licence. The restriction of the freedom of creation guaranteed by law is punishable under administrative or criminal procedure. Only in matters before a court, the court may prohibit the transmission of a certain programme or a part thereof on the bases and pursuant to the procedure prescribed by law.

17. According to Art 71, the freedom of reception and retransmission is also guaranteed to programmes originating from foreign states:

Art 71. Freedom of reception and retransmission

(1) Reception and retransmission of radio and television programmes and programme services originating from foreign states shall not be restricted.

(2) By way of derogation from subsection (1) of this section, temporary restrictions may be imposed in accordance with the requirements of international agreements ratified by the Riigikogu, if a television programme or programme service originating from a foreign state:

1) manifestly and gravely infringes the generally recognised moral and ethical broadcasting principles to the extent which is likely to impair the physical, mental or moral development of minors;

2) is likely to incite hatred on grounds of race, sex, religion or nationality;

3) involves pornography or gratuitous violence.

(3) Restrictions may be imposed with regard to television programmes originating from the members states of the European Union or a states party to the European Convention on Transfrontier Television only if:

1) during the year preceding the potential imposition of restrictions, the television broadcaster has infringed the requirements specified in this section on at least two prior occasions;

2) a competent Estonian body has notified the television broadcaster and a competent body of the European Union of the infringements and of the measures it intends to take should any such infringement occur again;

3) consultations with a competent Estonian body and a competent body of the European Union have not produced an amicable settlement within 15 days of the notification provided for in clause 2) of this subsection, and the alleged infringement persists.

(4) The provisions of this section extend to all television programmes and programme services which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission of such programmes or programme services will not be able to receive them.

(5) *In addition to the specifications of subsection (4) of this section, it shall be ensured that when such programmes are transmitted in unencoded form, they are preceded by a corresponding acoustic warning or clearly identifiable visual symbol.*

18. For broadcasters, there exists the general obligation to guarantee the morals and legality:

Art 9. Guarantee of morals and legality

(1) *Broadcasters shall not transmit programmes the content of which is immoral or in conflict with the Constitution or laws.*

(2) *The requirements provided for in clause 71 (2) 1) of this Act and subsections (4) and (5) of the same section shall extend to television programmes which are likely to impair the physical, mental or moral development of minors, except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors will normally not be able to receive such programmes or programme services.*

(3) *When the programmes specified in subsection (2) of this section are broadcast in unencoded form, they shall be preceded by an acoustic warning or identified by the presence of a visual symbol throughout their duration.*

19. A broadcasting licence is an activity licence which grants the legal or natural person specified in the licence the right to broadcast programmes and programme services under the conditions specified in the licence. Broadcasting licences are issued by the Ministry of Culture on the bases and pursuant to the procedure prescribed by this Act (Art 37 Sec 1). According to Art 38 of Broadcasting Act, a broadcasting licence shall specify the number and names of programme services broadcast, the scheduling and transmission time of each programme service per day and week and the term for commencement of the broadcasting activity. A broadcasting licence may specify additional conditions which are not in conflict with law and the generally recognised principle of freedom of speech.

20. According to Art 41 Sec-s 3 and 5, a broadcasting licence may be revoked by a court or the Ministry of Culture, which issued the licence. A broadcasting licence shall be revoked if the person specified in the licence: submits a corresponding application; continually fails to fulfil the conditions specified by the licence, violates the requirements of this Act in the person's activities or submitted false information in order to obtain the licence.

21. The officials of the Media Division of the Ministry of Culture and of the Communications Board shall exercise supervision over compliance with Broadcasting Act and with the conditions of a broadcasting licence. The officials of the Media Division of the Ministry of Culture shall exercise supervision over compliance with the requirements of this Act, with the conditions relating to the programme service and with the term for commencement of the broadcasting activity (Art 42). By this, the officials exercising supervision have the right to: obtain recordings of programmes of broadcasters, if necessary, issue a mandatory precept to a broadcaster pursuant to the procedure provided for in Art 43 of this Act upon the violation of this Act or of the conditions of a broadcasting licence, make a proposal to the Minister of Culture to suspend or revoke a broadcasting licence or obtain information from a broadcaster concerning compliance with this Act and the conditions of the broadcasting licence, if necessary.

22. The officials may issue a precept which shall set out (among other things) the provisions which prescribe liability for the offence and a request to eliminate the offence and the term for complying with the precept. Upon failure to comply or upon unsatisfactory compliance with a precept, the liability prescribed in Broadcasting Act or in the Code of Administrative Offences shall be applied (Art 43).

23. Based on a reasoned proposal of an official exercising supervision, the Minister of Culture has the right, by a directive, to suspend a broadcasting licence for up to fourteen days or to revoke a broadcasting licence (Art 431).

24. A legal person who violates the conditions of a broadcasting licence shall be punished by a fine of up to 50 000 kroons (Art 434). A legal person who violates the requirements of the Broadcasting Act shall be punished by a fine of up to 40 000 kroons (435).

25. The provisions of the General Part of the Penal Code and of the Code of Misdemeanour Procedure apply to the misdemeanours provided for in this Act. Extra-judicial proceedings concerning the misdemeanours provided for in Broadcasting Act shall be conducted by the Ministry of Culture or the Communications Board (in the case of violation of technical conditions of broadcasting licences) (Art 436).

Georgia

26. According to Article 14 of the Law on Broadcasting of Georgia,

"[...] 2. If a license holder breaches Georgian legislation, the license conditions and/or the Code of Conduct, any affected person is entitled to file a complaint to the Commission or to court.

3. The Commission shall, within 7 days of a complaint being filed, take a reasonable decision on acceptance or refusal of the complaint and immediately inform the plaintiff about the decision.

4. Consumers' written and verbal complaints shall be considered by means of hearings under administrative proceedings, unless there are exclusions that are defined in the General Administrative Code of Georgia and/or cases, when disputes may be settled without administrative proceedings. Consumers' complaints concerning issues of wide public interest shall be considered by the Commission under administrative proceedings only.

5. In case a violation is approved, the Commission draws up and promulgates a declaration. A broadcasting license holder shall, within 5 days, broadcast on prime time a declaration on violation of the license conditions, Georgian legislation or the Code of Conduct.

6. The Commission, taking into consideration the nature and seriousness of violation, is entitled to raise the question of imposing appropriate sanctions on the license holder

27. Under 52 of the Law on Broadcasting (Accuracy, Right of Correction and Retraction)

1. General, specialized, public and community broadcasting license holders shall take all reasonable steps to ensure factual accuracy and correct mistakes in a timely manner.

2. Within 10 days of an initial statement being made, an interested party is entitled to request publication of retraction or correction of the facts using the same means and format, including duration, as the initial statement.

3. Correction and retraction shall not be made if:

a) the relevant request for publication is not made within the period of 10 days;

b) the initial statement applies to an indefinite group of people or does not allow direct identification of the plaintiff;

c) the length, content or mode of the reply exceeds what is necessary to correct or retract in equal means and mode the facts stated in the initial statement, or the reply contains correction or retraction of an opinion and not the facts stated in the initial statement;

d) a reply or retraction contains defamation or advocacy prohibited by Paragraph 4 of Article 24 and Paragraph 3 of Article 26 of the Constitution of Georgia;

e) a reply or retraction adversely affects a third party;

f) the plaintiff cannot demonstrate the existence of a legitimate interest.

4. Refusal of a license holder to correct or retract factual errors, with equal means and format, may be appealed to the court.

28. Article 56 of the Law on Broadcasting (prohibition) reads:

1. Any type of war propaganda is prohibited.

2. *Broadcasting license holders shall avoid broadcasting programs containing material to incite ethnic or religious hatred and which are of a discriminatory nature to any group.*
3. *Broadcasting license holders shall avoid broadcasting programs containing material to stir up hatred, discrimination, that is offensive to any person or group on the basis of ethnic background, religion, opinion, age, gender, sexual preference or disability, or any other feature or status. Special emphasis of these features or statuses is only permissible within the context of a program if it aims merely to illustrate such hatred or discrimination, as they already exist in society.*
4. *Television programs or advertisement including pornography, as well as obscenity and infringing a citizen's dignity and his/her basic rights, are prohibited.*
5. *Programs having a harmful influence on the physical and intellectual development of children and adolescents must be scheduled accordingly (not at times when they are likely to be tuned in).*
6. *Cable broadcasting license holders have the right to broadcast, using a coded form, television and radio programs or advertisements as determined in this Article, Paragraph 4, under the individual agreement reached with the consumer.*

29. Breaches of Article 56 may not be appealed to a court.

Hungary

30. Title 1 A of Act I of 1996 on Radio and Television Broadcasting on Protection of Minors provides:

Section 5/A.

- (1) *Broadcasters shall assign a rating to each and every program they wish to broadcast - other than previews, news programs, current affairs programs, sport events and advertisements - according to the categories specified under Section 5/B.*
- (2) *A preview may not be broadcast at a time of the day when the program to which it pertains cannot be broadcast.*
- (3) *Current affairs programs, sports events and advertisements cannot be broadcast at a time of the day when, according to the ratings of similar programs, they could not have been broadcast had they been rated according to their content.*

Section 5/B.

- (1) *Category I shall include the programs which are rated to be viewed by all audiences.*
- (2) *Category II shall include the programs that may frighten viewers under twelve years of age, or that they cannot comprehend or may misunderstand due to their age. These programs shall be classified as "Parental discretion is advised for viewers under the age of twelve".*
- (3) *Category III shall include the programs which might impair the physical, mental or moral development of minors under the age of sixteen, in particular those that involve gratuitous violence or sexual content, or that are dominated by conflict situations resolved by violence. These programs shall be classified as "Not recommended for viewing for audiences under the age of sixteen".*
- (4) *Category IV shall include the programs which might impair the physical, mental or moral development of minors, in particular those that are dominated by graphic scenes of violence and/or sexual content. These programs shall be classified as "Not recommended for viewing for audiences under the age of eighteen".*
- (5) *Category V shall include the programs which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or extreme or explicit scenes of violence.*

Section 5/C.

(1) Programs classified under Category II cannot be broadcast targeted to viewers under twelve years of age, or among such programs; they can be broadcast at any other time having the proper classification affixed.

(2) Programs classified under Category III can be broadcast between 21.00 p.m. and 05.00 a.m., having the proper classification affixed.

(3) Programs classified under Category IV can be broadcast between 22.00 p.m. and 05.00 a.m., having the proper classification affixed.

(4) Programs classified under Category V cannot be broadcast.

Section 5/D.

(1) Subject to the exceptions laid down in this Act, all programs must be broadcast in accordance with their classification.

(2) At the beginning of the broadcast the rating and classification of the program must be displayed.

(3) During broadcasting the proper distinguishing symbol of the rating of the program must be displayed in either corner of the screen throughout the entire duration of the broadcast. The rating of programs classified under Category I need not be displayed. No distinguishing symbol needs to be applied for radio broadcasts.

Section 5/E.

Program guides containing the programs of television broadcasters shall indicate the rating of each program according to the classification defined under Section 5/B.

Section 5/F.

The National Radio and Television Board shall determine the guidelines for the rating system specified in Section 5/B, the symbols to be applied prior to and during broadcast and the manner in which they are to be displayed by resolution passed by a two-thirds majority - in keeping with the prescribed procedure -, and shall publish them in the official journal of the ministry directed by the minister in charge of cultural affairs.

31. Under Title 11 of the Law, a complaint may be lodged to the Complaint Committee and subsequently to court only in relation to alleged breaches of the requirement of providing balanced information. It does not appear that such possibility is open for alleged breaches of Section 5.

Ireland

32. Radio Telefís Éireann (hereinafter RTÉ) is the national broadcaster for the Republic of Ireland. RTÉ is responsible for providing public service programmes on radio and television to members of the public who pay a licence fee to receive these services. RTÉ has in place guidelines which set out the editorial policies of RTÉ, its legal status and obligations and its responsibilities.

33. Broadcasters have full editorial independence; however under Irish law (Re: Radio & Television Act 1988), every broadcaster must ensure that it does not broadcast anything that may reasonably be regarded as offending good taste or decency, in particular in respect of:

- The portrayal of violence and sexual conduct or

- Being likely to promote or incite crime or as tending to undermine the authority of the State.

34. If members of the public are of the opinion that a programme or a segment of a programme has breached the Guidelines they are entitled to express their views and complain either in writing or by e-mail to the relevant department dealing with the contentious broadcast. RTÉ promises a 20 working day timeframe for responding to complaints. Moreover, any complainants not satisfied with the reply they receive, are informed that there is a review process available to them within RTÉ. The review will always be carried out by an Editorial Manager senior to the member of staff who replied to the complaint in the first instance.

35. Individual complaints against broadcasters can also be assessed by a separate independent statutory body, the Broadcasting Complaints Commission (BCC), which was also established in 2001. The BCC's decisions are made in reference to relevant legislation and to the Broadcasting Commission of Ireland's (BCI) Code of Programme Standards which lays down rules for broadcasting material. Under the Code, broadcasters are required to exercise due care when broadcasting material, which may include, where appropriate, the issuance of prior warnings when broadcasting material which has the potential to offend; or the operation of a "watershed", during which time more adult-orientated programme material may be broadcast. It may be noted that, for television programming, there is a 9pm "watershed" after which it is assumed children are not watching; as a result, more explicit language and sexual and violent themes are allowed in programming after this hour. For radio programming the 9pm "watershed" does not exist and programming suited to an exclusively adult audience will conform to the rules if broadcast at a time when children are unlikely to be listening (this may be earlier than 9pm and so is more flexible than the television "watershed"). The BCC strictly scrutinises complaints regarding material unsuitable for children - it will not uphold a complaint simply because it contains some adult-orientated material, and has rejected complaints regarding adult-orientated content of a mildly sexual nature when broadcast on television before, but close to, the 9pm watershed.

36. Under Section 24(2) of the Broadcasting Act 2001, any viewer or listener may refer a complaint to the BCC if they are unhappy about programme content on an Irish licensed broadcasting service, both radio and television, under the following categories:

- 24(2)(a) objectivity & impartiality in news;
- 24(2)(a) fairness, objectivity & impartiality in current affairs;
- 24(2)(a) objectivity & impartiality in news & current affairs in RTÉ published matter;
- 24(2)(b) law & order;
- 24(2)(c) privacy of an individual;
- 24(2)(d) taste & decency (Code of Programme Standards);
- 24(2)(f) inaccurate facts or information that could amount to an attack on your dignity, reputation or honour.

37. When assessing the appropriateness of programmes for children the following factors, both as a whole and in context, are taken into account in Ireland: Violent Programme Material; Sexual conduct; Coarse & Offensive Language; Persons and Groups in Society; Factual Programming – News, Current Affairs and Documentaries; Children's Programming and Drugs, Alcohol and Solvent.

38. Complaints must not be made any later than 30 days after the date of the broadcast. If the BCC agrees with a complaint, it will be upheld; if it does not, the complaint is rejected. The BCC has no power to order compensation for those individuals whose complaints are upheld. Its increasing number of decisions may be viewed as providing a further guide for broadcasters when broadcasting material. Furthermore, BCC decisions may be appealed to the High Court which may overturn its decisions.

39. The BCC does not deal with requests to have programmes rescheduled; the BCC does not possess any editorial control and deals solely with matters post-broadcast. Consequently, if a viewer wants to stop a programme going ahead prior to broadcast (as appears to be the situation in this case query), they would have to seek an injunction from a court of law.

40. A fundamental requirement when bringing a case concerning a point of constitutional law is that the person initiating the claim can establish him/herself as having an identifiable personal interest in the point at issue (i.e. the plaintiff's locus standi must be clear). The plaintiff must be able to establish a direct or personal connection with the operation of the legal rule being challenged.

41. The remedies available from a Court of Law are an injunction, which may be used to prevent some future action which the applicant fears: for example, a prohibitory injunction by which a person (i.e. the broadcasting authority) is prohibited from doing something (i.e. broadcasting the contentious programme)); and judicial review. The procedure for judicial review is twofold: i) the applicant makes an ex parte application to a High Court Judge for leave to proceed having set out the grounds on which relief is sought. If the application is granted, as the judge considers that the case discloses some ground for claiming relief, the applicant must then serve notice on the other party, called the respondent; ii) the second stage is the application for judicial review itself where the court determines the appropriate remedy.

Slovenia

42. The Slovenian Media Act (Official Gazette RS, No. 110/2006) has the following pertinent provision:

Protection of minors

Article 84

(1) Television programme services may not present scenes containing excessive violence or pornography that could seriously harm the mental, moral or physical development of children and other minors.

(2) The broadcasting of the contents listed in the previous paragraph that could harm the children and minors shall be allowed if it is adequately limited, with the appropriate technical means or otherwise, in such a way that it is inaccessible to children and minors.

(3) Television programme with scenes of violence and sexuality may exceptionally be shown in other programmes provided that such contents do not violate the aesthetic and ethical criteria stated in the first sentence. Prior to and during the presentation of the programme or works specified in the first sentence or the scenes specified in the second sentence an acoustic and visual warning and symbol must be given clearly and understandably that such programme is not suitable for children and minors under the age of fifteen.

(4) The aesthetic and ethical criteria for presenting the programme, works or scenes and the showing of the appropriate warnings and symbols referred to in the previous paragraph shall be defined by the broadcaster of television programme with their internal rules (ethical codes) which must be available to the general public all the time. The rules must also define the possibilities of complaints for the viewers objecting to the implementation of the criteria, referred to in the previous paragraph. The broadcasters of television programme must send a copy of their internal rules to the competent ministry and the Broadcasting Council within 15 days of their adoption and inform the abovementioned of any changes within the same deadline.

(5) Every year, the broadcasters of television programme must submit to the competent ministry and the Broadcasting Council a report on the implementation of internal rules referred to in the previous paragraph which must include the data on received complaints of the viewers and their resolving by no later than the end of February for the previous year.

(6) The competent minister shall pass the appropriate secondary legislation to determine the visual symbol and the acoustic and visual warning referred to in the third paragraph and the manner of presenting them, as well as stipulate a plan for their promotion.

(7) By taking into account the first paragraph and the criteria laid down in the third and the fourth paragraphs, the television programme can also broadcast programme that contains the scenes of violence and sexuality in the period between midnight and 5 a.m.

(8) Pornographic contents in printed publications and on advertising areas may be offered in such a way that the children and the minors cannot see and buy them. Access to pornographic contents in electronic publications must be limited, by means of appropriate technical protection, in such a way that children and minors cannot access them.

(9) The implementation of the first, the second, the third, the fourth, the fifth and the seventh paragraph and the secondary legislation laid down in the sixth paragraph shall be monitored by the competent ministry and the Broadcasting Council. The annual report prepared by the Broadcasting Council for the National Assembly must contain the assessment of the implementation of the provisions laid down in the paragraphs one to seven hereunder.

(10) The inspection supervision over the compliance with the provisions of the eighth paragraph hereunder in the newspapers, magazines and electronic publications which count as media in line with the first paragraph of Article 2 hereof shall be carried out by the inspectorate within the competent ministry, while the Market Inspectorate of the Republic of Slovenia shall supervise the printed and electronic publications which do not count as media in line with the third paragraph of Article 2 hereof.

43. The control of the legality of the concrete administrative acts is exercised by bodies by the (specialized) courts, which independently exercise their duties and functions in accordance with the Constitution and statute (Article 125 of the Constitution). The right to the judicial review of the Acts and decisions of all administrative bodies and statutory authorities which affect the rights and legal entitlements of individuals or organizations is guaranteed (Article 120.3 of the Constitution). Courts of competent jurisdiction are empowered to decide upon the legal validity of decisions of State bodies, local government bodies, and statutory authorities made in relation to administrative disputes and concerning the rights, obligations and legal entitlements of individuals or organizations, but only where alternative legal redress is not specifically provided by statute (Article 157.1 of the Constitution; Article 1 of the Administrative Dispute Act). If no other legal redress is provided, courts of competent jurisdiction are also empowered to decide upon the legal validity of individual activities and acts which infringe the constitutional rights of an individual (Article 157.2 of the Constitution; Article 1 of the Administrative Dispute Act). Concerning administrative disputes, the Slovenian constitutional system adopted the so-called system of general clause.

44. An administrative dispute may be lodged only against a final (individual) administrative act or actions (Article 1 of the Administrative Dispute Act). The object of the administrative dispute is the determination of the legality of the concrete and final administrative act - a dispute on the legality (Articles 1.2 and 1.3 of the Administrative Dispute Act). If the illegality of an administrative act is found by the court, the court may annul the act and return the case for decision by the competent body. In cases of full jurisdictional dispute (e.g. Article 61 of the Administrative Dispute Act) the court, by annulling the disputed administrative act, at the same time decides the respective administrative case in merito and replaces with its own decision, the annulled administrative act completely. The plaintiff in an administrative dispute may be an individual or a legal entity, or the State Legal Officer. An administrative procedure may be initiated by an appeal, lodged by the plaintiff. The appeal must be lodged within 30 days from the day of the delivery of the administrative act to the plaintiff.

Switzerland

45. In Switzerland, the Independent Authority for the Examination of Complaints in the Field of Radio and Television is competent to deal with complaints about the content of programmes, be they broadcast by the public broadcaster or by private ones.

46. Art. 4 of the Law on Radio and Television sets out minimum criteria for the content of programmes, notably (para. 1) the obligation to respect fundamental rights, human dignity,

non-discrimination, the obligation not to spread racial hatred, not to offend public morals and not to defend or trivialize violence. Article 4 reflects Article 93 of the Federal Constitution. The criteria in Article 4 are applicable to any programme (on public or private television); in addition, the public radio broadcaster must pursue a cultural and linguistic end (art. 24 of the law).

47. In order to lodge an application to the Independent Authority, a person needs to have been personally and closely affected by the programme, or to co-sign the application with at least 19 other individuals (article 94 of the law).

48. Until 2006, appeals to the administrative courts against decisions by the Independent Authority were excluded by Article 3.e/bis of the Federal Law on Administrative Procedure. Appeals to the Federal Tribunal were only possible on the ground of violations of the basic procedural guarantees of Article 4 of the former Federal Constitution.

49. In 2006 a revision of the legislation (Article 99 of the new Federal Law on radio and television) introduced the possibility of a material appeal to the Federal Tribunal.⁹

⁹ See annual report of the Independent Authority 2007, at http://www.ubi.admin.ch/de_dokumente/jb2007.pdf (German).

III. European Convention on Human Rights

A. The “victim” status

50. The first question which needs to be addressed is whether a viewer may claim to be a *victim* of a violation of the ECHR in respect of the broadcasting of a television programme with pornographic or erotic content outside of the timeframe legally foreseen for this kind of programmes. Two cases must be distinguished: firstly, the case of a person alleging a violation of his or her own rights (e.g. human rights of a child, Article 1 of Protocol no. 2 with respect of the rights of parents) and, secondly, the case of a person who, in his or her capacity of parent, claims that his or her child has been a victim of a violation.

51. In the first case, any child viewer – represented by its parents – could possibly claim to have been directly affected by the allegedly illegal broadcasting *in the absence of a specific prejudice suffered in connection with the programme*.

52. In the second case, when, like in the Georgian case, the parent complained, it must be established that the applicant in his capacity as (parent of) a person falling in the category of individuals which the law intended to protect, has suffered a violation on account of the failure on the side of the authorities to respect the applicable legal provisions (*victime indirecte*).

53. In both cases, it has to be asked whether it is sufficient to allege to be a victim of a breach of the ECHR in this respect. The Commission finds that this is doubtful. One has to claim to have been or to run the risk to be *directly* affected by an act or omission¹⁰, which goes beyond being affected in one’s capacity merely as a member of a category. In the case of a television programme, that would not be the mere fact that a programme was broadcast at the wrong time, but, for example, that as a consequence of having seen it, a child has been specifically affected (irrespective of actual damage).

B. Article 6 ECHR – fair trial / access to court

54. Assuming that the viewer has the quality of victim, the question of whether he or she should have had access to a court against the decision of the regulatory authority refusing to reschedule the programme in question may be analysed under Article 6 (right of access to a court) or Article 13 (right to an effective remedy).

55. According to the case-law of the European Court of Human Rights, Article 6 ECHR confers a right of access to a court. This right however has no bearing on matters other than civil and criminal within the meaning of Article 6 ECHR. With regard to the Georgian legislation the key question is therefore whether or not the request for rescheduling the programme possesses such a quality.

56. This is not the case. The request for rescheduling the programme does not entail a private dispute in the traditional sense. The content which the applicant seeks to contest does not rest on contractual relations, instead it has to comply with state regulation pursuing different aims such as the protection of the minor. Also, the request does not affect contractual relations or pecuniary rights of the concerned viewer, nor does it concern assets or is it based on alleged violations that affect assets. It does not affect either the viewer’s right to respect for his reputation.

¹⁰ see ECtHR, *Monnat v. Switzerland* judgment of 21 September 2006, § 31.

57. It follows, in the Commission's view, that Article 6 ECHR is not applicable.

C. Article 13 ECHR – right to an effective remedy

58. The questions raised by the Constitutional Court of Georgia amount to whether or not the European Convention on Human Rights grants a parental right to prevent or challenge the broadcasting programme insofar as it does not meet the legal requirements about programme schedules (protection of children from pornography). This procedural right may infer from Article 13 ECHR according to which everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. The applicability of Article 13 therefore requires that the ECHR sets forth a parental right to a certain content or, conversely, to the omission of a certain content of broadcasting. Several avenues are conceivable in order to infer this right from the Convention.

a. Article 13 ECHR in combination with Article 2 Protocol 1 ECHR - Right to education

59. Article 2 of the Protocol to the Convention confers the right to education. *"In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."* Is it possible to derive the mentioned right from this provision?

60. The wording of Article 2 of the Protocol makes it clear that private persons do not have to comply with the Convention. As far as private broadcasting is concerned one might argue that the State is under the positive obligation to exert influence on the private companies. As regards public broadcasting this indirect approach is not necessary.

61. Irrespective of this, there are a few severe general considerations which may be used against such an interpretation of Article 2 of the Protocol.

62. Obviously, Article 2 of the Protocol rests on the notion that parents raise and therefore influence their children. The second phrase of Article 2 of the Protocol is meant to prevent the State from undermining that parental prerogative. There is, however, no necessity to interpret Article 2 of the Protocol in such a way that it has an effect on broadcasting programmes, as the parental education is not endangered by television. It is to a large extent up to the parents to let their children watch television or, on the contrary, to forbid doing so.

63. Furthermore, one has to keep in mind the diversity of parental convictions. Pornography and undue violence might make up a common denominator which is opposed by almost every parent. On the other hand, diverse views exist with regard to delicate contents such as religious beliefs, sexual education and the like. Arguably, some parents might even endeavour to keep their children from television altogether. Apart from this, television does not influence children any more than plenty of other everyday phenomena these days. A State obligation to hinder any adverse and negative influence on the children would be bottomless since the state control would have to scan all media, books, video games, advertisements and if nothing else the Internet. Any attempt thereof would fail. Such an interpretation of Article 2 of the Protocol would dilute the effectiveness of the guarantee.

64. Accordingly, in the Commission's view an interpretation of Article 2 of the Protocol which grants the parental right to the omission of a certain broadcasting does not meet the requirements of that guarantee.

b. Article 13 ECHR in combination with Article 10 ECHR - Freedom of expression

65. A different approach to make a case for the right in question might start with Article 10 ECHR. Its second paragraph lays down those conditions which a State has to meet in case it is willing to restrict the freedom. *“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 interest 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.”*

66. It follows from Article 10 paragraph 2 ECHR that the freedom of expression is not absolute. A state may confine the contents of broadcasting provided that it pursues a legitimate aim which is, for instance, the protection of minors against immoral contents.

67. Nevertheless, paragraph 2 does not imply any sort of state obligation and individual rights of that kind. Paragraph 2 does not entitle parents to the omission of an immoral content of television, radio, newspapers etc. Finally, there is no positive obligation flowing from the right to impart information in this respect.

c. Article 13 ECHR in combination with Article 8 ECHR – right to private and family life

68. As to Article 8 ECHR one has to stress at the outset that the guarantee in the first place protects the freedom of the private and family life against state interferences. Authorities are only allowed to restrict this freedom within the limits of paragraph 2. On the other hand, the Court contends that certain conditions may give rise to various positive obligations on the part of the state authorities.

69. On no account, is Article 8 ECHR suitable for an interpretation according to which the state authorities have to censor a television programme such that any delicate content, that is any content which may for moral and personal reasons displease a customer, is evacuated. On the one hand this approach would undoubtedly surpass the necessary means in terms of Article 10 paragraph 2 ECHR, on the other hand Article 8 ECHR does not require the State to create a society in which only “sterile” information is accepted. Art 8 ECHR is intended to protect one’s private and family sphere whereas it is not designed to be a means to impose one’s notions upon society.

70. It remains to be seen whether in a specific case the broadcast of a programme (for example, with pornographic or erotic content outside the timeframe which the law allocates to this kind of programmes) may be considered to constitute an interference with the viewers’ (the children’s) right to respect for private life.

71. In the Commission’s view, in order for such a case to happen, it would be necessary that the viewer had been specifically affected by the programme. The mere broadcasting of a programme in breach of the applicable rules on the time of the broadcast would not constitute an interference with the viewer’s right to respect for private life.

72. It is true that in a recent case¹¹ the Court found that under certain circumstances (the application was declared inadmissible) the receipt of *undesired or shocking* communications

¹¹ ECtHR, Muscio v. Italy, application 31358/03, dec. 13 November 2007.

(in that case, pornographic spams) may be considered to be an interference with one's private life. The Court examined whether in that case the Italian authorities had discharged their positive obligation to protect the applicant from such undesired communications. The case of a spam, however, differs from that of a television programme in that the first is specifically addressed to an individual on his or her address of electronic mail. The "undesired or shocking" communication is therefore targeted, unlike in the case of a television programme, on a specific individual.

73. It follows, in the Commission's view, that a viewer could not allege an interference with his or her right to respect for private life merely as a consequence of the broadcasting of a television programme in breach of the applicable rules on the timing of such programme. Accordingly, if the national law provides for the possibility for a viewer to apply to the regulatory authority in order to seek the rescheduling of a programme in line with the applicable rules on the broadcasting time, the ECHR does not require the possibility of applying to a court against the possible refusal by the regulatory authority.

74. The case would be different if the television programme contained information or images regarding one specific individual. The Constitutional Court of Georgia indeed has also requested clarification as to whether under the European Convention on Human Rights the applicant has a right to appeal to a court if and when the broadcaster airs false or erroneous information about the applicant and then refuses to comply with the requested corrections.

75. While the response to this question depends on the concrete circumstances of the case, it may be said that if the false and erroneous information is capable of interfering with the private and family life in that, for instance, it reveals personal information about the applicant, one can argue that there was an interference¹² and even that there is a state obligation to curb the interference by positive means. The right of the concerned individual to appeal to court may for this purpose be an eligible means. However, this consideration holds equally good for information which are neither false nor erroneous but correct.

76. Accordingly, the state legislation may, in certain circumstances, be in breach of Article 8 ECHR if it does not provide an appropriate mechanism for the protection of private persons against unlawful interferences with their right to respect for their private or family life by other private persons through the media (in this respect, the *amicus curiae* Opinion on the Relationship between the Freedom of Expression and Defamation with respect to unproven defamatory Allegations of Fact¹³ may be of interest).

77. The Commission notes that the national legislation on broadcasting conferring the right of access to a court (section II above) generally requires that the applicant have a personal and direct interest (see for example Ireland, Switzerland, Belgium, Georgia).

78. In conclusion, in the Commission's view, the domestic legislation is not out of line with Article 8 ECHR if it does not allow the viewers to influence the content of the media (in the absence of a specific and direct prejudice resulting from such content).

¹² ECtHR, *Peck v. UK* judgment of 28 January 2003, § 62

¹³ CDL-AD(2004)011

IV. Conclusion

79. In conclusion, the question of whether viewers may claim to be victims of a violation of the ECHR merely on account of the broadcasting of a television programme in breach of the applicable rules on the broadcasting time needs to be addressed.

80. If the national law provides for the possibility for a viewer to apply to the regulatory authority in order to seek the rescheduling of a programme in line with the applicable rules on the broadcasting time, neither Article 6 nor Article 13 ECHR require the possibility of applying to a court against the possible refusal by a regulatory authority competent to control the content of television programmes.

81. An analysis of some examples of European legislation in this field shows that some countries provide for the possibility for the viewers to apply to an independent authority in order to seek the rescheduling of certain programmes. In some cases, the decisions of these authorities are subject to judicial review. Access to court is therefore provided in order to protect constitutionally guaranteed rights of the viewers.

82. The Venice Commission finally recalls that the Committee of Ministers of the Council of Europe has recommended¹⁴ that

“All decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;*
- open to review by the competent jurisdictions according to national law;*
- made available to the public.”*

83. The Venice Commission remains at the disposal of the Constitutional Court of Georgia for any further request in this matter.

¹⁴ Rec (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, Appendix, Guidelines, § 27