

## Communications Commission in the European Commission's Recommendations – Questions Regarding Its Independence

Davit Kutidze<sup>1</sup>

On November 8, 2023, the European Commission recommended granting EU candidate status to Georgia. The final decision on this status will be made in December. Alongside the positive recommendation, the European Commission outlined several priorities for Georgia. Failure to address these priorities will make it more challenging for the country to align with European standards. Consequently, this could delay the prospects of EU membership or, in some cases, make it impossible. One of the key priorities pertains to media freedom. The European Commission is urging the Georgian government to exert stronger efforts in ensuring a free, professional, pluralistic, and independent media environment. This includes ensuring that criminal procedures against media owners meet the highest legal standards. Additionally, the Commission calls for impartial, effective, and timely investigations in cases of threats against the safety of journalists and other media professionals. Furthermore, the conclusion highlights the importance of ensuring the institutional independence of the Communications Commission, which is the media regulating institution. This, it is emphasized, will enhance the trust of media workers in the Communications Commission.<sup>2</sup>

The activities of the Communications Commission, which, according to the law, is an independent body and is formally not under any government agency, raise numerous questions about its independence. This is especially noteworthy in light of the growing authority of the Communications Commission through relevant legislative changes year by year. In accordance with the Law of Georgia on Broadcasting, the scope of regulation of the Communications Commission covers service areas of electronic communications, broadcasting media, and video-sharing platforms, where the provision of services or the performance of activities is subject to licensing and/or authorization in accordance with the legislation. For the aforementioned service providers (private companies), the Communications Commission defines license provisions, sets license duties and regulation fees, issues, suspends, and revokes licenses, supervises and controls the performance of license provisions, and is authorized to

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<sup>1</sup> Research Institute Gnomon Wise (The University of Georgia), e-mail: [d.kutidze@ug.edu.ge](mailto:d.kutidze@ug.edu.ge)

<sup>2</sup> European Commission. (08.11.2023). *Commission Staff Working Document – Georgia 2023 Report*. Accessible at: [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD\\_2023\\_697%20Georgia%20report.pdf?fbclid=IwAR3iU\\_ObnbSt7VP8nADQ6rgCiTWIV-LiyB7wjBYQov\\_CZA4PkOC\\_ZdaANjE](https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_697%20Georgia%20report.pdf?fbclid=IwAR3iU_ObnbSt7VP8nADQ6rgCiTWIV-LiyB7wjBYQov_CZA4PkOC_ZdaANjE)

impose appropriate sanctions<sup>3</sup> in case of violation of license provisions. In other words, the scope of regulation of the Communications Commission encompasses TV and radio broadcasters, video on-demand, video-sharing platform services, and electronic communications (internet and mobile communication).

As we can observe, the regulatory scope of the Communications Commission extends to vitally important domains of the modern information society. Therefore, it is crucial to ensure higher standards of independence, transparency, and trust in relation to this institution. However, questions arise regarding the Commission's activities and its fulfillment of these criteria, both within the country and among Georgia's international partners. To gain a better understanding of the current challenges, this article aims to provide an overview of legislative changes that have increased the power of the Communications Commission. Simultaneously, it seeks to analyze to what extent the Commission's accountability and independence are ensured at legislative or practical levels. Given the magnitude of the issue and considering the fact that the European Commission primarily discusses the regulatory commission within the media context, this paper specifically focuses on analyzing problems related to media freedom.

In 2014, as a result<sup>4</sup> of amendments enacted to the Law of Georgia on Broadcasting, the Communications Commission were authorized to interfere in the content of social advertisement aired on broadcasting media. In particular, the Commission was authorized to discuss the content of a specific advertisement, ascertain to what extent does it meet the social advertisement criteria and oblige a private broadcaster to air it or on the contrary not to air it. This happens in light of rather vague definition of the social advertisement. In 2015, authority of the Communications Commission was expanded in terms of social commercial advertisement as well.<sup>5</sup> For instance, Article 691 about product (goods/services) placement in the program was added to the Law of Georgia on Broadcasting, containing numerous vague, previously unanticipated provisions. For instance, such as prohibition that a broadcaster “should not attach excessive importance to advertising product”. In different times, many broadcasters were fined by the Communications Commission for violation of this article.<sup>6</sup>

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<sup>3</sup> Legislative Herald of Georgia. *Law of Georgia on Broadcasting*. (as of 19.10.2023). Accessible at: <https://matsne.gov.ge/document/view/32866?publication=70>

<sup>4</sup> Legislative Herald of Georgia (31.10.2014). *On Amending the Law of Georgia on Broadcasting*. Accessible at: <https://matsne.gov.ge/ka/document/view/2568784?publication=0#DOCUMENT:1>

<sup>5</sup> Legislative Herald of Georgia (12.03.2015). *On Amending the Law of Georgia on Broadcasting*. (12.03.2015). Accessible at: <https://matsne.gov.ge/ka/document/view/2749425?publication=0#DOCUMENT:1>

<sup>6</sup> Kutidze, D., Rekhviashvili, M. (18.10.2023). *Financially and Content-Damaging Legislative Regulations for Broadcast Media and Their Alternatives*. Research Institute Gnomon Wise. Accessible at: <https://gnomonwise.org/ge/publications/policy-papers/150>

Since 2020, simultaneously with the Code of the Right of the Child coming into effect, the Communications Commission were given another instrument for interference in the broadcasters' content under the pretext of "protecting underage person from harmful influence" stemming from such vague provisions, as follows: "Broadcaster is obliged to ensure protection of underage person from harmful information, broadcasting of programs without age labels and specific airtime which have harmful influence on the physical, intellectual and moral development as well as on psychological and physical health of adolescents are prohibited; Broadcasting of programs or placing a content in a program having harmful influence on adolescents' socialization is prohibited" (Article 56<sup>1</sup>, 56<sup>2</sup>).<sup>7</sup>

As a result of amendments to the Law of Georgia on Broadcasting, adopted in December 2022, video sharing platform services domain was also subjected to the regulatory scope of the Communications Commission. In particular, the latter is authorized for instance to request from Myvideo.ge to remove a video if the Communications Commission considers that spreads hate speech and/or impose relevant sanctions to a platform. As result to the amendments, adopted by the Parliament of Georgia in October 2023,<sup>8</sup> the Commission was further authorized to review hate speech in the broadcasters and therefore interfere in the content of broadcasting media in this regard. Previously, only self-regulation bodies of the broadcasters were able to discuss these issues. Currently, however, their decisions can be appealed to the Communications Commission to the Court. In addition, according to the amendments, if the Communications Commission decides that a specific broadcaster promoted hate speech, it is authorized to respond to this issue at its own initiative without a complaint submitted from an interested party. It should be emphasized, that "there are numerous important aspects that need to be taken into account when discussing regulation of the hate speech in media. Among other things, hate speech can be interpreted broadly which may pose a risk to the freedom of speech and expression. Looking through the same lenses, interference of an administrative body – Communications Commission – in the media content also contains huge risks, because instead of accomplishment of some benevolent objectives, we may end up with disproportionate suppression of the freedom of expression. The latter, at the very least,

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<sup>7</sup> Legislative Herald of Georgia. *Law of Georgia on Broadcasting* (as of 19.10.2023). Accessible at <https://matsne.gov.ge/document/view/32866?publication=70>

<sup>8</sup> Legislative Herald of Georgia (03.11.2023). *On Amending the Law of Georgia on Broadcasting*. Accessible at: <https://matsne.gov.ge/ka/document/view/5945583?publication=0#DOCUMENT:1>

can lead to self-censorship of journalists/media whereas in the worst case it may enable the regulator to curtail critical media”.<sup>9</sup>

As a result of amendments adopted in October 2023, the issue of “dissemination of obscenity”<sup>10</sup> by a broadcaster was transferred from media self-regulation to the regulatory scope of the Communications Commission. Similar to the hate speech, or perhaps even more, the concept of obscenity can be a matter of broad interpretation and naturally has a problem of clarity. Therefore, subjecting it to the Communications Commission regulatory scope creates a risk that the government may misuse it to curtail free speech. This is particularly in view of the previous such attempts of the Communications Commission, before the issue of obscenity was legally transferred under its regulatory scope. Specifically, it is about program aired on Mtavari Arkhi on 12 December 2020 and the Communications Commission’s decision to proclaim the broadcaster as offender based on wrong interpretation of the judgement of the Constitutional Court.<sup>11</sup>

A testament to the power of the Communications Commission is its authority to sanction broadcasters. Specifically, it is authorized to impose disproportionately high fines on private companies within its regulatory scope and even suspend their operations. Imposing massive fines on broadcasters and/or suspending their operations may inflict great damage to freedom of speech in the country.

The aforementioned legislative regulations and the growing powers of the Communications Commission become even more concerning when we examine the Commission's practical approaches towards certain broadcasters. In particular, through a peculiar and not entirely accurate interpretation of the law, the Communications Commission has interfered with the content of broadcasters' products and advertisements numerous times. It has virtually prohibited political advertisements in non-election periods and imposed disproportionately high fines on media outlets critical of the government, among other actions. These facts, in the relevant context, indicate that the Communications Commission is not independent from the government's influence (for more details, see the policy paper by Gnomon Wise).<sup>12</sup>

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<sup>9</sup> Kutidze, D., Rekhviashvili, M. (18.10.2023). *Financially and Content-Damaging Legislative Regulations for Broadcast Media and Their Alternatives*. Research Institute Gnomon Wise. Accessible at: <https://gnomonwise.org/ge/publications/policy-papers/150>

<sup>10</sup> Legislative Herald of Georgia (03.11.2023). *On Amending the Law of Georgia on Broadcasting*. Accessible at: <https://matsne.gov.ge/ka/document/view/5945583?publication=0#DOCUMENT:1>;

<sup>11</sup> Kutidze, D. (14.02.2021). *Communications Commission as a Censorship Committee*. Research Institute Gnomon Wise. Accessible at: <https://gnomonwise.org/ge/publications/opinions/39>

<sup>12</sup> Kutidze, D., Rekhviashvili, M. (18.10.2023). *Financially and Content-Damaging Legislative Regulations for Broadcast Media and Their Alternatives*. Research Institute Gnomon Wise. Accessible at: <https://gnomonwise.org/ge/publications/policy-papers/150>

Against the backdrop of Communications Commission's growing power and its controversial practical approaches, the issue of the Commission's independence is problematic at the legislative level as well. This is confirmed by the European Commission's recommendations with respect to the communications' regulatory body as well as conclusion and recommendations of the Council of Europe's experts about the Law of Georgia on Broadcasting.<sup>13</sup> According to those experts, "The National Regulatory Authority, the Communications Commission (ComCom) cannot be said to be independent according to the criteria laid down by AVMSD and the Council of Europe's standards on the independence of regulatory authorities... There are a number of shortcomings in the law to support this conclusion, including the fact that a list of candidates to be members of ComCom are put together by the government through a non-transparent procedure, and Parliament then selects candidates by [simple] majority vote. Whenever the ruling party has a majority, as is currently the case, this means all members are effectively submitted and selected by the governing party, contrary to CoE standards" (p. 11).

Certainly, the Law of Georgia on Broadcasting does not specify the criteria that the government should employ when selecting candidates for the Communications Commission, who are subsequently nominated to the Parliament. Naturally, such an approach cannot be regarded as transparent. Furthermore, the Parliament's capacity to elect Commission members by a simple majority vote, especially when this majority belongs to only one government party, undermines the independence of the Communications Commission. To rectify this deficiency, a legislative amendment requiring a 2/3 or 3/4 majority of the full composition of the Parliament to elect Commission members could be considered, provided there is sufficient political will to implement such a change.

Concerning the selection procedure for the members of the Communications Commission, it is noteworthy that the Parliament recently adopted an amendment at the third reading,<sup>14</sup> which will come into effect after the President's signature. According to this amendment, the government will establish a selection commission to choose candidates nominated to the Communications Commission. The selection commission will be "staffed with impartial and competent individuals." This commission will review applications and conduct interviews with all candidates who meet the qualification requirements outlined by the law. The competition commission, based on the review of applications and interview results, will present its recommendations to the government regarding specific candidates. The explanatory note of

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<sup>13</sup> Council of Europe. (21.02.2023). *Legal Opinion on the Law of Georgia On Broadcasting*. Accessible at: <https://bit.ly/3Hdl1CR>

<sup>14</sup> Parliament of Georgia. *On Amending the Law of Georgia on Broadcasting*. Accessible at: <https://info.parliament.ge/file/1/BillReviewContent/346155>

the legislative amendment indicates that this change is prompted by the European Commission's recommendation, which aims to enhance the independence of the Communications Commission. However, the extent to which the selection commission—again appointed by the government—and the candidates it selects will contribute to the independence of the Communications Commission is a matter for separate discussion. Moreover, the latest legislative amendment does not specify how transparent and accessible the interviews with the candidates for the Commission's membership will be to the public.

On top of that, Council of Europe's experts also emphasize in their conclusion that that according to the Article 9 of the Law of Georgia on Broadcasting, Commissioners are appointed for 6 years and can be renewed once, so have the opportunity to serve 12 years. The document highlights that “this is amongst the longest potential terms of office within Europe. It must be noted that the only other regulatory authorities within the EU where a member may serve 12 years (Austria, Belgium-Flanders, Cyprus, Catalonia, and Slovakia) are not converged<sup>15</sup> regulators, but only audiovisual media regulators. Therefore, Georgia is a complete outlier compared to EU Member States by permitting its regulators to serve up to 12 years”.

Within the context of terms of office, of mention is an amendment that came into effect in autumn 2019. In particular, if previously the chairman of the commission (who can become one of the 5 commissioners and is elected by the members of the commission) was elected only once<sup>16</sup> for a term of 3 years, under the new version of the law, this restriction was removed. As a result, it became possible for a person to be elected as the chairman of the regulatory commission two or more times. Consequently, the same person can be the chairman of the commission for 12 years. This change raised doubts that the law was adapted specifically to the current member and chairman of the commission, Kakha Bekauri, who was elected as a member of the commission for the second term in December 2019, and in February 2020, he also became the chairman of the commission for the second time and for a term of 6 years.<sup>17</sup>

Council of Europe's experts also say that low threshold of voter for decision-making within the Communications Commission is also a problem. According to the current legislation, “The Commission may make a decision if the majority of members of the Commission is present at the session. The Commission shall make a decision by the majority of votes of the members” (Art. 7.7). Currently, there

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<sup>15</sup> Regulatory body which regulates not one, but several communication domains (for instance audiovisual media, phone communications, internet).

<sup>16</sup> Legislative Herald of Georgia. *Law of Georgia on Broadcasting*. (as of 20.09.2019). Accessible at: <https://matsne.gov.ge/ka/document/view/32866?publication=53>

<sup>17</sup> Arabuli, N. (05.01.2022). *If the Law Changes for One Person*. Radio Liberty. Accessible at: <https://www.radiotavisupleba.ge/a/31640885.html>

are five members in the Communications Commission, including the chairman. This provision basically allows decisions to be taken by just two Commissioners. In particular, if three out of five commissioners attend the Commission's session a quorum is established and, in this case, consent of at least two members is enough to make a decision about a specific issue. Experts conclude that is a very low standard and it recommended to increase both the number of commissioners as well as number of votes to make a decision.

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The independence and impartiality of the Communications Commission remain challenging at both legislative and practical levels. The European Commission's assessment, unveiled on 8 November 2023, is yet another confirmation of this. The same document also emphasizes the need to enhance trust in the media sector regarding the Communications Commission. Given the numerous controversial decisions made by the Communications Commission, it can be asserted that trust in the institution is currently very low. Therefore, in the context of a general need and for alignment with the European Union, fundamental rather than superficial legislative changes are required to ensure the independence of the Communications Commission. This should be achieved, first and foremost, through the involvement of stakeholders subjected to the Commission's regulatory scope. It is important to note, however, that no specific legislative change can guarantee the Commission's complete independence, especially given that good laws sometimes go unenforced in practice. However, such changes could also be a crucial starting point.