I. Introduction

This Memorandum is based on the draft Broadcasting Law produced by the Georgian Working Group on reform of the Broadcasting Laws. We understand that the draft has been produced by lawyers from the existing Georgian National Communications Commission (the Commission) working together with the Liberty Institute and that the Working Group, consisting of parliamentarians, ministry officials, the Commission, representatives from the State and private broadcasting sector and relevant NGOs, aims to produce a final draft by the end of December.

The draft Law will put the entire broadcasting sector on a new regulatory footing. It proposes a new legislative basis for the Georgian National Communications Commission, accountable to Parliament and appointed by the President on the basis of a parliamentary vote. The new Commission will draw up a Broadcasting Strategy, based on a Broadcasting Policy set by Parliament, and licences will be issued in accordance with that strategy. The draft Law will also prevent concentration of ownership and require holders of broadcast licences to disclose any interest they hold in the print media. A Code of Conduct will be drawn up by the Commission, in close consultation with licence holders and the public, to regulate content issues such as

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1 The draft is dated 29 November 2002.
accuracy, fairness and impartiality, privacy, sex and violence, and a complaints mechanism will be set up, with an Ombudsman as the arbitrator.

ARTICLE 19 believes that this draft Law forms a good basis on which to proceed to a final draft consistent with international standards in this area. In particular, we believe that the new appointments mechanism for the Commission will be a significant improvement on the existing regime, pursuant to which members are appointed by the President.\(^2\) Similarly, we believe that the licensing regime as well as the complaints mechanism will represent a significant step forward. This Memorandum analyses the draft Law against international standards in this area, offering support for the regulatory scheme envisaged whilst making suggestions for further improvement. We recognise that this is only the first draft so our recommendations are largely limited to identifying issues of principle and we have at this point largely refrained from making detailed drafting suggestions.

This Memorandum first outlines Georgia’s international and constitutional obligations, emphasising the important of freedom of expression and its implications with regard to broadcast regulation. Then, it examines the draft law in further detail, offering suggestions for improvement. Two standard-setting documents will be relied on in particular: Council of Europe Recommendation No. (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector,\(^3\) and ARTICLE 19’s Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation.\(^4\) The former represents standards developed under the Council of Europe system while the latter takes into account wider international practice, including under United Nations mechanisms as well as comparative constitutional law and best practice in countries around the world.

II. International and Constitutional Obligations

II.1. International and Constitutional Guarantees

Article 19 of the Universal Declaration on Human Rights (UDHR),\(^5\) a United Nations General Assembly Resolution, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.\(^6\)

\(^2\) We commented on this in our April 2001 Memorandum on the draft changes to the law on communications and the post relating to licencing in the Republic of Georgia, available at [http://www.article19.org/docimages/1014.htm](http://www.article19.org/docimages/1014.htm).

\(^3\) Adopted by the Committee of Ministers on 20 December 2000.


\(^5\) UN General Assembly Resolution 217A(III), adopted 10 December 1948.

\(^6\) See, for example, Filartiga v. Pena-Irala, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2\(^{nd}\) Circuit).
The *International Covenant on Civil and Political Rights* (ICCPR),\(^7\) a legally binding treaty which Georgia ratified in 1977, guarantees the right to freedom of opinion and expression in very similar terms to the UDHR, also in Article 19. A Council of Europe Member State since 1999, Georgia is also a party to the *European Convention on Human Rights*,\(^8\) which guarantees freedom of expression at Article 10.

Article 19 of the Constitution of Georgia protects the right to freedom of expression in the following terms:

1. Every individual has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of an individual for his thoughts, beliefs or religion is prohibited as is compulsion to express opinions about them.

**II.2. The Importance of Freedom of Expression**

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations General Assembly adopted Resolution 59(I)\(^9\) which states:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The European Court of Human Rights has held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.\(^10\)

Statements of this nature now abound throughout the caselaw of the European Court and constitutional and human rights courts around the world.

**II.3. Broadcasting Freedom**

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and the Internet. As the Inter-American Court of Human Rights has stated: “It is the mass media that make the exercise of freedom of expression a reality.”\(^11\)

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\(^7\) UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.
\(^8\) Adopted 4 November 1950, in force 3 September 1953.
\(^9\) 14 December 1946.
\(^10\) *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

[I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.  

This applies particularly to information which, although critical, is important to the public interest:

The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote deleted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.

This does not imply that the broadcast media should be entirely free and unregulated; Article 10 of the ECHR states that the right to freedom of expression “shall not prevent States from requiring the licensing of broadcasting … enterprises”. However, two key principles apply to broadcast regulation. First, any bodies with regulatory powers in this area must be independent of government. Second, an important goal of regulation must be to promote diversity in the airwaves. The airwaves are a public resource and they must be used for the public benefit, an important part of which is the public’s right to receive information and ideas from a variety of sources.

II.4. Regulatory bodies

Any bodies which exercise regulatory or other powers over broadcasters, such as broadcast authorities or boards of publicly-funded broadcasters, must be independent. This principle has been explicitly endorsed in a number of international instruments, including both Council of Europe Recommendation (2000)23 and ARTICLE 19’s Access to the Airwaves. Central to both is that regulatory bodies should be established in a manner which minimises the risk of interference in their operations, for example through an open appointments process designed to promote pluralism, and which includes guarantees against dismissal and rules on conflict of interest.

Chapter II of the Appendix to the Council of Europe Recommendation states:

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
   - regulatory authorities are under the influence of political power;

14 Articles 3-8 of the CoE Recommendation; Principle 13 of Access to the Airwaves.
members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.

5. Furthermore, rules should guarantee that the members of these authorities:
- are appointed in a democratic and transparent manner;
- may not receive any mandate or take any instructions from any person or body;
- do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.

6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.

7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.

8. Given the broadcasting sector’s specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

Principle 10 of Access to the Airwaves notes a number of ways in which the independence of regulatory bodies should be protected:

Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.

These same principles are also reflected in a number of cases decided by national courts. For example, a case decided by the Supreme Court of Sri Lanka held that a draft broadcasting bill was incompatible with the constitutional guarantee of freedom of expression. Under the draft bill, the Minister had substantial power over appointments to the Board of Directors of the regulatory authority. The Court noted: “[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.”

II.5. Pluralism

An important aspect of States’ positive obligations to promote freedom of expression and of the media is the need to promote pluralism within, and to ensure equal access of all to, the media. As the European Court of Human Rights stated: “[Imparting] information and ideas of general interest … cannot be successfully accomplished unless it is grounded in the principle of pluralism.”

The Inter-American Court has held that freedom of expression requires that “the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.” This implies that the airwaves should be open to a range of different broadcasters and that the State should take measures to prevent monopolisation of the airwaves by one or two players. However, these measures should be carefully designed so that they do not unnecessarily limit the overall growth and development of the sector.

The same approach is reflected in many national policies and laws. Both by German and French constitutional courts, for example, have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil constitutionnel, assessing the legitimacy of a 1986 law on communications, found that the principle of pluralism of information was of constitutional significance. Similarly, the German Constitutional Court has consistently held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.

The obligation to promote media pluralism incorporates both freedom from unnecessary interference by the State, as well as the need for the State to take positive steps to promote pluralism. Thus, States may not impose restrictions which have the effect of unduly limiting or restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure the healthy development of the broadcasting sector, and that this development takes place in a manner that promotes diversity and pluralism.

III. Analysis

III.1. Overview

In its current draft, this Law would make a significant contribution to advancing broadcasters’ right to freedom of expression. In particular, we believe that an independent regulator as envisaged under this law will remove the significant potential for political and other interference with the regulator that exists under the current system. While we have certain reservations on some aspects of the law – for example on awarding points for licence bids – we believe that, viewed as a whole, this law represents a good first draft. Our recommendations and suggestions for further

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17 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, note 11, para. 34.
18 Decision 86-217 of 18 September 1986, Debbasch, 245.
19 See the First Television case, 12 BverfGE 205 (1961).
20 See Principle 3 of Access to the Airwaves.
improvement are provided in the chapter-by-chapter discussion of the draft law, below.

As a preliminary, we note, however, that the law does not address the important question of improving the general economic environment within which broadcasters in Georgia have to operate. We are aware that the advertising market in Georgia is relatively small – information communicated to us privately indicates it may be as small as US$4m. This will make it difficult for commercial broadcasters to survive. While this is of course part of a wider debate on economic policy, consideration could be given to including within this law rules creating a more favourable environment for broadcasters. For example, the law could put in place preferential tax, import duty and tariff regimes, reduce direct levies on broadcasters and/or require the provision of training opportunities.

**Recommendation:**
- Consideration should be given to including rules relating to economic and other measures to boost the broadcasting sector in the draft Law.

### III.2. Chapter I. General Provisions

Article 3 of the draft Law specifies that the broadcast regulation shall be based on a number of principles, including freedom of expression and free enterprise, professionalism and independence of the regulatory body, managerial, editorial and financial independence of the broadcasters, and achieving a balanced broadcast spectrum. Article 4 provides that Parliament shall determine the “main directions of broadcasting and communication policy”, on the basis of which the regulatory body annually determines and publishes a broadcasting strategy. Article 4(2) provides that “President and relevant executive agency direct and execute broadcasting and communication policy”.

**Analysis**

We welcome the express stipulation that the broadcast regulation shall be based on principles of promoting freedom of expression, diversity, accuracy and impartiality and the free flow of information and ideas, consistent with Principle 12 of *Access to the Airwaves*. Similarly, we welcome that the Broadcasting Policy and Strategy are to be drawn up by Parliament and the Commission, respectively. However, we are concerned at Article 4(2) which gives seemingly unlimited power to the President and the ‘relevant executive agency’ to ‘direct and execute’ broadcasting policy. First, having established a new legislative basis for the Commission, it should be left to that body to execute and implement broadcasting law and policy. The President should have no special powers in this regard. Second, if, as we assume, the phrase ‘relevant executive agency’ in Article 4(2) refers to the Commission, this should be made explicit. As a drafting suggestion, we note that there appears to be a significant amount of overlap between the different principles set out in Article 3 (for example, promoting diversity is mentioned under both e. and f.).

Finally, it has become practice for modern broadcasting laws in Council of Europe States to include an express stipulation that they shall be interpreted in accordance with the European Convention on Human Rights and the jurisprudence developed by
the European Court of Human Rights. While we understand that Article 6(2) of the Georgian Constitution provides for the application of international human rights law, the inclusion of a clear statement to this effect in this draft Law would make this absolutely clear for broadcasting.

**Recommendations:**
- The President should have no powers to direct or execute broadcasting policy.
- The law should expressly state that it is to be interpreted in accordance with the ECHR and European Court jurisprudence.

### III.3. Chapter II. Guarantees of independence

Chapter II of the draft Law contains three Articles dealing with conflicts of interest, appointment and dismissal of Commissioners. Under Article 5, no-one may be appointed as a Commissioner, Ombudsman or Head of Department of the Commission if he or she:
- has held or holds official office within the government or a political party;
- was or is a member of an administrative body; or
- performed any activities that are regulated by the Commission, or has an interest in an enterprise that performs such activities.

Article 5(2) provides that a person whose relative is ineligible is also ineligible. The same rules apply to all personnel of the Commission.

Articles 6 and 7 provide the procedure for nomination of Commissioners. The procedure is to be started with an open competition commencing 90 days prior to the expiration of an existing Commissioner’s tenure, or within 3 days of the position becoming vacant. Candidates are to be nominated within 30 days when a list of all nominees will be published. There will be a process of ‘public scrutiny’ after which the President, giving reasons, will select five candidates per vacancy and forward this list to Parliament. Within 30 days after submission, Parliament will conduct public hearings after which votes are cast following a points system. The candidate with the most points will be appointed. If one of the nominees is unacceptable to Parliament, Article 7(2) provides that, by a one-third vote, it may request a substitute nominee.

Article 8 provides that a Commissioner shall be immediately dismissed if he or she violates paragraphs a), d), v) or z) of Article 14 of the Law on Independent National Regulatory Bodies. Furthermore, a Parliamentary procedure for dismissal may be instigated against any Commissioner who violates the rules on conflicts of interest, who is unable to carry out their functions for four months or for violations of paragraphs b) and g) of the Law on National Independent Regulatory Bodies. In the latter case, Commissioners may be dismissed by a three-fifths Parliamentary vote. All dismissals may be appealed.

**Analysis**
While we welcome the rules on incompatibility provided in Article 5, there are a number of things that need to be clarified. First, some of the drafting could be more precise and to the point. Articles 5(1)(d)-(g) could be easily contracted into one paragraph, for example and it is unclear how far the ban on relatives extends (Article

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21 See, for example, the Broadcasting Law recently adopted in Montenegro.
Second, some of the restrictions are excessively strict. To bar from membership someone who has been a representative of, for example, a broadcasting company would bar any practising lawyer who had, in the last two years, represented a broadcasting company. While we recognise that the aim of the law is to prevent corrupt practices, this may be overly restrictive. We also note that the restrictions extend to all employees of the Commission something which, in our view, is similarly excessively restrictive. At the same time, we recommend that another condition on ‘conflict of interest’ be added to restrict employees of political parties from becoming members of the Commission.

With regard to nominations and appointments pursuant to Articles 6 and 7, we welcome the fact that appointments will be made on the basis of who receives the most votes in Parliament.\(^{22}\) This is a vast improvement on the existing regime and is line with Principle 13 of *Access to the Airwaves*. In some cases, however, these provisions lack clarity and detail. It is unclear, for example, how the public will be able to input into the procedure – can anyone nominate Commissioners? – or how exactly the ‘public scrutiny’ in Article 6(6) will take place. This could be ensured, for example, by explicitly guaranteeing the right of the public to make nominations or to make representations concerning individuals being considered for appointment. In addition, Article 6(4) makes provision for the situation where an insufficient number of nominations have been made but fails to specify what number of nominations is regarded as ‘sufficient’. We also note that, pursuant to Principle 13.2 of *Access to the Airwaves*, overall membership of the Commission should be required to be representative of society as a whole. Such a requirement is missing from the draft Law.

We are also concerned about the involvement of the President, particularly with regard to his role in the initial nominations process. This task could easily be performed by a Parliamentary Committee, which would provide important additional democratic accountability. In our April 2001 Memorandum, we stated:

> An ideal solution would have been to minimise the role of the President altogether, giving Parliament the ultimate competence to appoint members to the Commission. We are aware that under the current Constitution, this is not possible. We believe, however, that a long-term aim of constitutional reform in Georgia should be to minimise the role of the President in the appointment of regulatory bodies in the field of media and human rights.

We note that the present model represents a significant step forward but we still believe that the ultimate goal should be for Parliament to be sovereign in its appointment of Commissioners.

With regard to the rules for dismissal, we have not seen the Law on Independent National Regulatory Bodies, so cannot comment on it as a basis for dismissal. The other two grounds for dismissal mentioned – conflicts of interest or inability to carry out functions for four months – are in themselves uncontroversial, although it is unusual that a parliamentary procedure should be necessary if a conflict of interest emerges. This should be an absolute ground for dismissal. Consideration should be

\(^{22}\) Article 7(6).
given to allowing some leeway for valid excuses to override the four month rule, for example where someone has had to spend time in hospital as a result of illness.

Principle 13.3 of *Access to the Airwaves* provides that grounds of dismissal should include committing a serious violation of a Commissioner’s responsibilities under the law. This may be important, for example where a Commissioner is clearly under the influence of political powers although they are not technically in breach of the rules relating to this or where someone is clearly incompetent. We recognise that such a rule may be open to abuse but still recommend that it is included as a discretionary grounds for dismissal, that is, pursuant to a Parliamentary vote. The Parliamentary vote together with the possibility of judicial appeal should safeguard against abuse.

Finally, an important guarantee of independence for individual Commissioners is through rules on payment and reimbursement. These should be set out clearly in the law in a manner that does not allow for discretion in relation to individual Commissioners. Commissioners should be prohibited from receiving any funds in connection with their functions other than those provided for by law.

**Recommendations:**

- The conditions of incompatibility should be reconsidered in favour of clearer, more coherent rules, specifying which relatives are included in their scope.
- Consideration should be given to relaxing some of the conditions on incompatibility and rules on conflict of interest, for example whether they should apply to all employees of the Commission as well as to past activities of individuals who have worked in this area while at the same time they should be extended to exclude employees of political parties.
- The nominations process should provide for an explicit right for public participation and it should be clear on how public scrutiny of nominees will take place.
- The draft Law should clarify what constitutes a ‘sufficient’ number of nominees.
- The draft Law should require the overall membership of the Commission to be broadly representative of society as a whole.
- A Parliamentary Committee, not the President, should shortlist from among the original nominees.
- The power to dismiss for not having fulfilled one’s functions for four months should be amended to allow for a valid excuse to be pleaded.
- An additional ground for dismissal of committing a serious violation one’s responsibilities and for gross incompetence should be considered.
- The law should set out clear rules on reimbursements and payments for Commissioners.
- Commissioners should be prohibited from receiving any funds in connection with their functions other than those provided for by law.

**III.4. Chapter III. The Regulator**

Articles 9-21 of the draft Law deal with the position of the regulatory body. Article 9 provides that the Commission shall be the independent regulatory authority in the field of broadcasting and telecommunications. It will consist of six Commissioners...
Article 10, to be appointed in the manner described in Chapter II of the Law. Article 11 described the functions of the Commission as follows:

- supervising the implementation of the communications and broadcasting policy;
- determining licence conditions and issuing licences;
- drawing up a Code of Conduct;
- considering complaints;
- imposing sanctions;
- protecting the rights of consumers;
- setting the broadcasting fee; and
- performing such other duties as may be prescribed in accordance with this law.

Article 14 stipulates that Commissioners are to serve six-year terms, with the terms staggered in two-year intervals, and no Commissioner may be appointed for more than two consecutive terms. It also states that all Commissioners shall have at least five years’ experience in a relevant field and emphasises that Commissioners are independent and subordinate only to the law.

Decisions are taken by a majority vote, except when the law requires a qualified majority, and the quorum shall be four (Article 15). Any decisions taken by the Commission may be appealed to a court of law. A chair is appointed from among the Commissioners to serve a three-year term; the chair may be reappointed only once (Article 16). The Commissioners will appoint an Executive Director to lead the operations of the Commission; the executive Director will hire further staff as necessary (Article 17).

The Commission will be fully funded from regulation fees and licence fees as well as other sources of income not prohibited by law (Article 20). A budget will be adopted annually by 15 December (Article 19) and the Commission will lay before Parliament a report on its operations – including the audited accounts – by 1 March every year. In addition to the accounts, the report should also include information on how the broadcasting policy has been fulfilled, the current situation in the field of broadcasting and communications and future outlook, the frequency plan and free frequencies, licences issued, information on complaints handled and sanctions issued and information regarding the following year’s budget (Article 20).

Analysis

We welcome the explicit guarantee of independence afforded to both the Commission as a whole, under Article 9, and individual Commissioners, under Article 14. This could be further strengthened by extending the same guarantee to its staff and by including an express stipulation that no-one shall attempt to interfere with the activities of the Commission, except as provided by law.

We note that there is some overlap between the different functions spelt out in Article 11. For example, the conditions enumerated under Article 11(1)(k) are an elaboration of the broader function of ‘fulfilment of rules prescribed by law’ mentioned under Article 11(1)(f) and protecting the rights of consumers is mentioned twice (under Article 11(1)(i) and Article 11(1)(k)).

An additional function of the broadcast regulator in many countries is to conduct audience research, for example on the state of public opinion with regard to
Programmes broadcast by current licence holders or the types of programmes that members of the public would like to see included in television and radio services. This is not currently provided for in the draft Law.

**Recommendations:**
- The law should guarantee the independence of the staff of the Commission and stipulate that no-one shall seek to influence the members or staff of the Commission in the discharge of their duties or to interfere with the activities of the Commission, except as specifically provided for by law.
- Article 11, setting out the functions of the Commission, could be drafted more coherently and clearly.
- The Commission should be required to carry out audience research.

**III.5. Chapter IV. Licensing**

Chapter IV of the draft Law (Articles 22-37) deals with the licensing process. Article 22 specifies that licences are issued in accordance with the broadcasting and communications strategy, as well as the Law on Enterprise Activity Licensing and Bases of Permission Issues. Three different categories of licence may be issued: community broadcasting, public service broadcasting and private, commercial licences. In addition, to serve the needs of specific target groups, the Commission may issue specialised licences, for example, on music, news or to broadcast in a minority language. All licences are valid for a period of ten years and commercial licence holders are bound to pay a licence fee as well as an annual regulation fee of 1% of the licence value (to be determined by the Commission). Any natural or legal person may hold a licence, except for administrative bodies, their officials and companies controlled by them, public officials, members of the Board of a public service broadcaster and political parties.

Pursuant to Article 29, 15% of the broadcasting spectrum shall be reserved for community broadcasting licences. Holders of a community broadcasting licence are bound to serve community purposes, ensure participation of the community they serve, and provide access to views not represented properly by other media.

Article 32 provides that all broadcasting licences will be issued on the basis of a public tender. Before announcing the public tender, the Commission will determine the licence conditions and the minimum amount of investment needed. The announcement of tender will include information on the proposed licensing category and licence type, the proposed service area, general programme requirements, the prime target audience, minimum duration of broadcasting as well as the initial value of the licence, minimum amount of investment commitment required and procedural information on the schedule of the tender, application admission conditions and the deadline. Pursuant to Article 35, the Commission will consider all bids and award points on the amount offered for the licence, the amount of investment committed and the quality and diversity of programme content. The bidder with the most points is awarded the licence. Under paragraph (4), the Commission must “take into account the minority situation in the country and should not discriminate against any particular minority”.

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Under Article 36, licence conditions may be modified on the request of the licence holder, the Ombudsman or the Commission, although modifications that would essentially constitute a new licence are prohibited. A licence holder is bound to commence broadcasting within six months of the licence being awarded.

Analysis

Broadly speaking, the licensing process provided under the draft Law is in line with international law and practice in the area, as crystallised in Section 5 of Access to the Airwaves. However, we doubt whether a process of awarding points on aspects of individual bids such as envisaged under Article 35 would work in practice or be desirable. First, it is nearly impossible to quantify factors such as ‘quality and diversity of programme content’. Second, to award points may effectively relieve the Commission of the need to justify its decisions, or at least lead to less justification. This may in practice result in a process which is actually less transparent than envisaged. A truly transparent system requires the Commission to justify its decision to grant or refuse a licence on its full merits. This will also allow judicial review of a refusal, something which is far more difficult with a points system. Finally, the points system will create confusion when it comes to licence renewal, particularly since Article 35(5) provides that licence holders may benefit from a presumption of licence renewal. This presumption cannot easily or fairly be reflected through a points system.

Furthermore, the draft law should specify that appropriate frequencies shall be reserved for public service broadcasting, in line with their mandate. We understand that public broadcasting is to be provided for in a separate law but public service broadcasters should not need to compete for a licence.

Recommendations:

- The use of a points system to award licences should be reconsidered in favour of a requirement for the Commission to give detailed reasons for deciding to grant or refuse a licence.
- A licence and broadcasting frequency should be reserved for public service broadcasters.

### III.6. Chapter V. Media Ownership

Chapter V of the draft Law contains restrictions on multiple ownership of broadcast licences and requires holders of a broadcast licence to disclose any interests they hold in newspapers or news agencies. Under Article 38, one person or entity may control no more than one national and one local broadcasting licence for each of TV and radio. ‘Control’ is defined as owning more than a 25% interest in a licence holder. A person or entity who does not hold a national licence may control no more than two radio or TV licences in one service area. There appear to be no restrictions in holding several licences in different service areas.

Under Article 39, broadcast licence holders are required to disclose to the Commission any information regarding ownership of or interests in another broadcasting licence, ownership or interests in newspapers or news agencies, and

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23 Article 2(e).
information regarding their ownership or interests in any other enterprises. Similar obligations apply to shareholders and ‘top managers’ of broadcast licence holders, and their relatives.

**Analysis**

Under Article 10 ECHR, the State has an obligation to take positive measures to promote the growth and development of broadcasting, and to ensure that it takes place in a manner which ensures maximum diversity.\(^{24}\) This means that effective measures should be in place to prevent undue concentration, and to promote diversity of ownership both within the broadcast sector and between broadcasting and other media sectors. Such measures must take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable. The State also has an obligation to refrain from imposing restrictions on broadcasters which unnecessarily limit the overall growth and development of the sector.

In this light, the restrictions in Article 38, preventing multiple ownership of national broadcast licences and national and local broadcast licences are not unreasonable. Similar restrictions can be found in Australia and the United Kingdom, for example, and have been justified as being necessary to prevent undue concentration of ownership. The requirement on owners of broadcast licences to disclose their interests in other businesses is also not unreasonable, particularly given the history in Georgia of interference with the media of commercial interests. However, the requirement on all shareholders to disclose interests is likely to be found disproportionately onerous; it should apply only to those investors who hold a significant percentage of shares.

**Recommendation:**
- Only major shareholders should be required to disclose their business interests.

**III.7. Chapters VI-VII: Content Requirements**

Pursuant to Article 41, the Commission must draw up a Code of Conduct in close consultation with the public and licence holders dealing with issues such as accuracy, fairness and impartiality of programmes, privacy, children, coverage election campaigns and politics, religion, minorities, crime, sex and violence and advertisement and sponsorship. The Code is to be revised at least once every five years. Under Article 42, holders of a universal broadcasting licence are required to provide sufficient diversity in their programming to accommodate all interests. Article 45 requires holders of a universal licence to broadcast election debates.

Articles 44 and 46 prescribe content requirements that apply to all licence holders. All licence holders are bound by obligations of fairness and impartiality, discrimination and propaganda for war are prohibited, and licence holders are required to avoid any programmes likely to stir up ethnic or religious hatred, discrimination or violence against any group. Article 47 provides for a right of reply for statements of fact which treat someone unfairly, together with a procedure for the reply either to be broadcast or refused. Article 49 prohibits the broadcasting of subliminal images.

\(^{24}\) See, for example, *Informationsverein Lentia and Others v. Austria*, note 16.
Chapter VII contains a number of provisions regarding advertisements and sponsorship, for example prohibiting sponsorship of news and current affairs programmes and requiring that all sponsored programmes are identified as such.

**Analysis**

Restrictions on the content of what may be broadcast, like all restrictions to freedom of expression, should be imposed only where they meet a strict three-part test, as foreseen in Article 10(2) of the ECHR. The content requirements prescribed under Chapter VI generally comply with this requirement and are in line with the requirements spelt out in Section 6 of *Access to the Airwaves*. It should, however, be understood that the Code of Conduct should not itself contain any harsh requirements. For example, a generally requirement to strive for accuracy is legitimate, but a strict requirement of accuracy for each programme is not. We also note that no overall limit on advertising is provided, although this will probably be addressed in the Code of Conduct. It would be preferable if the law set a clear overall limit.

In addition, while we welcome that the Code of Conduct will be drawn up “in consultation with licensees and the public”, there is no detail on how consultation will take place in practice. The law should require a draft Code of Conduct to be published and allow members of the public to make representations.

The right of reply may be claimed by anyone who has been unfairly treated and who wishes to correct false facts. In our view, it would be better for this purpose to provide for a right of correction so that anyone has a right to point out a mistake to the broadcaster, but it is up to the latter to decide how to correct it. Any failure to correct a mistake could then be the subject of a complaint to the Ombudsman. Otherwise, the scope of the right of reply should be substantially narrowed from anyone who has been unfairly treated to those whose legal rights have been infringed, for example because they have been defamed. An excessively broad right of reply may be abused, for example by politicians wishing to respond to material which is critical of them.

**Recommendations:**

- The law should require a draft Code of Conduct to be published for consultation, allowing members of the public to make representations.
- The law should set an overall limit on the amount of advertisement allowed.
- The right of reply should either be transformed into a right of correction or be substantially narrowed in scope.

**III.8. Chapter VIII. Complaints and Sanctions**

Chapter VIII of the draft law outlines the complaints mechanism and establishes a sanctions regime for violations of the law.

Under Article 57, all broadcast licence holders have to establish internal mechanisms for the consideration of complaints. Any member of the public may lodge a complaint regarding a violation of the law, Code of Conduct or specific licence conditions. Unless a complaint is dealt with to his or her satisfaction within ten days a complainant may refer the complaint to a specially established Broadcasting

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Ombudsman. The Ombudsman shall decide on the admissibility of the complaint within ten days, and take a decision on the merits within 30 days of the admissibility decision. These measures shall be conducted in accordance with public administrative procedures, and parties may be represented and present evidence. The admissibility decision may be appealed to the Commission, but the decision on the merits appears to be final. If the Ombudsman decides that a violation has taken place, he or she will draw up a Declaration which has to be broadcast on prime time within 5 days of the decision.

Under Article 59, the Commission may impose a sanction consisting of a written warning, fine or licence suspension or withdrawal for violations of the law, or for ceasing to broadcast for more than thirty consecutive days, or sixty days intermittently within one calendar year. Article 60 specifies the maximum amount of the fine – left blank in the current draft – and Article 61 provides that licence suspension may be imposed only in the case of serious and repeated violations of the law, Code of Conduct or licence conditions, and only if warnings or fines have proved ineffective. Licences may be suspended for a period of up to thirty days, which may be renewed twice if the licence holder has failed to take sufficient steps to address the violation. Finally, Article 62 provides that a licence may be revoked only upon expiration of the licence term, on the request of the licence holder, when the licence holder fails to commence broadcasting within the period determined by the law, upon expiration of the suspension period if the licence holder has failed to take steps to address the violations, after the third consecutive suspension of a licence or if prohibited multiple ownership occurs or comes to light.

Analysis
The complaints mechanism outlined in Chapter VII is broadly in line with international standards, although there are some important omissions and certain provisions need to be fine-tuned. It is odd that only admissibility decisions from the Ombudsman are subject to appeal, and not decisions on the merits. This may in fact be a drafting error, particularly given that the Commission has also been given the exclusive power to impose sanctions. It is also odd to note that Article 18 provides that the Ombudsman shall “make recommendations to the Commission”. This may be another drafting issue; perhaps it is envisaged that the Ombudsman should, upon finding a violation, not only draw up a Declaration but also refer his or her findings to the Commission, together with a recommendation regarding the appropriate sanction. Either way, both the procedure for complaints and the relationship between the Ombudsman and the Commissioner needs clarification. In any event, the law should provide for an appeal against any decision that affects the rights of a licence holder.

Recommendations:
- The law should provide for a right to appeal any sanctions to a court of law.
- The complaints procedure should be clarified, in particular regarding the respective roles of the Ombudsman and the Commissioner.

26 To be appointed by the Commission, following a public competition in accordance with administrative law. See Article 18.