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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT *AMICUS CURIAE* OPINION
FOR THE CONSTITUTIONAL COURT
OF GEORGIA**

**ON THE LIMITATION
OF THE VIEWERS RIGHT OF ACCESS TO COURT
AGAINST DECISIONS
OF AN INDEPENDENT BROADCASTING AUTHORITY
FOR THE RESCHEDULING OF PROGRAMMES**

**on the basis of comments by
Mr Christoph GRABENWARTER (Member, Austria)**

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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 for the rescheduling of programmes. The Venice Commission appointed Mr Grabenwarter as rapporteur in this issue.

2. The present *amicus curiae* opinion was adopted by the Venice Commission at its ... Plenary Session (...)

Comparative remarks

3. The following comments are based primarily on the Austrian legal situation which appears to bear some "typical" elements of the European legal orders. Thereafter the comments assess the Georgian legislation against the background of the European Convention on Human Rights (ECHR).

4. 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.

5. 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.

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

7. 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.

8. 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.

[...]

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

10. 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.

11. In Switzerland, Article 3.e/bis of the Federal Law on Administrative Procedure excluded appeals to administrative courts against decisions on radio and television broadcasting by the Independent Authority for the Examination of Complaints in the Field of Radio and Television. Appeals to the Federal Tribunal were possible only if basic procedural guarantees of Article 4 of the Federal Constitution are violated. A revision of the legislation has opened a material appeal to the Federal Tribunal.⁹

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.

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

European Convention on Human Rights

12. The questions raised by the Constitutional Court of Georgia amount to whether or not the ECHR grants the parental right to prevent or challenge the broadcasting programme insofar as it is not in line with the parents' views. 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. Two avenues are conceivable in order to infer this right from the ECHR.

a) Right to education

13. 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?

14. Private persons do not have to comply with the ECHR, which in particular the phrasing of Article 2 of the Protocol makes clear. 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.

15. Irrespective of this, there are a few severe general considerations speaking against such an interpretation of Article 2 of the Protocol.

16. 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 requirement 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 up to the parents to let their children watch television or, on the contrary, to forbid doing so.

17. 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 so on. 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.

18. Accordingly, 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) Freedom of Media

19. 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.”

20. 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. Nevertheless, it goes almost without saying that 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.

Conclusion

21. In conclusion, Article 13 ECHR is not applicable to the limitation of the viewers right of access to Court against decisions of an independent broadcasting authority for the rescheduling of programmes because there is no right to a certain content of broadcasting guaranteed by the Convention. Consequently, national legislation which does not enable the viewers of television to prevent or challenge the programmes does not violate the ECHR.

22. Still, from a national perspective it seems to be European standard that broadcasting laws provide a mechanism by means of which concerned viewers may challenge the concrete programme before specific administrative authorities. As a rule, these acts are subject to judicial control, especially before Constitutional Courts in States where such a jurisdiction exists.¹⁰

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

¹⁰ E.g. in Austria, Ireland, Slovenia, Switzerland (Federal Tribunal).