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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AMICUS CURIAE BRIEF

FOR THE CONSTITUTIONAL COURT OF GEORGIA

ON INDIVIDUAL APPLICATION BY PUBLIC BROADCASTERS

adopted by the Venice Commission
at its 98th Plenary Session
(Venice, 21-22 March 2014)

on the basis of comments by:

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I. Introduction

1. By a letter dated 9 February 2014, Mr Kote Vardzelashvili, Deputy President of the Constitutional Court of Georgia, requested an *amicus curiae* brief from the Venice Commission concerning in particular the right of members of the Board of Trustees of the Georgian public broadcaster to lodge an application before the Constitutional Court claiming an unjustified interference with their right to freedom of expression.

2. Later, an information note (hereinafter, "Information note") was sent to the Venice Commission providing some explanations on the background of the questions raised by the Constitutional Court of Georgia in its request.

II. Background

3. It appears from the information note provided by the Constitutional Court of Georgia that a reform of the Georgian Law on Broadcasting has been adopted by the Parliament of Georgia on 20 November 2013, which subsequently entered into force following its signature by the President of Georgia. The amendments introduced new provisions relating to the status of the members of the "Board of Trustees" of the Georgian Public Broadcaster. The number of members of the Board was reduced from 15 to 9 and new rules on to the appointment of its members were introduced.

4. The amendments introduced in November 2013 also resulted in the premature termination of the tenure of the current members of the Board of Trustees, who are to be replaced by new members appointed according to the new selection provisions introduced by the amendments. According to Article 3 of the Law on amendments, "once this Law takes effect prior to the commencement of the new Board of Trustees' tenure, Broadcaster's current Board of Trustees shall not be authorized to make any decisions save to make recommendations".

5. The Venice Commission has not received the text of the application lodged with the Constitutional Court. According to the Information note, some of the current members of the Board introduced an individual application before the Constitutional Court claiming that the premature termination of the office of all the members of the Board constitutes an infringement with their right to freedom of expression. They accept that the new rules on the selection of the members of the Board of Trustees are in line with the Constitution and international standards but they claim that these provisions should have been applied prospectively in order to allow the current members of the board to stay in office until the end of their original term. The failure of the legislator to justify the need for termination of office of all serving members, according to the claimants, indicates that the decision is politically motivated. "Thus, unjustified intervention into the work of public broadcaster infringes its independence and the right to freedom of expression".

6. Against this background, in its request for an *amicus curiae* opinion, the Georgian Constitutional Court raised three questions.

7. These questions are as follows:

"A. Does the Public Broadcaster have the right to freedom of expression?

B. Does unjustified intervention in the work of the Board of Trustees, termination of the office of the current members, amount to the infringement of the constitutional protected right of Public Broadcaster and/or its right to freedom of expression?

C. Does a citizen have the right to argue before the Constitutional Court or relevant judicial body for the protection of his/her right to receive information in a case, when state interferes with the independence of Public Broadcaster?"

III. Preliminary remarks

8. The Venice Commission observes at the outset that the questions of the Constitutional Court are not abstract ones and are connected to the questions of law and fact raised by a concrete case pending before it. Therefore, the answers - as in any other juridical conflict - have to be found by taking into account the precise circumstances of the concrete case.

9. More particularly, answers to the first two questions which raise the issue of individual application of the public broadcaster before the Constitutional Court on the one hand, and the capacity of the members of the Board of Trustees to represent the broadcaster before it on the other, require detailed information on procedural law and practice of the country. The legal status of the public broadcaster, the rights that status gives it, the nature of the activity it carries out, the context in which it is carried out, the degree of its independence from political authorities and the legal and administrative status of the members of the Board of Trustees are only but a few of the factors that should be examined more closely in the context of the specific legal environment of the country in order to provide an accurate answer to the questions raised.

10. Those specific factors cannot be examined as regards solely the legal provisions, as the concrete facts surrounding the case before the Georgian Constitutional Court are also essential to understand the situation and for the resolution of the problems raised by this application.

11. The request by the Constitutional Court only contains a brief description of the main complaints made by the members of the Board of Trustees and the above-mentioned set of three questions.

12. Under these circumstances, the Venice Commission will not take a position on whether the facts of the case before the Constitutional Court reveal any violation of the rights enshrined in the Constitution of Georgia. Because of its knowledge and expertise of the legal and factual circumstances of the concrete case, the Constitutional Court is in the best position to examine in detail the facts, evidence and legal issues of the case. The role of the Venice Commission in an *amicus curiae* brief is not to decide on the complaints of the claimants in the concrete case instead of the Constitutional Court, but to provide the Court with elements from international and national comparative law to assist it in its judicial task of deciding the case.

13. According to the information note, the claimants themselves do not challenge the constitutionality of the amendments in general, which they consider in line with the Constitution and international standards. Parliaments, in general, in their constitutional role as "supreme representative body of the country" and thus exercising "legislative power" to "determine the principle directions of domestic (…) policy"[1], are entitled to change a law at any time using the instruments provided by the Constitution, even if this affects the election period of members of a supervisory body. However, as it was stressed by the Committee of Ministers of the Council of Europe in its Recommendation No. R(96)10 on the Guarantee of the independence of Public Service Broadcasting, the legislators, in the performance of their constitutional functions should have regard to the principle of "independence of public service

[1] Article 48 of the Constitution of Georgia.

broadcasting" which is "an essential principle in this field"[2]. It is up to the Constitutional Court to decide on whether the Parliament complied with this requirement of standards for law making on public broadcasting. Besides, in the *amicus curiae* request of the Constitutional Court, the Venice Commission is not called upon to assess the constitutionality of the amendments in general, nor is it provided with the arguments raised by the Parliament to justify the premature termination of the term of office of the current members of the Board of Trustees.

14. Therefore, in the present *amicus curiae* opinion, the Venice Commission will adopt a restrictive approach to the issues raised by the Constitutional Court in its request. Without analysing the concrete case pending before the Constitutional Court and without suggesting how the Constitutional Court should solve the case, the Venice Commission will limit the scope of the present *amicus curiae* brief to an abstract analysis of the case-law of the European Court of Human Rights (hereinafter, "ECtHR") concerning the admissibility of complaints by public broadcasters or by members of a board of such a broadcaster. This analysis of the international case-law will be consolidated by one example of comparative constitutional case-law, German constitutional law. Drawing conclusions from this material will be up to the Constitutional Court, assuming that the concrete case has specific aspects and that only the Constitutional Court can decide on whether the complaints are admissible or not.

IV. Analysis of the case-law of the ECtHR and comparative constitutional case-law on the admissibility of complaints by public broadcasters

A. Preliminary remarks

15. The Venice Commission considers that it is possible to approach the subject matter from different angles. First, the request of the Constitutional Court obviously raises questions about the admissibility of an individual complaint introduced by a public broadcaster, taking account of the fact that according to Article 34 of the European Convention on Human Rights (hereinafter, "ECHR"), "any person, *non-governmental organizations*[3] or group of individuals claiming to be a "victim" of a violation (…) of the rights (…) can lodge an individual application before the ECtHR". The provision, at first glance, seems to exclude the public corporations from the scope of "individual applications"[4].

16. Secondly, the request by the Constitutional Court also raises questions on whether a decision by the competent authority (i.e. in the particular case, Parliament) concerning the internal organisation of public broadcaster, for instance the election of its members, or any other measure taken in respect of this legal entity, can constitute an interference with individual fundamental rights of its members. In other words, the question is whether a legislative act concerning the organisation or the functioning of the public broadcaster can be considered as creating a "personal injury" for the individual members of the Board of Trustees.

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[2] Recommendation No. R(96)10 of the Committee of Ministers to member states on the guarantee of the independence of Public Service Broadcasting adopted by the Committee of Ministers on 11 September 1996 at the 573rd meeting of the Ministers' Deputies.

[3] Emphasis added.

[4] See, however, the analysis below of the relevant case-law of the European Court in the cases of *Radio France v. France* (53984/00) admissibility decision of 23 September 2003 and *Österreischer Rundfunk v. Austria* (35841/02), judgment of 7 December 2006.

B. Analysis

1. Individual applications by public broadcasters

17. Under Article 34 ECHR, any person, non-governmental organisations or group of individuals claiming to be a victim of a violation (…) of the rights set forth in the Convention and the Protocols thereto, can lodge an individual application before the ECtHR. Although the term "person" (*personne physique* in the French text) appears to include only natural persons, applications may and have been brought by corporate bodies, such as companies, trade unions, churches political parties etc[5].

a. Public bodies in general

18. The formulation of Article 34 ECHR excludes however the individual applications by governmental bodies (by contrast to 'non-governmental organisations') and public corporations under State control[6].

19. According to the ECtHR case-law, public bodies, such as local authorities, cannot lodge applications to the European Court since Article 34 only permits any "person, non-governmental organisations or group of individuals" to petition the Court. The idea behind this principle is to prevent a Contracting party from acting as both an applicant and a respondent party before the Court[7]. The principle excludes from *locus standi*, not only the central organs of the State that are clearly governmental organisations, as opposed to non-governmental organisations, but also decentralized authorities that exercise public functions, notwithstanding the extent of their autonomy vis-à-vis the central organs.

20. An application lodged by a **city council** was rejected by the European Commission of Human Rights (hereinafter, "the European Commission") in the case of *Ayuntamiento de M. v. Spain* (15090/89) considering that the applicant was not entitled in any capacity to introduce an application based on Article 25 ECHR (former Article 34). It noted that under international law, the expression "governmental organisation" cannot be held to refer only to the Government or the central organs of the State. Where powers are distributed along decentralised lines, it refers to any national authority which exercises public functions".

21. In the same vein, an application lodged by the "Province of Bari"[8], concerning the inaction of the State which failed to help finance the reconstruction of an opera house was rejected by the European Commission on the same grounds. In addition, the European Commission also considered that this conclusion was proved by the fact that acts or failures to act, imputable to a province could engage the responsibility of the Italian State under the Convention. The fact that there is a possibility of conflict between a province and the central government cannot lead to a different conclusion, because conflicts between different State authorities, at different levels and liable to be decided in a more or less jurisdictional manner, are entirely possible and are regulated in most national and in some cases even supranational systems. Yet the possibility of such conflicts does not in any way diminish the public nature of the authorities involved (…).

22. The applications lodged by municipalities[9] or municipal sections[10] were also declared inadmissible by the Convention organs on the same grounds.

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[5] See Jacobs, White and Ovey, *The European Convention on Human Rights,* Oxford, 2010, p. 31.
[6] *Islamic Republic of Iran Shipping Lines v. Turkey* (40998/98), judgment of 13 December 2007.
[7] *Transpetrol a.s. v. Slovakia* (28502/08), admissibility decision of 15 November 2011.
[8] *The Province of Bari, Sorrentino and Messeni Nemagna v. Italie* (41877/98)
[9] *Rothenthurm Commune v. Switzerland* (13252/87), *Danderyds Kommun v. Sweden* (52559/99), Döşemealtı *Belediyesi v. Turkey* (50108/06).
[10] *The Municipal section of Antilly v. France* (45129/98)

23. Public law corporations who have a monopoly, such as the **Spanish national railway company**, are also considered as governmental organisations, which excludes them from the scope of Article 34[11]. The European Commission considered that the Spanish railway company was not entitled in any capacity to introduce an application, since its board of directors was answerable to the Government; it was the only undertaking with a licence to manage, direct and administer the state railways; and its internal structure and manner of conducting its business were regulated by legislation.

24. The European Commission reached the same conclusion with regard to an application lodged by the **General Council of Professional Association**[12]. It held that the General Councils of Professional Associations are public-law corporations which perform official duties assigned to them by the Constitution and legislation.

25. However, the Convention organs did not opt for a rigid and abstract interpretation of the notion of "governmental organisation" and have proceeded to a **case-by-case examination** taking into account the legal status of the organisation, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out and the degree of the entity's independence from political authorities. It follows that public-law entities can have the status of a "non-governmental organisation" in so far as they do not exercise "governmental powers" were not established "for public-administration purposes" and are completely independent from the State.

26. In the case of *The Holy Monasteries v. Greece* (13092/87; 13984/88), the **applicant monasteries** which were qualified as public-law entities at the domestic level, were also entitled to take enforceable administrative decisions whose lawfulness was subject to review by the Supreme Administrative Court like any other public authority's decisions. However, the ECtHR, on the basis of a detailed analysis of the legal status of the monasteries in the light of domestic legal provisions, considered that the monasteries, despite their public law status, were to be considered as non-governmental organisations under Article 34. Their function were essentially ecclesiastical and spiritual, but also cultural and social in some cases, which were not such as to enable them to be classed with governmental organisations established for public-administration purposes. Also, the monastery councils' only power consisted in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery. Finally, the monasteries came under the spiritual supervision of the local archbishop, not under the supervision of the State, and they were accordingly entities distinct from the State, of which they were completely independent. The applicant monasteries were therefore to be regarded as non-governmental organisations[13].

27. As regards **commercial companies**, the fact that the majority of its shares belong to the State, does not prevent the ECtHR to examine the concrete circumstances (i.e. legal status of the organisation, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out and the degree of the entity's independence from the political authorities) in order to establish the standing of the applicant company. In the case of *Islamic Republic of Iran Shipping Lines v. Turkey* (40998/98), although the majority of the company's shares belonged to the State and three-fifths of the members of the board of directors of the company were appointed by the State, the Court observed that the company was governed essentially by company law, did not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and was subject to the jurisdiction of the ordinary rather

[11] *RENFE v. Spain*, no 35216/97, decision of the Commission of 8 September 1997.

[12] A public law corporation (Spain) performing official duties such as governing council of the association of a given profession. Consejo General de Colejos Ociciales de Economista de España v. Spain, nos 26114/95 and 26455/95, decision of 28 June 1995.

[13] See also, *Finska Församlingen I Stockholm, Hautaniemi v. Sweden*, no 24019/94, decision of the Commission of 11 April 1996 ; *Rommelfanger v. Germany*, no 12242/86, decision of the Commission of 12July 1989.

than the administrative courts. It concluded that the company was run as a commercial business (…) and was entitled to bring an application under Article 34 ECHR[14].

28. However, as in the case of *State Holding Company LUGANSKVUGILLYA v. Ukraine* (23938/05), if the applicant company is a legal entity registered as a corporation owned and managed by the State, which participates in the exercise of governmental powers in the area of management of coal industry, having a public-service role in that activity of the State, exercising certain public functions related to administration of State property owned in the coal mining industry that is heavily subsidised and regulated by the State, and moreover which can be liquidated on the basis of a ministerial decision, then the ECtHR concludes that the applicant company is not a "non-governmental organisation" within the meaning of Article 34 of the Convention.

b. Public broadcaster

29. The ECtHR adopted the same case-by-case approach in the examination of individual applications by a public broadcaster, taking into account its legal status, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out and the degree of the entity's independence from political authorities. The "governmental organisations" include legal entities which participate in the exercise of governmental powers or run a public service under government control.

30. In the case of *Radio France and others v. France*[15], the applicant is the "national programme provider" and according to Section 44.III of the Freedom of Communication Act of 30 September 1986, it must create and schedule local and national radio programmes to be broadcast throughout the whole or any part of metropolitan France, promote regional expression through its radio stations located in every part of France, and showcase its artistic heritage and creativity (...). Moreover, under the Freedom of Communication Act of 30 September 1986, the State holds all of the capital in Radio France; its memorandum and articles of association are approved by decree; its resources are to a large extent public and it performs "public service mission in the general interest". Radio France is obliged to comply with the terms of reference and to enter into contact with the State setting out its objectives and means.

31. However the Court also observed the following:

> *1. (…) within the bounds of, inter alia, the public-service requirements, section 1 of the Act guarantees freedom of audio-visual communication. That means, firstly, that Radio France does not come under the aegis of the State, but is under the control of the Conseil supérieur de l'audiovisuel (CSA), which the Act terms an "independent authority" and which is responsible in particular for "preserv[ing] the independence and impartiality of the public radio ... sector".*
>
> *2. Only four out of twelve members of its board of directors represent the State and that its Chairman is appointed by the CSA.*
>
> *3. Radio France does not hold a monopoly over radio broadcasting; it operates in a sector open to competition, since the Act permits private companies and associations*

[14] See also Ukraine-Tyumen v. Ukraine, (no. 22603/02), 22 November 2007. In the case of a joint venture between Ukraine and a Region of the Russian Federation, the Court found that even though some of the articles of association suggested that the applicant company had a public-service mission (namely, to implement intergovernmental decisions in the field of business cooperation), the company was predominantly involved in ordinary business, it enjoyed institutional autonomy, was governed by company law, was under the control and management of its founders, and the State's minority shareholding did not give to the State a greater role in the management of the company than other shareholders. The company could therefore still be considered as a "non-governmental organisation" for the purposes of Article 34 of the Convention.

[15] Admissibility decision of 23 September 2003, no.53984/00.

to use the terrestrial frequency spectrum, subject to certain conditions and under the supervision of the CSA;

4. it is also governed essentially by company law, does not enjoy any powers beyond those conferred by ordinary law in the exercise of its activities and is subject to the jurisdiction of the ordinary rather than the administrative courts.

32. On the basis of those observations the Court considered that, although Radio France has been entrusted with public-service missions and depends to a considerable extent on the State for its financing, the legislature has devised a framework which is plainly designed to guarantee its editorial independence and its institutional autonomy (that being consistent with Recommendation No. R (96) 10 of the Committee of Ministers)[16]. In this respect, there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints. Moreover, the Act, which clearly places radio broadcasting in a competitive environment, did not confer a dominant position on Radio France. The Court accordingly concluded that the national company Radio France is a "non-governmental organisation" within the meaning of Article 34 of the Convention.

33. In the case of *Österreichischer Rundfunk v. Austria* (35841/02, 7 December 2006), the Court applied the criteria set out in the Radio France decision, in order to examine the question of public broadcaster's capacity to apply to it in the light of the statutory provisions contained in the 2001 Act on Austrian Broadcasting. The Court observed that:

1. the basic rules for broadcasting in Austria are laid down by the 1974 Constitutional Law concerning the Safeguarding of the Independence of Broadcasting, which stipulates that any law governing broadcasting has to contain provisions to ensure the objectivity and independence of reporting;

2. The applicant which, since 1974, was a public law corporation was transformed into a public law foundation without an owner by the 2001 Act. Its capital, though stemming from public means, is therefore no longer held by the State. The applicant finances its activities from programme fees which it can fix itself. Its mandate is set out in the 2001 Act as are the rules relating to the establishment of its organs, namely the Foundation Council, the Director General, the Audience Council and the Auditing Commission.

3. The Foundation Council monitors the applicant's management and appoints the Director General for a period of five years. The latter is responsible for running of the applicant's activities and can only be removed by the Foundation Council acting with a two-thirds majority.

34. Moreover, as a reply to the Government's objection that the public authorities exercise control since the Federal Government and the Länder appoint a majority of the members of the Foundation Council, namely 18 out of 35, the Court noted a number of features designed to guarantee the boards independence:

1. its mandate laid down in Section 4 § 1 of the 2001 Act oblige it to observe the requirements of objectivity and diversity of reporting and to preserve its independence inter alia from the State and the parties.

[16] Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States on the Guarantee of the Independence of public service broadcasting, whose recitals reiterate that the independence of the media is essential for the functioning of a democratic society.

2. Section 19 § 2 provides that the members of the Foundation Council are only bound by law in the exercise of their functions and do not receive any instructions. Section 22 § 3 contains the same provision for the Director General.

3. a number of provisions of the said Act guarantee the editorial and journalistic independence of the applicant's staff members.

4. the Federal Communication Panel which monitors the board's compliance with the 2001 Act is an independent body consisting of a majority of judges.

5. Furthermore, the Austrian Broadcasting does not hold a broadcasting monopoly, but operates in a sector open to competition. Private broadcasters can obtain licences under the Private Radio Act and the Private Television Act

35. The Court also added that, even where a public broadcaster is largely dependent on public resources for the financing of its activities, this is not considered to be a decisive criterion, while the fact that a public broadcaster is placed in a competitive environment is an important factor. Having regard to all these elements, the Court concluded that the Austrian Broadcasting qualifies as a "non-governmental organisation" within the meaning of Article 34 of the Convention and is therefore entitled to lodge an application[17].

36. The ECtHR in its case-law regarding the admissibility of individual applications by public corporations in general and public broadcasters in particular, does not try to set out an abstract criteria to distinguish the governmental and non-governmental organisations (Article 34 ECHR) but gives an assessment on the concrete independence of the legal entity from State authorities by taking into account the legal and factual circumstances of the case. The fact that the legal entity is classed as a "public law entity" at the domestic level as in the case of *The Holy Monasteries*, that the majority of its shares belongs to State as in the case of *Islamic Republic of Iran Shipping Lines v. Turkey*, that it has a public-service mission as in the case of *Ukraine-Tyumen v. Ukraine* or is qualified under the domestic legislation as a national programme provider the entire capital of which is held by the State (*Radio France v. France*), are not on their own decisive.

37. The legal status of a public broadcaster, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out, the degree of the entity's independence from the political authorities, whether the entity participates in the exercise of governmental powers or runs a public service under government control, are among the criteria that the Court refers to in order to decide on the admissibility of a case brought by a public broadcaster among other public corporations.

c. Comparative Law elements (German Constitutional Law)

38. The timeframe for the preparation of this *amicus curiae* brief only allowed for research in one other country, Germany. Comparative comments will therefore be based exclusively on German Law.

i. Relevant provisions and structure

39. Constitutional complaints may, according to Art. 93 (1) Nr. 4a of the Basic Law (*Grundgesetz* i.e. the German Constitution, abbreviated BL), be lodged by "any person

[17] In the case of *Mackay and BBC Scotland v. United Kingdom* (10734/05) (7 December 2010), in their initial observations, the Government objected that the BBC was a public broadcasting corporation established by Royal Charter and therefore could not be a victim for the purposes of Article 34 of the Convention. However, in their final observations the Government informed the Court that, for the sole purpose of the application, they conceded that BBC Scotland could be categorised as a victim and withdrew their initial observations on this point.

alleging that one of his basic rights or (…) has been infringed by public authority".[18] This provision is reiterated at statutory level by Section 90 of the Constitutional Court Act. The term "any person" encompasses private persons as well as other entities, if they can be holders of constitutional rights. It is therefore necessary to consider the rules governing the substantive enjoyment of fundamental rights. According to Art. 19 (3) BL, constitutional rights "apply to domestic artificial persons to the extent that the nature of such rights permits."

40. The following remarks will first consider the question of substantive enjoyment of constitutional rights by public entities in general and especially by public broadcasters. Secondly, the ability to lodge constitutional complaints will be examined respectively.

ii. Substantive enjoyment of constitutional rights

41. The term "legal or artificial person" as phrased in Art. 19 (3) BL establishes a constitutional notion. It encompasses public law and private law associations alike, if they can generally hold fundamental rights. Therefore, it needs to be ascertained whether the "nature of such rights" permits their application to a legal person. The question of the "nature of such rights" is the key criterion that also distinguishes the scope of protection of public entities from private legal persons. The main purpose of fundamental rights is to solve conflicts between private entities and bearers of public authority. Infringements and restrictions among public entities, on the other hand, are conflicts of competence that – in general - do not fall within the scope and purpose of protection by fundamental rights.[19],

42. On the other hand, these rules allow for exceptions. If the Constitution allocates certain public entities to areas of life protected by a constitutional right and commissions them some degree of independence from the state;[20] they are protected against infringements of those fundamental rights whose exercise the organisation is meant to enable and facilitate.

43. The Constitutional Court has acknowledged such exceptions for some types of entities, including Public Broadcasters. They enjoy the right to report by means of broadcast emanating from Article 5 (1) S. 2 BL.[21] The provision guarantees free expression by mass media. Its protection encompasses the production of the content of transmissions and all related activities. Public broadcasters are established by the state to enable and facilitate independent mass communication. To this end, it must be ensured that the institution is neither controlled exclusively by the state nor by a single societal group. To safeguard this position, public broadcasters are vested with constitutional rights protection against infringements by the state.

iii. Rules of Standing – Ability to lodge a constitutional complaint

44. Constitutional complaints can, according to the Constitution and statutory provisions, be lodged by "any person alleging that one of his basic rights or (…) has been infringed by public authority". The first requirement to be met is the "any person" criterion, which denotes all entities able to substantively enjoy constitutional rights, including public broadcasters.

45. As to the question of who may lodge the complaint on behalf of a public entity, Constitutional Court Procedure does not establish autonomous rules,[22] meaning that the complaint can - as in other cases - be only lodged by the entity's statutory representative.

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[18] Translation by Professors Kommers and Currie in cooperation with the Language service of the German Bundestag, available at: https://www.btg-bestellservice.de/pdf/80201000.pdf.
[19] BVerfGE(Decisions of the German Constitutional Court) vol.21, p.362 (369 et.seq.).
[20] BVerfGE 61, 82 (103).
[21] BVerfGE 31, 314 (322).
[22] BVerfGE 1, 87 (88); 72, 122 (132)

46. Lastly, claimants need to plausibly contend that one of their constitutional rights may have been violated and that they themselves are currently and directly affected by the measure.[23] Public broadcasters can therefore lodge constitutional complaints if they can plausibly contend that their freedom of reporting by means of broadcast has been violated by the state, including the legislature and if they can demonstrate self-affection as well as current and direct affection by the measure in question.

2. Individual applications by members of the Public Broadcaster

47. As mentioned above (IV A. Preliminary Remarks), the request of the Constitutional Court also raises the question of whether a legislative act on the organisation or functioning of the public broadcaster can be considered as creating a "personal injury" for the individual members of the Board of Trustees.

48. This question should be distinguished from that of whether the members of the Board of Trustees of the public broadcaster are entitled to represent the legal entity and to introduce an individual application before the Constitutional Court on behalf of the public broadcaster. The ECtHR does not seem to have developed an autonomous concept on the "legal representative of a legal entity" and takes into consideration the internal regulations of the legal entity itself and relevant domestic provisions in order to analyse whether a given applicant is empowered to represent the legal person during the proceedings before it[24]. This question should be dealt with by the Constitutional Court referring to domestic administrative law and statutory provisions governing the legal statute of the Board members and their legal capacity to represent the legal entity in legal proceedings.

a. Case-law of the ECtHR

49. According to the case-law of the ECtHR, an applicant cannot claim to be a "victim" within the meaning of Article 34 of the Convention unless s/he is or has been directly affected by the act or omission in question or runs the risk of being directly affected by it. The Convention does not institute for individuals a kind of *actio popularis* for its interpretation and thus does not permit individuals to complain against a law *in abstracto*[25]*.* On the other hand, it is also established in the ECtHR case-law that journalists and other media employees, even those working for a public broadcaster owned by the State[26], can claim protection under Article 10 ECHR. A sanction or other measure taken by an employer against an employed journalist can amount to an interference with the freedom of expression[27].

50. In *Manole and others v. Moldova* case, a policy of censorship imposed by the State authorities through the senior management of the public broadcasting company the applicants were working for (as journalist, editors and producers) was considered to be an interference into the applicants' right to freedom of expression. After having observed that the public broadcasting organisation was systematically required to avoid certain topics considered harmful to the Government and to devote a disproportionate amount of airtime to reporting on the acts of members of the ruling party, with little or no coverage of the acts and views of opposition party, the Court concluded that the applicants, as journalists, editors and producers of the public broadcaster, must have been affected by those policies and experienced a continuing interference with their rights to freedom of expression. The Venice

[23] BVerfGE 1, 97 (102); 100, 104 (125); 72, 39 (43).
[24] See for example, Bogdan Vodă Greek-Catholic Parish v. Romania (26270/04), judgment of 19 November 2013; Saarekallas OÜ v. Estonia (11548/04), judgment of 8 November 2007; Yazar, Karataş and Aksoy v. Turkey (22723/93 22724/93 22725/93), judgment of 9 April 2002; IPSD v. Turkey (35832/97) (admissibility decision of 10 February 2004).
[25] See for instance, *Monnat v. Switzerland* (73604/01), judgment of 21 September 2006, §31.
[26] See, Nenkova-Lalova v. Bulgaria (35745/05), judgment of 11 December 2012 and *Manole and others v. Moldova* (13936/02), 17 September 2009.
[27] *Manole and others v. Moldova,* §103.

Commission underlines that this statement is related to "journalists, editors and producers", not to members of a supervisory board of the public broadcaster.

51. In *Nenkova-Lalova v. Bulgaria* case however, the ECtHR examined the concrete circumstances of the case, and considered that the applicant's dismissal from the Bulgarian National Radio was not intended to prevent the dissemination of information of public interest or to apply a censorship on the applicant's freedom of expression, but was due to her failure to abide by the duties and responsibilities undertaken as a journalist employed by a public broadcasting organisation. In the absence of any indication that the decisions against the applicant was taken under pressure from the outside or that the public broadcaster's management was subject to outside interference, the Court dismissed the applicant's claims. It held that it was not established in the case that the applicant's dismissal was intended to stifle her freedom of expression.

52. However, the Venice Commission is not aware of any precedent in the case law examining the question on whether new rules adopted by a parliament concerning the internal organization and functioning of a public broadcaster can be considered as a violation of the rights of its members of the governing board of a broadcaster.

53. On the basis of the Information note, the Venice Commission observes that the claimants allege that specific provision of the amendments on the termination of the office term of the current members of the Board were politically motivated. This allegation is to be substantiated and proved by the claimants before the Constitutional Court in the concrete circumstances. The Venice Commission does not have at its disposal sufficient factual and legal information to support or to refute the allegation that the aim of the Parliament was to exert political pressure on the broadcaster in order to prevent the dissemination of information of public interest.

54. In this regard it may be important to recall the general principles on the independence of public broadcasters as set out in particular in the Committee of Ministers' recommendation No. R(96)10 on "The Guarantee of the Independence of Public Service Broadcasting"[28]. It is also to be underlined that, in the case of *Manole and others v. Moldova*, the Court considered that the respect of those principles constituted a positive obligation for the States which have a duty under Article 10 ECHR to guarantee that the public broadcasting system provides a pluralistic audiovisual service.

55. Recommendation No. R(96)10 of the Committee of Ministers sets out the general principles applicable both to the boards of management and supervisory bodies of public service broadcasters to protect them against political interference. More specifically, the Guidelines on the guarantee of the independence of public service broadcasting (hereinafter, "the Guidelines") (Appendix to Recommendation No. R(96)10) stress that "the rules governing the status of the boards of management [and the supervisory body] (Point III.2 of the Guidelines) of public service broadcasting organisations, especially their membership, should be defined in a manner which avoids placing the boards at risk of any political or other interference[29].

[28] See also the Resolution No. 1 on The Future of Public Broadcasting Adopted by the Committee of Ministers of the Council of Europe at the Fourth European Ministerial Conference on Mass Media Policy in Prague, 7-8 December 1994.

[29] In the Resolution No. 1, the Ministers of the States highlighted the necessity to pay special attention in relation to guaranteeing the independence of the media and of the expression of public broadcasters against political interference: "Undertake to define clearly, in accordance with appropriate arrangements in domestic law and practice and in respect for their international obligations, the role, the missions and responsibilities of public service broadcasters and to ensure their editorial independence against political economic interference;" Furthermore, the Resolution No. 1 (under the title *Independence and accountability*) states that "[t]he independence of public service broadcasters must be guaranteed by appropriate structures such as pluralistic internal boards or other independent bodies".

56. The Explanatory Memorandum annexed to Recommendation No. R(96)10 states that editorial independence goes hand in hand with the institutional autonomy of public service broadcasting organisations (Guidelines No. 1) and sets out detailed principles concerning the appointment, responsibility, status of the members of the boards of management and supervisory bodies to guarantee the independence of public service broadcasting: the members of the supervisory bodies "appointed in an open and pluralistic manner", may not be dismissed, suspended or replaced during their term of office by any person or body other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions; whatever the composition and the appointment procedures, the rules governing the status of the supervisory bodies should be defined so as to avoid them being subject to any political or other interference. Also, "the applicable rules governing (...) boards of management should (...) be defined in a way which prevents any such interference, irrespective of whether these concern the appointment of the boards, their functions, etc. Special attention must be given to the arrangements for appointing members of boards of management when the latter are collegiate bodies (administrative board, board of governors, etc)."

57. On 20 December 2000, the Committee of Ministers adopted Recommendation Rec(2000)23 on "The Independence and Functions of Regulatory Authorities for the Broadcasting Sector" and emphasized that precise rules should be defined as regards the possibility of dismissing members of regulatory authorities so as to avoid that dismissal be used as means of political pressure.

58. In the case of *Manole and others v. Moldova*, the Court considered that the above-mentioned standards, among others relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers, provide guidance as to the approach which should be taken to interpreting Article 10 ECHR. It considered that the States are under a positive obligation to ensure that their domestic law and practice guarantee that the public broadcasting system provides a pluralistic audiovisual service.

59. Against this background, the ECtHR examined the concrete circumstances surrounding the litigation during the reference period: the public broadcaster was the sole Moldovan broadcasting organisation producing television programmes which could be viewed throughout the country and approximately 60% of the population lived in rural areas, with no or limited access to cable and satellite television. Thus, it was of vital importance for the functioning of democracy in Moldova that the public broadcaster transmits accurate and balanced news and information covering the full range of political opinions and debates. In order to comply with its positive obligations, it was essential for the respondent State to put in place a legal framework which ensured the public broadcaster's independence from political interference in the light of the above-mentioned Recommendations and Guidelines of the Committee of Ministers. The Court found a violation of Article 10 ECHR in this case after having observed that the domestic law did not provide the structure which would have made independence of the public broadcaster possible[30], in particular during a period where one political party controlled the Parliament, the Presidency and Government[31].

60. The *Manole and others* judgment should be interpreted in its specific circumstances (see para. 59 of this Opinion). However, this judgment confirmed on the one hand that the guarantees of independence of public broadcasters can be considered as requirements of the positive obligations of the State authorities under Article 10 ECHR, and on the other, that

[30] According to the domestic law, the activity of the public broadcaster was conducted by the State through a Coordinating Council which was composed of nine members all appointed by the Parliament, the President and the Government, with no guarantee against dismissal. The President, Vice-Presidents and the board of directors of the broadcaster were appointed by the Parliament on the proposal of the Coordinating Council.

[31] Para. 109 *in fine* of the judgment.

individual employees of such a public broadcaster[32] can lodge an application before the ECtHR to challenge the State authorities' compliance with these positive obligations. Thus, the question whether the State took the necessary measures in its domestic law and practice to guarantee the independence of the public broadcaster from the State authorities, can be the subject matter of an individual application by the employees of the public broadcaster before the ECtHR. Again, it must be pointed out that these statements refer to the rights of employees, not to those of members of a board in their supervisory function.

b. Comparative law elements: German Constitutional Law

61. As to the question of applications to the German Constitutional Court by members of the board of the Public Broadcaster, several elements have to be distinguished from one another. The question of whether the members of the Board of Trustees or of a comparable committee can lodge a constitutional complaint on behalf of a public broadcaster is to be treated separately from applications by the board members as individuals. An individual application of the members of a board of the Public broadcaster poses problems on two levels: It requires them, on the level of substantive Constitutional Law, to be individual holders of the affected constitutional right and, therefore, a possible subject of a "personal injury". Additionally, the procedural question of standing, i.e. the ability to lodge a constitutional complaint, has to be solved.

62. A constitutional complaint advanced by single members of the board of a Public Broadcaster contending the violation of that entity's rights in their own name is generally inadmissible under the German Constitutional Court Act.

63. In order to lodge a complaint contending the violation of their own constitutional rights, the board members must, on the level of substantive Constitutional Law, either be individual protectees or holders of that right. Public Broadcasters are protected by the constitutional guarantee to report by means of broadcast granted in Article 5 (1) S. 2 of the Basic Law. The activities of members of their internal governing bodies are included in the ambit of this freedom[33]. It is, however, not yet solved by the German Constitutional Court whether this protection is derived from the public broadcaster's protection or whether the members of the respective boards themselves become holders of the right and, also, whether the protection, if need be, can be directed against the legislator for the duration of the office term: These questions expressly were left open in a decision dealing with the constitutionality of the termination of membership in the board as a consequence of the enactment of a new law establishing a new composition of the board.[34] The Constitutional Court decided directly on the constitutionality of the law. It was upheld. The Court expressly stated that the members of the board enjoy constitutional protection not as individual persons but as trustees for the public ("Sachwalter der Allgemeinheit")[35].The justification for the new structure of the board and thus for the termination of membership was held to be in line with the constitutional requirements. The Court recognized a margin of appreciation of Parliament in deciding on the composition of such a board.

V. Conclusion

64. The Venice Commission notes that the legal and factual material submitted by the Constitutional Court in its *amicus curiae* request does not allow a comprehensive analysis of the concrete case pending before the Constitutional Court and of the questions raised by the Constitutional Court related to this case. Moreover, it is not the Venice Commission's role to

[32] The application before the ECtHR in *Manole and others v. Moldova* case was introduced by nine applicants on their behalf, who were all employed or formerly employed as journalists at the public broadcasting company.
[33] BVerfG, Beschl. v. 7.11.1995 – 1 BvR 209/903, NVwZ 1996, 781 (782).
[34] BVerfG, Beschl. v. 7.11.1995 – 1 BvR 209/903, NVwZ 1996, 781 (782).
[35] See also BVerfGE 83, 238, 333.

take a position on whether the circumstances of the case reveal a violation of the claimants' right to freedom of expression. The Constitutional Court, aware of the concrete legal and factual circumstances, is best placed to decide on the substance of the allegations of the claimants.

65. The question of whether a public broadcaster is entitled to lodge an application before the ECtHR is an open question: in its case-law the ECtHR does not set out abstract criteria in order to distinguish governmental and non-governmental organisations (Article 34 ECHR), but examines the concrete circumstances in order to give an assessment on the practical independence of the legal entity from State authorities. The fact that the legal entity is qualified according to domestic law as a "public entity" is not decisive. Similarly, even if the applicant broadcaster is classified as "public" at the domestic level, the Court continues to examine its legal status, the right that status gives it, the nature of the activity it carries out, the context in which it is carried out, the degree of the broadcaster's independence from political authorities, to decide whether the public broadcaster can be considered as "non-governmental organisation" under Article 34 ECHR and entitled to lodge an individual application before it. The Constitutional Court, having the necessary legal and factual knowledge of the concrete circumstances of the case pending before it, can draw conclusions from this analysis of the ECtHR's approach to such cases.

66. Furthermore, the Venice Commission is not aware of any precedent in the case-law of the ECtHR analyzing the issue on whether new rules adopted by a parliament concerning the organization of a public broadcaster can be considered as a violation of the right to freedom of expression of the members of the governing board of a broadcaster.

67. In view of the factual and legal information at its disposal, the Venice Commission is not in a position to support or to refute the allegation that the premature termination of the current members of the board constitutes political pressure on the broadcaster in order to restrict its freedom of expression. Since political motives are usually behind any new legislation, an allegation that a law is "politically motivated" does not in itself prove a violation of constitutional guarantees. It must be proved that the motivation contradicts principles of constitutional law. The allegation therefore should be examined by the Constitutional Court in the circumstances of the case.