
THE PUBLIC DEFENDER OF GEORGIA VERSUS THE PARLIAMENT OF GEORGIA

N 1/1/468

Batumi, 11 April 2012

Composition of the Board:

Konstantine Vardzelashvili - Chairman of the sitting, the Judge Rapporteur;

Vakhtang Gvaramia – Member;

Ketevan Eremadze – Member;

Maia Kopaleishvili – Member;

Secretary of the sitting: Lili Skhirtladze.

Title of the Case: The Public Defender of Georgia versus the Parliament of Georgia.

Subject of the Dispute: constitutionality of the words: “holding the license” of subparagraph “s” of Article 2, the words “the terrestrial and orbital stations of broadcasting satellite systems, cable networks” of paragraph 3 of Article 38, the words “as well as terrestrial stations of TV or radio broadcasting satellite systems or cable networks” of paragraph 4 of Article 38, paragraph 5 of Article 38, the first sentence of the first paragraph of Article 41 of the law of Georgia “On Broadcasting” with respect to the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

Participants to the Case: the Claimant – Giorgi Tughushi, the Public Defender of Georgia, his representatives – Vakhtang Menabde and Tamar Charbadze; representatives of the Parliament of Georgia – Zurab Dekanoidze and Tamar Khintibidze; the witness – Nino Nizharadze, chief specialist of legal department of the Georgian National Communication Commission.

I

Descriptive Part

1. On 5 December 2008, a constitutional claim (registration N468) was lodged with the Constitutional Court of Georgia by the Public Defender of Georgia. On 10 December 2008, the constitutional claim was referred to the First Board of the Constitutional Court with a view to deciding about the admissibility of the case for the consideration on the merits. The administering sitting with the oral hearing was held on 6 October 2009. The hearing of the case for consideration on the merits was held on 28 April 2010.

2. The first paragraph of Article 42 and subparagraph “f” of the first paragraph of Article 89 of the Constitution of Georgia, subparagraph “e” of the

first paragraph of Article 19, paragraph 5 of Article 25, subparagraph “a” of the first paragraph of Article 39 of the organic law of Georgia “On the Constitutional Court of Georgia” and paragraph 2 of Article 1 of the law of Georgia “On the Constitutional Legal proceedings” are indicated as the grounds for lodging the constitutional claim.

3. The Claimant contends against the words “holding the license” of subparagraph “s” of Article 2 of the law of Georgia “On Broadcasting”. The mentioned subparagraph provides the definition of “broadcaster”, under which, broadcaster is a physical person or legal entity holding the license and carrying out TV and radio broadcasting through terrestrial transmitters, via cable network or satellite, wire or air, in coded or decoded form. Stemming from this norm, in order to carry out broadcasting through cable network or satellite, it is necessary to obtain a license, which the Claimant considers as unconstitutional.

4. The Claimant also considers as unconstitutional the obligation to modify the license, when its type is altered in the conditions of carrying out broadcasting through cable network or satellite. Particularly, under Article 38 of the law of Georgia “On Broadcasting”, in the broadcasting sphere, the licenses are issued by the Commission for community and private broadcasting. The private broadcasting implies general and specialized broadcasting, which, under paragraph 3 of the mentioned Article, is carried out through the terrestrial and orbital stations of TV and radio broadcasting satellite systems, cable networks or the frequency spectrum.

5. Paragraphs 4 and 5 of Article 38 of the law of Georgia “On Broadcasting” define the types of administrative procedure to issue, modify, revoke or suspend the license that may be applied by the regulator. The mentioned norms are contended by the Claimant on the grounds that they in their essence are associated with the broadcast licensing.

6. Besides, in the Claimant’s opinion, the timeframe established for issuing a license for broadcasting through cable networks or satellite is unconstitutional. Pursuant to Article 41 of the law of Georgia “On Broadcasting”, the Commission makes the decision on granting a license in the mentioned sphere within 30 business days from lodging the application.

7. The Claimant, based on a number of decisions by the European Court of Human Rights, declares that the state is empowered to exert the control on broadcasters through licensing, but a licensing measure should serve the purpose of legitimate public goal, which could justify such restriction. Media licensing is justified with regard to only those TV and radio broadcasting that

carry out their broadcasting by using a frequency spectrum. The mentioned resource exists in the nature in limited form and, therefore, it represents a special public good. While broadcasting through this resource, different requirements existing in the society should be equally reflected and the quality broadcasting should be assured. So, the active regulatory function is assigned to the state with regard to distribution of frequency spectrum.

8. In the Claimant's opinion, by using frequency, unlike broadcasting, broadcasting through cable network or satellite does not require the use of limited resource and any subject can enter the mentioned market without detriment to the interest of any social group or circle. The state is authorized to control the conformity of activities of these broadcasters with the requirements established by the Georgian legislation, for the broadcasting carried out by cable networks or satellite may also infringe the rights of vulnerable members of the society, for example, the rights of minors or minorities. Besides, the Claimant pays attention to the fact that unlike the control on the activity of broadcasters, the issues related to commencement of activity by cable and satellite broadcaster, determination of types of broadcasting, concept and potential audience should be removed from the state regulation sphere, as there is no necessity from the part of the state to interfere in these issues.

9. The Claimant indicates that broadcast licensing does not represent the mechanism necessary for controlling the legality of their activity, as even in the case of compulsory licensing, it is possible to exert control on cable broadcasting with the purpose of protecting the rights of others. Representative of the Claimant considers the Commission as one of such possible means. As the Claimant refers, the law of Georgia "On Broadcasting" determines the functions of the National Communication Commission and one of the basic functions, among others, is the regulation, which includes the control on activities of the broadcasters. Within these scopes, the National Communication Commission is obliged to control to what extent the content of broadcasting complies with the requirements provided for by the other legislative acts of Georgia. Consequently, the Commission exercises the function to control the legality of a broadcaster's activity within the scopes of regulation and not licensing. Independently of whether the broadcasting by using a cable network is subject to licensing or not, the Commission, within the scopes of regulatory function, retains the right of scrutinizing these issues.

10. Stemming from the above-mentioned, the Claimant indicates that broadcast licensing through cable network or satellite does not serve any of

the legitimate aims enumerated in paragraph 4 of Article 24 of the Constitution of Georgia. Therefore, the disputed norms should be recognized as unconstitutional, for only the aims that are specified in the constitution may be used as a ground for restricting the freedom of information and moreover, with the respect for the principle of proportionality.

11. As representative of the Respondent explains, the Georgia legislation is in full compliance with the Constitution in terms of media freedom, and in general, from the angle of freedom to receive and impart the information. Broadcasting represents such sphere of business that deals with increased public interest, in certain cases, with increased dangers as well. It is natural that this does not automatically mean that the state should interfere with its business, although with regard to the control on broadcaster, it is permissible to rule certain standards. Licensing is the mechanism of preliminary control, which derives from the increased interest of the society and the state with respect to the broadcasting. The state regulation of this or that activity is exercised by a license and permission only in the event, if this activity or action is directly connected with the life of an individual and increased danger to his/her health and state or public interest of special importance.

12. The Respondent indicates that pursuant to the law of Georgia “On Broadcasting”, an entity by obtaining a license for activity, within the scopes of certain conditions, shall have the right to carry out an activity – broadcasting. In this sense, licensing is the mechanism through which, a regulatory body extends the function of its control and regulation on persons holding the license. In order to issue a license it is necessary for an entity to comply with certain technical standards. The state inspects the minimum requirements, as to what extent a broadcaster can satisfy the public interest and requirements through existing technical means.

13. The Georgian legislation does not differentiate the realization of broadcasting based on the technical characteristics. Stemming from the principle of technological neutrality recognized by the law “On Electronic Communications”, it does not matter what technical forms are applied for broadcasting – by using frequency spectrum, cable network or satellite. In the Defendant’s opinion, one and the same requirements and responsibilities are foreseen for all types of broadcasting.

14. In the Respondent’s assertion, the licensing, considering the absence of difficulty for complying with its conditions constitutes less restrictive means. Preliminary conditions for issuing a license are clearly and exhaus-

tively defined by the law and this process is carried out in accordance with the principle of impartiality, open and transparent procedures. Such interference is conditioned by the necessity for maintaining the democratic order and sovereignty as well as protecting the rights of other individuals. In this case, restriction of freedom of expression is exercised for the reason to ensure the state security, territorial integrity and public safety, for the prevention of crime and for the protection of rights and dignities of others.

15. For functioning of the democracy, it is necessary to preliminarily identify all persons that may influence upon the media. At the same time, under the obligations of a broadcaster, all parts of program service dealing with its presentation and content should respect human dignity and other basic human rights. The Defendant considers the licensing and determination of conditions for licensing as the important mechanism for assuring such obligations. Licensing is not and may not be the sole guarantee for carrying out the obligations of a broadcaster. To this effect, it is necessary to apply other forms of regulation. Therefore, the licensing and the conditions for licensing constitute a certain preventive mechanism, which provides the possibility to warn and thoroughly comprehend the obligations of a broadcaster.

16. The Respondent points to different functions of a license. Stemming from the public responsibility and obligations, according to declarable function, by obtaining a license, the broadcaster declares that it shall respect the requirements of the legislation and shall act within the scopes of regulations of the Commission. Pursuant to the function of identification and public information, the society has the right to be aware of a broadcaster's identity, persons and interests that may exert an influence upon the activity of the broadcaster. And under the function of warning and prevention, a license holder is informed by the act issued specially for him of the responsibility that shall be imposed in case of improper fulfillment of the legitimate obligations. The given restriction is not directed against the democratic values; on the contrary, its aim is to assure these values by establishing the minimum standards in starting an activity.

17. The Respondent indicates that establishment of different regulations between broadcasting and printing media are conditioned by their different social roles. Since, in a modern society, television represents considerably powerful and influential means for mass-information, so as compared with printing media, it has a more immediate and powerful effect upon the society. The audio-visual means of information, by using an image, may convey such opinion that cannot be delivered by the printing media. Consequently, because of

its relatively immediate and powerful influence as well as its increasing social function, additional obligations may be imposed upon a broadcaster.

18. As the Respondent construes, the international documents give the right to the states to interfere with the licensing sphere for the regulation of expression. It is natural that the major requirement for all restrictions is that it should comply with the principle of proportionality. In the given case, the principle of proportionality is respected and the means that is applied as a form of interference is minimally restrictive, proportional to the aim sought and values pursued. Stemming from all the aforementioned, the Defendant believes that the disputed norms are in full conformity with the Constitution of Georgia.

19. Ms Nino Nizharadze chief specialist of the Legal Department of the Office of the National Communication Commission of Georgia was invited to the consideration of the case on the merits. As the Witness clarified, there is not any need for any types of the technical regulation, for which the regulator requires the license for broadcasting by cable networks. Persons broadcasting through cable networks or satellites do not, in technical terms, disturb one other in broadcasting. The law establishes the procedure for competition with regard to frequency; this is connected solely with the exhaustive resource and with establishing the price for this exhaustive resource.

20. The grounds for refusal to grant a license, as the Witness indicated, is the same for both satellite and cable network broadcasting. For example, a political party, person holding a political position and etc is declined to obtain a license. Besides, the grounds for the refusal to issue a license and license obligations are not associated with the technologies.

21. The Witness also indicated that creation of cable network is not a part of broadcaster's activity. This is an activity that is subject to the authorization pursuant to the law of Georgia "On Electronic Communications". It does not matter, by using of which technologies: through cable, frequency or satellite, the broadcasting is carried out, what matters is the exercise of broadcasting. Consequently, the state uses the licensing with respect to broadcasting and not to the types of technologies.

22. Based on the first paragraph of Article 141 of the law of Georgia "On the Constitutional Legal Proceedings", in connection with the constitutional claim N468, non-commercial legal persons "the Georgian Young Lawyers' Association" submitted the written opinion of the Friend of the Court (*Amicus Curiae*).

23. The friend of the court in its written opinion points out that under the applicable legislation, the scopes of state regulation with respect to cable and

satellite broadcasting is identical to those of regulation extended to frequency spectrum broadcasting. As the Amicus Curiae construes, the social necessity to regulate audio-visual broadcasting through licensing system, which the state faces, exists only with respect to frequency broadcasting, which is caused by the natural scarcity of broadcasting frequency. From the part of the state, the function regulating the frequencies implies the effective use of the limited resource and due response to diverse requirements of the audience. In issuing a private license, the regulatory authority ensures that diverse interests and taste of the public are equally satisfied. After granting the license, the regulatory authority shall be obliged, stemming from the interests of the audience, to control in technical terms the broadcast quality.

24. It is indicated in the Amicus Curiae's opinion, that while carrying out broadcasting by cable network and satellite, unlike frequency spectrum, naturally exhaustible resource is not used. This circumstance compels the state to revise its regulatory function towards cable and satellite broadcasters. The state control towards cable networks and satellite broadcasting should consist not in starting broadcasting and setting technical regulation, but in scrutinizing the legality of the content of broadcasting programs.

25. With a view to further shoring up the argumentation provided in the written opinion, the Friend of the Court refers to different decisions rendered by the European Court of Human Rights as well as the legislative regulations applicable in different countries throughout the world.

II

Motivational Part

26. The right to freedom of expression is one of the preconditions necessary for existence of and complete development of a democratic society. Unimpeded dissemination of thought and information ensures the diversity of opinions, promotes public and informed discussion on the issues important for the society, and enables the engagement of each member of a society in the public life.

27. Article 24 of the Constitution protects the human right to receive and impart information, to express and impart his/her own opinion, extends the special protection to the possibility of dissemination of opinion and information through different means, "... among them, is printing media, television, and other means of dissemination of opinion and information" (Decision N2/482,483,487,502 of 18 April 2011 of the Constitutional Court of Georgia).

28. The norms disputed by the Public Defender is linked with the right of an individual to disseminate information by using cable network or/and satel-

lite systems. Also, the right of a broadcaster itself, as a legal entity to carry out the broadcasting without hindrance. The obligation of licensing provided for by the disputed norm represents the restriction of activity of media broadcasting and, therefore, means the interference with the right envisioned by Article 24 of the Constitution of Georgia.

29. “There is a consensus towards importance of the freedom of expression in a democratic society, however, enjoyment of this right frequently comes into conflict with the rights of others or the public interests such as public order, safety and etc.” (Decision N2/482,483,487,502 of 18 April 2011 of the Constitutional Court of Georgia). The right to disseminate information and opinion is not absolute, the legitimate aims of its restriction are provided in Article 24 of the Constitution of Georgia. The legislative norm that restricts dissemination of opinion and information should serve for achieving the aims sought by the same Article. The Constitution envisions restriction of this aspect of the freedom of expression to ensure the good protected by the Constitution and provides the complete list of grounds for restriction.

30. In particular, under Article 24 of the Constitution, the restriction of dissemination of opinion and information may be justified on the grounds for ensuring state security, territorial integrity, public safety, for ensuring the independence and impartiality of the judiciary, for prevention of the disclosure of information acknowledge as confidential, for the protection of the rights and dignity of others and for prevention of crime. Consequently, the licensing of broadcasting by using cable networks or/and satellite system should serve for achieving at least one of these aims envisioned by the Constitution.

31. In the given case, the Court should find out whether the licensing for terrestrial stations of TV or radio broadcasting satellite systems or broadcasting through cable networks, the rule for issuing a license as well as the obligation to modify the granted license are constitutional or not. During the consideration of the present constitutional dispute, the Court does not assess all possible forms of licenses (as one of the regulatory mechanisms) for broadcasting through cable network or satellite. The subject of the dispute is an effective licensing system for cable and satellite broadcasting, with due regard to legal and practical consequences entailed by the disputed norms.

32. The different forms of regulations, among them, the power of licensing for the activity may be linked with implementation of the basic function by the state. However, in exercising this power, the state is restricted by the constitutional rights and freedoms of an individual. The interference with these rights and freedoms can be justified on only special occasions. When

the interference is inevitable in order to achieve the legitimate aim defined by the Constitution, the state should apply the means that is less restrictive and proportionate to achieve the aim.

33. In order to assess the constitutionality of the norm, in the first place, the content of the restriction caused by the disputed norm should be defined. The law of Georgia “On Broadcasting” associates the broadcasting activity with the issuance of the license. Subparagraph “s” of Article 2 of the mentioned law construes that a broadcaster is “a physical or legal entity holding the license and carrying out TV and radio broadcasting through terrestrial transmitters, via cable network or satellite, wire or air, in coded or decoded form”.

34. Pursuant to subparagraph “a” of Article 3 of the law of Georgia “On Licenses and Permits”, a license is “the right on the ground of administrative act granted by the administrative organ to the person for the implementation of certain activity on the basis of fulfilling the terms envisaged under the law”. Simultaneously, the law separates a license of activity from that of application from each other. Under the legislation, a license for broadcasting through cable networks or satellite systems is the license of activity, the types of which is determined based on the content of the broadcasting network and a broadcaster’s goals.

35. A license seeker is required to submit personal information, an application for special or general license, the information about proposed duration and geographic coverage area of the future broadcasting as well as the document confirming payment of the license levy to the Georgian National Communication Commission. “The Commission shall, within 30 working days of submission of an application, take the decision on issuance of a license by a simple administrative procedure. When taking the decision on the admission of the application and issuance of the license, the discretion of the administrative agency is defined by the law “On Broadcasting”. The refusal to issue a broadcasting license may occur in the event when the conditions defined directly by the law are present. For example: a) if information provided in the license application is incomplete; b) Broadcasting seeker is not a resident physical or legal entity of Georgia, or is an entity registered in the offshore zone or if such entity holds shares/stocks of legal entity seeking the license; c) a person who is a member of political party or its official, administrative body, civil servant or a person holding relations with administrative body; d) if a license seeker was sanctioned by the Commission for violating the law of Georgia “On Broadcasting” for the last one year;

36. It is worth to be noted that the legislator associates the licensing with those technical means that are used for broadcasting. Activities subject to

licensing are so called “conventional forms” of broadcasting (frequency spectrum, cable network and satellite broadcasting), whilst, for example, internet broadcasting is not subject to licensing by the legislator. Besides, the law established a different regime of licensing for broadcasting, which is carried out, on the one hand, by using frequency spectrum and, on the other hand, by using cable network and satellite system.

37. The Claimant points out that the broadcasting by using frequency spectrum is connected with the application of exhaustible recourse, because at this time, the broadcaster applies frequency spectrum which represents a special public good. But the broadcaster, which carries out the activity by cable network or satellite does not use this type of resource, therefore, its licensing may not be justified. At the same time, there is no other legitimate aim to introduce the licensing.

38. As opposed to this argumentation, the Respondent signals to the principle of “technological neutrality” established by the law in the domain of electronic communications. In his opinion, the licensing is connected with the nature of a broadcaster’s activity, with the regulated character of its activity. Consequently, in spite of what technologies or resources are used by a broadcaster, the requirement of the law is the same for all, by means of the licensing, persons holding the licenses fall within the scope of its regulation.

39. By referring to the principle of “technological neutrality”, the Defendant underlines the circumstance that the broadcasting represents an object of particular interest. Such peculiarity may be conditioned by the specificity of broadcasting through using visual material (video image) or without it, a broadcaster can have in real time (powerful emotional) effect upon the undefined number of persons. Historically, this feature may truly have distinguished a broadcaster from other media; however, together with the development of communications and information technologies, “conventional” broadcasting has lost such “particularity”. In addition, it is insufficient to appeal on the principle of “Technological Neutrality” to justify the constitutionality of the restriction. The restriction of a broadcaster as well as other media is permissible in the cases directly provided for by the Constitution. To impose any restriction on the freedom of expression, among them, to establish the obligation of licensing, should serve for achieving the aims envisioned by the Constitution. Protection of the principle of “technological neutrality”, taken separately, cannot be considered as the legitimate aim provided for by Article 24 of the Constitution.

40. It is noteworthy that there are different grounds for the power of licensing of broadcasting by frequency spectrum and that of cable networks

or satellite. In the first case, in deciding the issue of application by frequency spectrum, the state enjoys quite a wide margin of appreciation, since the frequency itself is a public property and, therefore, the state enjoys the power to dispose it. The state in accordance with the public interest, disposes the limited resource – frequency spectrum in its possession. The public interest, among other things, represents the maximally effective use of the resource in its possession. Therefore, the power of the state to dispose frequency spectrum may not be emanated from Article 24 of the Constitution (however, the procedure for its use with the purpose of broadcasting should be in line with the requirements of this Article). But when a broadcaster uses broadcasting infrastructure that is in the private possession, the source for the power to regulate its activity should be searched in Article 24 of the Constitution of Georgia, existence of the regulatory norms may be justified by the necessity to assure the aims envisioned by this Article of the Constitution.

41. Stemming from the aforementioned, the Constitutional Court shares the Claimant's opinion that the necessity for licensing the broadcasting by cable networks or satellite should be scrutinized unlike that of broadcasting through frequency spectrum. Simultaneously, it considers expedient to assess the issues of constitutionality of the norms regulating the broadcasting by cable network and satellite independently from one another. Similarly, the compliance of the words "cable networks" and "terrestrial and orbital stations of satellite system" of paragraph 3 of Article 38 of the law of Georgia "On Broadcasting" with respect to Article 24 of the Constitution should be assessed independently from one another.

The issue of compatibility of licensing of broadcasting by using cable networks with the first paragraph and paragraph 4 of Article 24

42. While asserting the constitutionality of the disputed norm, the Defendant also points to the importance and necessity of regulating a broadcasting activity. In general, the constitutionality of regulation of broadcasting is not either contended by the Claimant, however, it indicates that the restriction envisioned by the disputed norm is not necessary to achieve the legitimate aim.

43. The Respondent also considers that the license for the broadcasting by using cable network serves for protection of state security, territorial integrity, public safety and the rights of others and, thus, meets the requirements as laid down by paragraph 4 of Article 24 of the Constitution. The mentioned aims represent, in truth, the constitutional ground for restricting the freedom of expression, however, in order to justify the restriction of constitutional rights,

it is not sufficient to simply state a specific public good, it is necessary that the cause-and-effect relation between the legitimate aim and restriction of the right be present.

44. The regulation of a broadcaster by the state should be carried out by restricting the freedom of expression to such an extent that is necessary to achieve the legitimate aim. In the case, if the restriction is not logically connected with the legitimate aim – the restriction is unjustified. Only in the case of presence of such connection, the Court moves onto next stage in assessing the compatibility of the disputed norm with the Constitution: whether the proportionality between an individual's right and public interests is respected or not. Besides, the state is obliged to prove that the licensing of broadcasting by cable network is proportionate to the aim sought, narrow and less restrictive means. The restriction is in conformity with the Constitution if it is necessary to ensure the good safeguarded by the Constitution in a democratic and free society and if the good protected as a result of the restriction of expression exceeds in essence the damage caused by the restriction.

45. The Respondent mentioned that the legitimate aims provided for by the Constitution may be achieved by excluding a political party, administrative body and non-resident person from the internal broadcasting market. The mentioned restriction serves the purpose for “protecting the independence of broadcasting from the influences of political groups or foreign interests”, for preventing them to monopolize this means, and therefore, it serves the purpose of achieving the pluralism of a broadcaster. The Respondent confirms that the licensing of broadcasting by cable network and satellite system is the mechanism necessary to meet the requirements laid down in Article 37 of the law of Georgia “On Broadcasting”. Namely, the aim of this Article is to not permit political parties, persons holding political and administrative positions, residents of foreign countries and an administrative authority to carry out the broadcasting.

46. At the stage of consideration of the case on merits, the Claimant declared that he does not contend the restrictions envisioned by Article 37 of the law of Georgia “On Broadcasting”, moreover, he finds their existence expedient. Therefore, the Constitutional Court cannot assess the issue of constitutionality of restriction of broadcasting for entities foreseen by this Article and, since the constitutionality of regulated restriction is not subject of the dispute, the presumption of constitutionality is extended to them. Consequently, upon deciding the constitutional dispute, the Court should be limited to assess the

constitutionality of the restriction established by the disputed norms only and to find out whether the licensing of broadcasting by cable network is proportional means to achieve the mentioned legitimate aim.

47. The Claimant thinks that the existence of the disputed norm is not necessary to fulfill the task as defined by the law “On Broadcasting”. In the Claimant’s opinion, achievement of these aims and tasks is possible by applying less restrictive norms. For carrying out cable and satellite broadcasting, by establishing “permit” system, the freedom of expression of those persons, who do not belong to the circle of subjects as defined by Article 37 of the law of Georgia “On broadcasting”, is unjustifiably restricted.

48. Since the law of Georgia “On Broadcasting” establishes that a broadcaster (that is broadcasting license holder) cannot be a person, who belongs to the circle of subjects as defined by Article 37, it is unjustifiable to rule additional restrictions towards those persons who do not represent the subjects as defined by this Article. The Court shares the Claimant’s opinion that stemming from the goals and content of the law “On Broadcasting”, the circle of subjects defined by Article 37 of the same law practically is forbidden to carry out broadcasting by using neither frequency spectrum nor cable network or satellite. And this aim can be achieved without existence of the disputed norms. The Claimant does not contend the circumstance that the obligation to submit a certain type of information may be imposed upon a broadcaster, but he considers operation of the regulatory norms prohibiting the commencement of broadcasting without the state authorization as unjustifiable.

49. The Court may not share the Respondent’s opinion, under which, the licensing (permit to start an activity) is necessary for a broadcaster to thoroughly comprehend its obligations, it facilitates the process of regulation, and serves for the protection of the rights of others, and assures the quality of broadcasting and its impartiality. Commencement of broadcasting by itself implies that the obligations set out by the law shall be extended to a broadcaster, its requirements are equally obligatory for the licensed media as well as media operating without the license. Simultaneously, according to the legislation in force, the license for broadcasting by using cable network does not foresee any additional essential requirements and restrictions.

50. The Court holds that every person is obliged to comprehend the consequences related to the violation of the law, for this reason, the licensing of a cable broadcaster (creation of additional mechanism in the form of permit) is not necessary. Perhaps, the licensing, in a certain extent, simplifies the regu-

lation of a broadcaster; however, this does not mean that the licensing of a broadcaster represents a necessary condition for achieving the legitimate aim.

51. In the event, if an activity of an broadcaster acquires the unlawful nature, threatens the rights of others, the state security, public safety or/and other legitimate aims, the state is empowered to apply restrictive measures foreseen by the Constitution and the law, regardless of whether or not an offender represents an broadcaster holding the license or other “unlicensed” media. In this regard, the introduction of permission system for broadcasting by using cable network cannot be considered as the necessary means for achieving the legitimate aims. The Court shares the Claimant’s position that it was not necessary to introduce the licensing as to restrict the right of broadcasting for subjects as defined by Article 37 of the law of Georgia “On Broadcasting”. Therefore, the disputed norm establishes additional unjustified restriction on those persons wishing to carry out a broadcasting activity, who do not belong to the circle of subjects as defined by Article 37 of the mentioned law. Consequently, in this case, also, it represents disproportionate means to achieve the aim.

52. The Respondent also believes that the licensing is meant to scrutinize as to how a broadcaster complies with “minimum technical standards”, if he can meet the public interest and requirements. Nevertheless, Article 24 of the Constitution may not exclude the state’s power to lay down certain technical requirements (for example, in order to assure the rights of others; exploitation of infrastructure available in the state’s possession and etc); the Court cannot share the argument mentioned by the Respondent, because the procedure to grant a license as defined by the Georgian legislation in force, while issuing a license for broadcasting by cable network, does not foresee the inspection of technical capacities of a person wishing to broadcast. In addition, the quality of broadcasting carried out by a broadcaster through cable network does not represent the subject of regulation.

53. The Constitutional Court in its decision mentioned that “the authority acts within the scopes of its competence when it establishes the norms for registration or regulation of the media, political or public associations. Among various types of regulations, the authorities are entitled to select the type which it considers to be the best for achieving the legitimate task” (Decision N2/482, 483, 487, 502 of April 18 2011 of the Constitutional Court of Georgia). The authorities are entitled to establish formal, substantially neutral restrictions on the exercise of the right to freedom of expression; however, such restriction (regulation) should be directed to achieve the legitimate aim and should be the necessary precondition for achieving this aim.

54. With a view to protecting public safety and the rights of others, the state (Regulatory authority) is entitled to demand from an entrepreneurial entity, among them, from an entity wishing to carry out the broadcasting by cable network, to submit the information about its identity. However, it exceeds this aim, when it associates the commencement of broadcasting (among them, broadcasting with specific content) by cable network with the issuance of a permit by an administrative authority. The obligation to obtain a permit in order to start cable broadcasting amounts to the unjustified interference with the right to freedom of expression.

55. Nevertheless the fact that in the present case the Respondent stated the public safety, the state security and territorial integrity as well as the protection of the rights of others as the legitimate aims, he failed to substantiate that the license for broadcasting by cable network is necessary and proportionate means to achieve these aims.

56. The Court shares the Claimant's opinion that achieving the legitimate aims (that are considered as uncontested by the parties to the case) listed by the Respondent is possible to be carried out completely by less restrictive means. Such means may be introduction of the obligation for entities wishing to broadcast, to submit certain information to the Commission. Stemming from the aforementioned, the normative content of the words "holding the license" of subparagraph "s" of Article 2 of the constitution of Georgia that deals with the broadcasting by cable networks contradicts the first paragraph and paragraph 4 of Article 24 of the Constitution.

Conformity of the words "Cable networks" of paragraph 3 of Article 38 of the law of Georgia "On Broadcasting" with the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia

57. Article 38 of the law of Georgia "On Broadcasting" determines the types of license existing in the broadcasting domain. According to the first paragraph of the mentioned norm, the Commission may issue community and private broadcasting license. Paragraph 2, in itself, specifies that private broadcasting license may be issued for general and specialized broadcasting, and the disputed words of the first sentence of Article 3 links the given requirement with the broadcasting carried out by "cable network". Therefore, the mentioned norm of the law should be considered as the one establishing the obligation to carry out the broadcasting by cable network either with general or specialized license. Exactly this very content of this norm is contested by the Claimant.

58. The disputed norm stipulates the requirement to an entity carrying out the broadcasting to implement broadcasting only within the scopes of the

type of license granted to it. If a broadcaster holding the specialized license decides to go beyond the topic which is related to the type of license that has been granted to it, the broadcaster shall be obliged to modify the license in accordance with the procedure as determined by the law. Otherwise, the broadcaster shall violate the law and the sanctions as provided for in the law shall be enacted against it.

59. The Respondent thinks that the restriction of the right defined by paragraph 3 of Article 38 and the obligation for the license to broadcast by using cable network serve one and the same purpose and, similar to the obligation for the license, emanate from the restrictions as provided for in Article 37 of the law of Georgia “On Broadcasting”.

60. In finding the issue of constitutionality of the words “holding the license” of subparagraph “s” of Article 2 of the law of Georgia “On Broadcasting”, the Constitutional Court has already ascertained that to impose the obligation upon an entity broadcasting by cable network as to carry out the broadcasting based on the license, did not represent the restrictive means that is necessary and proportionate to achieve the legitimate aims stated by the Respondent. Consequently, the norm determining the different types of license for broadcasting by cable network may not be considered as the reasonable means to achieve the goals of the Constitution. Stemming from the mentioned, the words “cable network” of paragraph 3 of Article 38 of the law of Georgia “On Broadcasting” contradicts the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

Conformity of the obligation to license the broadcasting by using satellite systems, general and specialized types of broadcasting license (the words “the terrestrial and orbital stations of broadcasting satellite systems” of paragraph 3 of Article 38) with paragraphs 1 and 4 of Article 24 of the Constitution of Georgia

61. Bearing in mind that the Constitutional Court held the license for broadcasting by cable network (establishment of permit system for commencing the activity) as unconstitutional, in order to assess the issue of constitutionality of the license for satellite broadcasting system, it is necessary to find out that whether or not there is any essential difference between the two forms of broadcasting, which would justify the existence of different regimes of regulation applicable to them.

62. It is worth noting that the broadcasting by cable network, based from its technical nature, is carried out in the clearly defined territory, and its coverage area is confined to the borders of Georgia. The goal and factual result of

the broadcasting carried out by satellite is different: broadcasting signal goes beyond the borders of the territory of broadcasting country. In addition, the artificial satellite, which is applied to carry out the broadcasting, may be a legal entity of foreign country (among them, the country receiving the broadcasting). The contact of a broadcaster through satellite to the legislative space of the foreign country, its sovereign interests served as precondition for sovereign countries to make an effort to agree on the common procedure for using satellite systems. As a result, satellite broadcasting systems has become a subject of regulations under international law. The international law norms which relates to the satellite broadcasting intend to protect broadcasting countries and countries receiving broadcasting, ensure the interests of their citizens and unimpeded transmission of trans-frontier broadcasting.

63. One of such endeavors to regulate the mentioned issue under the international law is the Declaration adopted by the United Nations General Assembly (Resolution 37/92 of 10 December 1982) on the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting. The given document, which lays down the principles for the broadcasting by using the artificial satellites, imposes the obligation upon the state for broadcasting carried out under its jurisdiction, from its territory.

64. With a view to simplifying dissemination of opinion and information among the states, ensuring human rights and freedoms and protecting the legitimate interests of the sovereign countries, the convention “On Transfrontier Television” adopted by the Council of Europe states represents one of such examples (the mentioned convention presently is not binding to Georgia, Georgia has signed it, but has not ratified it yet). The European convention “On Transfrontier Television” defines rights and obligations of the member states and establishes that the responsibility of the [transfrontier] broadcaster shall be clearly and adequately specified in the authorization issue by, or contract concluded with, the competent authority of each Party ...” At the same time, the concluding states assume the obligation not to restrict the freedom of the reception and the retransmission on their territories of programmes services. In exchange for this obligation, the competent authority of transmitting Party shall ensure, upon request, the availability of information about the broadcaster. Such information shall include, as a minimum, the name or denomination, seat and status of the broadcaster.

65. The authorities enjoy the special privilege to maintain the international relations. However, when acting at the international stage, concluding

agreements or carrying out international obligations, the authorities are restricted by the Constitution, among them, by the rights and freedoms enshrined in Chapter II of the Constitution. Any obligation assumed by the international agreement, which shall restrict the rights recognized by the Constitution within the territory of Georgia, should comply with the requirements laid down in the Constitution. Therefore, the source of the power to interfere with the broadcasting activity by satellite system should represent Article 24 of the Constitution of Georgia.

66. The Court holds that the state enjoys relatively wide margins of appreciation, when it sets out compulsory requirements towards those persons whose activities are related to the jurisdiction of another state. The contact of the broadcaster with the sovereign space of foreign country is linked with the international relations and international obligations of the state and, therefore, gives rise to the ground for regulation. A person wishing to broadcast by satellite system voluntarily chooses that means of broadcasting, which at presents represents the subject of regulation under international law and thus, agrees that its own activity shall be subject to regulation provided for by the international norms.

67. The procedure of licensing the broadcasting by satellite systems foreseen by the law of Georgia “On Broadcasting” is related to the state’s aspiration to harmonize the internal legislation with the norms of international law and in return of assuming the obligations envisioned by these norms, to promote the realization of freedom of opinion and information of a Georgian citizen. In the given case, determination of the types of license (general and specialized) for broadcasting by satellite systems serves the same aims as the broadcasting license itself does. Therefore, the disputed norms have the legitimate grounds as foreseen by the Constitution. The Court believes that the state has established formal, substantially neutral, reasonably restrictive procedure and, thus, has applied the means proportionate to achieve the aim.

68. The reasonability of the licensing of broadcasting by using satellite systems may be called into question under the conditions of availability of Internet, which ensures the access to information, among them, audio-video signal in different countries simultaneously. Dissemination of information via Internet, regardless of the state frontiers, can be carried out practically without impediment, and in the recent periods, the internet space is used for broadcasting as well.

69. Development of communications and information technologies, in parallel with “conventional” broadcasting means, has caused the creation of

“new” type of broadcasting: internet broadcasting, which has the properties similar as well as dissimilar to the satellite broadcasting. In both cases, the broadcasting area is not limited to the territory of transmitting country. Simultaneously, Internet, as compared to satellite system, is more affordable means for a broadcaster.

70. In order to settle the constitutional dispute, the Court considers expedient to draw parallel with internet-broadcasting. In parallel with broadcasting by satellite system, one of the “conventional” forms of transfrontier broadcasting, the advance of internet broadcasting by itself cannot become the ground for considering the norms regulating broadcasting by satellite systems as unreasonable and incompatible with the Constitution. The restriction that may be justified towards one type of means used for broadcasting may be disproportionate means for another type of broadcasting and other way around. It shall be unreasonable to apply the restriction of the broadcasting carried out by satellite system which is permissible by the Constitution in certain cases to the broadcasting via Internet. To establish the constitutionality of the restriction of broadcasting, in every specific case, emanates from the nature of the restriction, from its proportionate character. For this very reason, within the scopes of the given dispute, the Court limited itself to deliberate the issue of constitutionality of the regulation of broadcasting by satellite system.

71. “Conventional” and “New” forms of broadcasting (dissemination of information) represent alternative means for imparting opinion and information. Both broadcasting means ensure the freedom of expression as guaranteed by the constitution. The author of expression is given the opportunity to define by himself which means he shall use for broadcasting.

72. Stemming from the aforementioned, the Court holds that the licensing of broadcasting by satellite system is the method to obligate a person wishing to broadcast to, in advance, submit the identifiable information, to define the type of broadcasting and its area to the administrative authority is in conformity with the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

Conformity of paragraphs 4 and 5 of Article 38 of the law of Georgia “On Broadcasting” with the first paragraph and paragraph 4 of Article 24 of the Constitution

73. Paragraphs 4 and 5 of article 38 of the law of Georgia “On Broadcasting” determines the types of administrative proceedings applied to issue, suspend, revoke and modify the license. In particular, pursuant to paragraph 4

of Article 38, the license for broadcasting by cable network or satellite may be suspended or revoked under the public administrative procedure. Paragraph 5 of Article 38 determines that the license for broadcasting by satellite systems or cable networks shall be issued under the simple administrative procedure.

74. The given norms are contested on the ground that they are by their content connected with the broadcasting licensing. The Claimant unambiguously points out that he contends paragraphs 4 and 5 of Article 38 of the law of Georgia “On Broadcasting” bearing in mind that they contain the word “licensing”, however, independently of the institute of license, the Claimant does not consider it as disputable with regard to the other content defined by these norms. Therefore, the Claimant considers as problematic only the fact that the law determines, in general, the necessity of license for carrying out the broadcasting and the procedure of its issuance. He does not contest the issues of constitutionality of defining the types of specific administrative proceedings to issue, modify, suspend or revoke the license.

75. The words “holding the license” of subparagraph “s” of Article 2 of the law of Georgia “On Broadcasting” with regard to the cable broadcasting shall be abrogated as a result of the recognition of the license for broadcasting by using cable networks as unconstitutional. Consequently, it becomes impossible to issue, modify, suspend or revoke this license. Stemming from the mentioned, the given norms with regard to cable broadcasting do not any longer establish the legal regulations, on the grounds of which it is impossible to modify or grant the license for cable broadcasting. Similar to the words “cable network” of paragraph 3 of Article 38, the words “or cable network” of paragraphs 4 and 5 of Article 38 lose their meaning, consequently, the legal proceeding in this part of the claim requirement shall be terminated.

76. As it was mentioned above, in connection with the licensing for broadcasting by satellite means, the Claimant contends not the constitutionality of the types of administrative proceedings, but the fact of determination by the law of the possibility to issue, revoke, suspend and modify the license. The Constitutional Court has already decided the issue of constitutionality of license for broadcasting by satellite means and has established that the license for broadcasting by these types of technical means is compatible with the Constitution. Stemming from the disputed norm, the Court has already answered to the problem raised by the Claimant, and these norms with other meaning were not contested. Therefore, the Court cannot go beyond the requirement of the claim and cannot assess the constitutionality of this or that procedure of the

administrative proceedings as defined by the General Administrative Code of Georgia, which is applied to issue, modify, revoke or suspend the license.

77. Stemming from the abovementioned, the disputed content of the words “...as well as by using terrestrial stations of TV or radio broadcasting satellite systems” of paragraph 4 of Article 38 and the words: “Licenses for terrestrial stations of TV or radio broadcasting satellite systems ... shall be issued and modified under the simple administrative procedure” of paragraph 5 of Article 38 of the law of Georgia “On Broadcasting” does not contradict the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

Conformity of the first paragraph of Article 41 with the first and 4th paragraph of Article 24 of the Constitution of Georgia

78. Pursuant to the first sentence of the first paragraph of article 41 of the law of Georgia “On Broadcasting”, the Commission makes a decision on granting the license for broadcasting by using satellite systems or cable networks within 30 business days. Together with annulling the obligation to license for broadcasting by cable networks, the given norm loses its disputed meaning with regard to the cable broadcaster. The norm defining the period for issuing the license loses all legal importance then, when broadcasting by using cable networks are not subject to licensing at all. Stemming from this, the legal proceedings should be terminated in that part of the claim requirement, which deals with the constitutionality of the words “or cable networks” of the first paragraph of Article 41 with respect to the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

79. With regard to the mentioned norm, the Claimant considers as disputable not only the fact that the law associates the licensing with the broadcasting carried out by certain types of technical means, but also 30 business-day timeframe established for issuing the license. Despite the constitutionality of license for broadcasting by satellite systems, the norms determining the grounds for granting the license may automatically cause the restriction of the freedom of expression, thus, it is necessary to assess the issue of their constitutionality independently.

80. In order to obtain the license, it is necessary for an applicant wishing to broadcast by satellite systems to comply with the requirements laid down by the law. Respectively, the authority who grants the license is obliged to scrutinize conformity of the license application with the law, to explore the circumstances important for the case and to make an appropriate decision. In order to ascertain legally important facts, the public institution is required to

undertake certain type of work, which requires some time. Hence, introduction of licensing mechanism automatically implies the necessity to determine certain timeframes for issuing the license.

81. In determining the timeframe necessary for administrative proceedings, among them, the timeframe for issuing the broadcasting license, in comparison with substantial restriction of the freedom of expression, the state enjoys relatively wide margins of appreciation. Stemming from the content of the right to freedom of expression, it is impossible to precisely determine the timeframe of what duration shall be considered as the means proportional to restriction of the right, as the established timeframe may give rise to the violation of the constitutional right only in special cases. Unjustified interference with the right shall be present, if the timeframe established for issuing the license is evidently unreasonable and extended that creates the unjustified obstacle for realizing the right to freedom of expression, and places the unjustifiably heavy burden on the person willing to broadcast and leads to violation of the constitutional right of imparting information and opinion independent from the fact of licensing.

82. Stemming from the abovementioned, the criterion for assessing the constitutionality of the disputed norm is the reasonability of the timeframe for issuing the license. Commencement of the broadcasting activity within 30 business days does not represent such restriction of the right that, in any form, brings into question its effectiveness or contains such restriction of dissemination of opinion and information that is unjustifiable in a democratic society. Therefore, the first sentence of article 41 of the law of Georgia “On Broadcasting” in the context of broadcasting by satellite means does not contradict the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

III

Resolutive Part

Having been guided by subparagraph “f” of the first paragraph and paragraph 2 of Article 89 of the Constitution of Georgia, subparagraph “e” of the first paragraph of Article 19, paragraphs 2 and 8 of Article 21, paragraphs 2, 4, 7 and 8 of Article 43, the first paragraph of Article 45 of the organic law of Georgia “On the Constitutional Court of Georgia”, the first and second paragraphs of Article 7, Article 13, paragraph 4 of Article 24, Articles 30, 31, 32 and 33 of the law of Georgia “On the Constitutional Legal Proceedings”,

The Constitutional Court of Georgia

rules:

1. To partially uphold the constitutional claim N468 (The Public defender of Georgia versus the Parliament of Georgia). a) To recognize the normative content of the words “holding the license” of subparagraph “s” of Article 2 of the law of Georgia “On Broadcasting”, which establishes the obligation of license for broadcasting by cable network; b) the words “cable network” of paragraph 3 of Article 38 of the law of Georgia “On Broadcasting” as unconstitutional with respect to the first paragraph and paragraph 4 of Article 24 of the Constitution.

2. Not to uphold the constitutional claim N468 (The Public defender of Georgia versus the Parliament of Georgia) in the part of the claim requirement which deals with: the constitutionality of the normative content of the words “holding the license” of subparagraph “s” of Article 2 of the law of Georgia “On Broadcasting”, which establishes the obligation of license for broadcasting by satellite means; the words “terrestrial and orbital stations of satellite systems” of paragraph 3 of Article 38 of the law of Georgia “On Broadcasting”; the words “as well as by terrestrial stations of TV or radio broadcasting satellite systems...” of paragraph 4 of Article 38 of the law of Georgia “On Broadcasting”; the words “Licenses for terrestrial stations of TV or radio broadcasting satellite systems ... shall be issued and modified under the simple administrative procedure” of paragraph 5 of Article 38; the words “The Commission makes a decision on granting the license for broadcasting by using terrestrial stations of TV or radio broadcasting satellite systems within 30 business days after submitting the application to the Commission” of the first paragraph of Article 41 of the law of Georgia “On Broadcasting” with respect to the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

3. To terminate the legal proceedings of the constitutional claim N468 (The Public defender of Georgia versus the Parliament of Georgia) in the part of the claim requirement, which deals with the constitutionality of the words “or cable network” of paragraph 4 of Article 38, the words “or cable network” of paragraph 5 of Article 38, and the words “or cable network” of the first paragraph of Article 41 of the law of Georgia “On Broadcasting” with respect to the first paragraph and paragraph 4 of Article 24 of the Constitution of Georgia.

4. The norms recognized as unconstitutional shall be legally invalid from the moment of promulgation of the present judgment.

5. The judgment shall come into force from the moment of its public delivery at the hearing of the Constitutional Court.

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6. The judgment is final and not subject to appeal or revision.
7. Copies of the Judgment of the Constitutional Court of Georgia shall be sent to the parties, the President of Georgia, the Supreme Court of Georgia and the Government of Georgia.
8. The Judgment of the Constitutional Court of Georgia shall be promulgated in the “Legislative Herald of Georgia” within 15 days.

Members of the Board: Konstantine Vardzelashvili,
Vakhtang Gvaramia,
Ketevan Eremadze,
Maia Kopaleishvili.