

# Analysis of the Law of Georgia “On Introducing Amendments to the Law of Georgia on Broadcasting”

October 27, 2023

On October 19, 2023, the Georgian Parliament adopted the Law of Georgia “*On Introducing Amendments to the Law of Georgia ‘On Broadcasting’*” (hereinafter “the Law”<sup>2</sup>) through an accelerated procedure. The Law expands the powers of the state to prevent the broadcasting of programs allegedly containing hate speech, obscenity, and incitement to terrorism. Georgian civil society expressed concern that the increased discretionary powers of state authorities risk restricting freedom of expression, threaten control and censorship of Georgian media organizations, and can be used to punish critical media.<sup>3</sup>

Upon request from the USAID Civil Society Engagement Program, the International Center for Not-for-Profit Law (ICNL) and the European Center for Not-for-Profit Law (ECNL) conducted a comparative analysis of the Law and its compliance with the international law and European standards (hereinafter “Analysis”).<sup>4</sup> This Analysis focuses on the key problematic provisions of concern to Georgian civil society organizations (CSOs) and media representatives, not on all novelties.

## Introduction

The Law modifies several articles of the Law on Broadcasting by expanding the authority of the national regulator – the Georgian National Communications Commission (hereafter the “Commission”) – to use sanctions against broadcasters for a broader spectrum of violations of the Law on Broadcasting.<sup>5</sup> Previously, the broadcasters’ self-regulation bodies administered decisions in cases of such violations.

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<sup>1</sup> The Law of Georgia on Broadcasting Parliament of Georgia, December 23, 2004 (“Law on Broadcasting”), at <https://matsne.gov.ge/en/document/view/32866?publication=52>.

<sup>2</sup> The Law of Georgia on Introducing Amendments to the Law of Georgia on Broadcasting, October 19, 2023, at <https://info.parliament.ge/#law-drafting/27246>.

It is awaiting the approval of the President of Georgia.

<sup>3</sup> “SJC: Amendments to Broadcasting Law Severely Harm the Freedom of Expression,” Civil Georgia, October 23, 2023, at <https://civil.ge/archives/565117#:~:text=On%20October%2019%2C%20the%20Georgian,incitement%20to%20hatred%20and%20terrorism>.

<sup>4</sup> ICNL and ECNL used the unofficial translation of the Law from Georgian into English and bring our apologies for any discrepancies in the interpretation of the provisions of the Law caused by inaccurate transliteration and/or translation.

<sup>5</sup> For the purposes of this analysis, the terms “broadcaster” and “media service provider” will be used to refer to TV broadcasters, radio broadcasters, and video-sharing platforms, unless otherwise provided by the specific paragraph.

Furthermore, the Law expands restrictions on the activities of broadcasters by introducing a prohibition on the placement of a program or advertisement “*infringing upon human/citizen dignity and basic rights and freedoms that contains obscenity.*”<sup>6</sup>

According to the authors of the Law, per the Explanatory Note, the Law “*aims to improve the Georgian “Law on Broadcasting” in accordance with the recommendation of the European Commission and to create an effective mechanism to prevent the spread of programs and commercials containing hate speech and incitement to terrorism.*”<sup>7</sup> The Explanatory Note implies that the “*effective mechanism for responding to such violations (dissemination of incitement to violence, hatred, and terrorism...is a prerequisite for Georgia’s full participation*” in the European Union’s (EU) flagship “Creative Europe,...”<sup>8</sup>

Georgian CSOs and media are concerned that the Law will be used to suppress independent media before the Parliamentary elections in 2024 and that the vague provisions of the Law will be applied selectively against them, identifying specific instances when the government subjected these civic actors to selective restrictions in the past.<sup>9</sup> CSOs and the media are distrustful of the Commission, which they do not consider impartial and see as representing the government’s attitude towards the independent broadcasters.<sup>10</sup> The Georgia Ombudsman’s 2022 report indicated additional criticisms of the Commission, stating that “... *taking into account several deficiencies identified over the years regarding the work of the National Communications Commission of Georgia [439<sup>11</sup>], numerous criticisms expressed in the direction of the agency at the national and international level [440<sup>12</sup>], and the low trust of broadcasters towards it [441<sup>13</sup>], the increased supervisory mandate of the Commission may not ensure the proper performance of such a task.*”<sup>14</sup>

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<sup>6</sup> Paragraph 3 of Article 56(1) of the Law on Broadcasting (as amended.)

<sup>7</sup> See the “Explanatory Note on the Draft Law of Georgia on Introducing Amendments to the Law of Georgia on Broadcasting,” at <https://info.parliament.ge/file/1/BillReviewContent/342083>.

<sup>8</sup> Since joining the EU-funded Program in 2015, and until 2020, Georgia received €1.5 million in financing from the program to support the country’s cultural and creative sectors.

See “Creative Europe,” European Commission, upd. 2023, at <https://culture.ec.europa.eu/creative-europe>;

“Creative Europe Desk Georgia 2022-2024,” European Commission, 2018, at

[https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-](https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-details/43251814/101101770/CREA2027)

[details/43251814/101101770/CREA2027](https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-details/43251814/101101770/CREA2027); “Georgia joins Creative Europe programme for 2021-2027,” Agenda Georgia, December 8, 2021, at <https://agenda.ge/en/news/2021/3870>.

<sup>9</sup> “Georgian Gov’t Slammed for Selective Sanctioning of Indebted Televisions,” Civil Georgia, December 26, 2019, at <https://civil.ge/archives/333030>.

<sup>10</sup> Opinion of the Directorate General Human Rights and Rule of Law Information Society and Action against Crime Directorate Information Society Department, ON The Law of Georgia on Broadcasting, Strasbourg, 21 February 2023, Pg. 7.; at: <https://rm.coe.int/eng-georgia-legal-opinion-law-on-broadcasting-feb2023-2777-8422-2983-1/1680aac48e>

<sup>11</sup> “[439] 2021 Parliamentary Report of the Public Defender of Georgia, Tbilisi, 2022, 177-179; 2020 Parliamentary Report of the Public Defender of Georgia, Tbilisi, 2021, 229-232; 2019 Parliamentary Report of the Public Defender of Georgia, Tbilisi, 2020, 232-233.”

<sup>12</sup> “[440] Reporters Without Borders statement of 20 July 2020 available at: <https://rsf.org/en/mounting-pressure-georgia-s-media-run-elections> [last accessed: 27.02.2023]; 2021 Report of the United States Department of State on the State of Human Rights in Georgia, Section 2.a. Freedom of expression for media representatives, available at: <bit.ly/3lyprUK >> [last accessed: 27.02.2023].”

<sup>13</sup> “[441] Council of Europe experts - Toby Mendel and Y. Salomon, Technical document on professional media regulation: European standards, practices, and perspectives for Georgia, Tbilisi, July 2022, p. 7.

<sup>14</sup> “On The State of Protection of Human Rights and Freedoms in Georgia,” Ombudsman of Georgia 2022, at <https://ombudsman.ge/res/docs/2023033120380187763.pdf>.

The Ombudsman refers to the efforts of the Parliament to ensure Compliance with the EU 2018/1808 Audiovisual Media Services Directive (AMSD) by expanding the supervisory and punitive powers of the Commission related to the prohibition of incitement to hate speech.

## Provisions of Concern

The key issues of concern to CSOs and independent media regarding the Law include:

1. The expanded power of the Commission to review the appeals regarding the decisions of the self-regulatory bodies of broadcasters on the alleged violations of Article 55 (2), prohibiting incitement to violence and hatred.<sup>15</sup> Currently, the decisions of the self-regulation bodies on those matters cannot be appealed in the Commission or courts.<sup>16</sup> Expanding the authority of the Commission to impose sanctions based on a broadcaster's violation of vaguely defined obligations may not only restrict the content (now prohibited by law) but may also push broadcasters to self-censor potentially critical content. Consequently, this is a restriction of the freedom of expression.
2. The establishment of a new prohibition for broadcasters *"to place a program or an advertisement that contains pornography, as well as the kind of program or advertisement infringing upon human/citizen dignity and basic rights and freedoms that contains obscenity"*.<sup>17</sup> The term *"obscenity"* and the phrase *"infringing upon human/citizen dignity and basic rights"* are not defined clearly in Georgian legislation and may be interpreted broadly, at the Commission's discretion, with the possibility of imposing sanctions against broadcasters in case of alleged violations. The introduction of such a prohibition is a restriction of the freedom of expression.

## Comparative Analysis

The Analysis reviews the relevant provisions of the Law against Georgia's obligations under the key international human rights instruments, particularly the International Covenant on Civil and Political Rights ("ICCPR"<sup>18</sup>) and the Convention for the Protection of Human Rights and Fundamental Freedoms (also referred to as the "European Convention on Human Rights") ("ECHR"<sup>19</sup>).

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<sup>15</sup> Article 55 (2) of the Law on Broadcasting states: *"1. it is prohibited to distribute programs or advertisements that incite violence or hatred toward a person or a group of persons based on disability, ethnicity, social origin, gender, sex, gender identity, nationality, race, religion or belief, sexual orientation, skin color, genetic characteristics, language, political or other opinions, belonging to a national minority, property, place of birth or age, except for cases where this is necessary considering the content of the program and there is no intent of the distribution of hate speech. A program or advertisement should not be regarded as containing hate speech as determined by this paragraph solely because of its critical and/or offensive content. 2. It is prohibited to distribute such a program or advertisement that contains incitement to terrorism."*

<sup>16</sup> Under the current text of paragraph 2 of Article 14 of the Law on Broadcasting, *"In case if a broadcaster violates requirements of Georgian legislation (with exception of norms provided in Articles 52, 54, 55(2), 56 and 59 of this Law), as well as of license terms, an interested person may appeal to the Commission."* Under the current paragraph 2 of Article 59 (1), *"It is not permitted to appeal to court, to Commission, or to other administrative bodies issues relating to interpretation of provisions provided in articles 52, 54, 55(2), 56 and 59 of the Law, as well as of ethical norms and professional standards established by the Code of Conduct, as well as decisions made within the self-regulation mechanism provided in Article 14 of this Law."*

<sup>17</sup> Paragraph 3 of Article 56 (1) of the Law on Broadcasting (as amended by the Law).

<sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

<sup>19</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe, 4 November 1950, at [https://www.echr.coe.int/documents/d/echr/Convention\\_ENG](https://www.echr.coe.int/documents/d/echr/Convention_ENG).

The Analysis also references the documents by the European Court of Human Rights (“ECoHR”<sup>20</sup>), the UN Human Rights Committee (“UN HRC”<sup>21</sup>), the Audiovisual Media Services Directive (“AMSD”<sup>22</sup>), the Council of Europe’s (“CoE”) Opinion of Europe Directorate General Human Rights and Rule of Law on the Law of Georgia on Broadcasting (hereinafter the “CoE Opinion”<sup>23</sup>), among other international documents which concern the participation of Georgia in the “Creative Europe” program, as the key sources to interpret the norms of the relevant international law pertaining to Georgia’s obligations.

**LIMITATIONS ON THE RIGHT TO FREEDOM OF EXPRESSION NEED TO BE PRESCRIBED BY LAW, NECESSARY, PROPORTIONATE, AND TO PURSUE A LEGITIMATE AIM.**

The right to freedom of expression is not an absolute right and may be limited in certain cases. According to the ECHR,

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

A permissible restriction on the right to freedom of expression under Article 10 of the ECHR must meet all the following requirements of being<sup>24</sup>:

- prescribed by law;
- in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (hereinafter referred to as “legitimate aims”); and
- necessary in a democratic society.

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<sup>20</sup> European Court of Human Rights (ECoHR), at <https://www.echr.coe.int/>; UN Human Rights Committee, at <https://www.ohchr.org/en/treaty-bodies/ccpr#:~:text=The%20Human%20Rights%20Committee%20is,of%20law%2C%20policy%20and%20practice>.

<sup>21</sup> UN Human Rights Committee (UN HRC), at <https://www.ohchr.org/en/treaty-bodies/ccpr#:~:text=The%20Human%20Rights%20Committee%20is,of%20law%2C%20policy%20and%20practice>.

<sup>22</sup> “DIRECTIVE (EU) 2018/1808,” European Parliament and Council, 14 November 2018, at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808>

<sup>23</sup> “Opinion of the Directorate General Human Rights and Rule of Law Information Society and Action against Crime Directorate, Information Society Department ‘On the Law of Georgia on Broadcasting’” (hereinafter the “CoE Opinion”), Council of Europe (CoE), 21 February 2023, at <https://rm.coe.int/eng-georgia-legal-opinion-law-on-broadcasting-feb2023-2777-8422-2983-1/1680aac48e>.

<sup>24</sup> Article 10 of the ECHR.

In reviewing each appeal, the ECoHR examines the three above-named requirements in the order therein provided. If the ECoHR finds that the state has failed to prove one of the three requirements, it determines that the respective interference was unjustified, and, therefore, freedom of expression was violated.<sup>25</sup>

A similar approach is employed by the ICCPR:

*“Paragraph 3 (of Article 19) lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions on other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.”*<sup>26</sup>

## 1. Prescribed by Law

According to the UN HRC’s General Comment No. 34 (2011) on freedoms of opinion and expression (hereinafter “General Comment No. 34”), for a restriction on the Right to the Freedom of Expression to be considered permissible, it must be provided by law. “[A] norm, to be characterized as a ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly [53] and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”<sup>27</sup> The “prescribed by law” requirement refers to the quality of the law, even where a relevant norm is adopted by a parliament.

In addition, the ECoHR has consistently stated that a law has to be public, accessible, predictable, and foreseeable.<sup>28</sup> These criteria and their interpretation have been developed through the decisions of the ECoHR:

*“141. One of the requirements flowing from the expression “prescribed by law” is foreseeability. Thus, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable citizens to regulate their conduct; “143. In particular, a rule is “foreseeable” when it affords a measure of protection against arbitrary interferences by the*

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<sup>25</sup> Dominika Bychawska-Siniarska, “Protecting The Right To Freedom Of Expression Under The European Convention On Human Rights: A Handbook For Legal Practitioners,” CoE, July 2017, p. 33, at <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.

<sup>26</sup> Par. 22 of the General Comment No. 34 (2011) on freedoms of opinion and expression (Article 19), CCPR/C/GC/34 (hereinafter “General Comment No. 34”), UN HRC, 12 September 2011, at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (“General Comment No. 34”).

<sup>27</sup> *Id.* Paragraph 25, General comment No. 34.

[53] See communication No. 578/1994, de Groot v. The Netherlands, Views adopted on 14 July 1995.”

<sup>28</sup> In *Rotaru v. Romania*, the Court found that the domestic law was not “law” because it was not “formulated with sufficient precision to enable any individual – if need with appropriate advice – to regulate his conduct.” *Rotaru v. Romania*, 4 May 2000, paragraph 55.

*public authorities and against the extensive application of a restriction to any party's detriment.*<sup>29</sup>

The restrictions provided in the Law under review violate the “*prescribed by the law*” requirement in several ways:

- The Law allows the Commission to use various sanctions against a broadcaster and to restrict the freedom of expression if the Commission decides that the broadcaster violated the prohibition to distribute programs or advertisements that “*incite violence or hatred*”. However, the Law does not contain the definition of “*violence*” or “*incitement to violence*” and the relevant definition of “*hate speech*” provided in Article 55 (2) of the Law on Broadcasting is too broad and vague to interpret.<sup>30</sup> While these terms remain unchanged, the Commission now has the authority to impose sanctions upon their violation.
- The broadcaster can also be sanctioned if it places “*a kind of program or advertisement infringing upon human/citizen dignity and basic rights and freedoms that contains obscenity*.”<sup>31</sup> The Georgian laws do not provide for a definition of the acts that can “*infringe upon human/citizen dignity and basic rights*”. The term “*obscenity*” is vaguely defined, and the definition relies on the interpretation of ethical norms established in society.<sup>32</sup> Therefore, the Law “*confers unfettered discretion for the restriction of freedom of expression on those charged with its execution*.”<sup>33</sup>

Broad definitions, or a lack of definitions, prevent the Law from being “*foreseeable*” and do not “*afford a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction*” to the media.<sup>34</sup> In the conditions of such regulation, it is impossible to “*predict the consequences of the restrictions provided in the law*.” Specifically, it is impossible to determine if calling a person “*corrupt*” or “*a traitor*” violates the restriction on “*obscenity*”; or if stating that the government or an official should be “*removed*” violates the prohibition of “*incitement to violence*.”

The vague formulation of the restrictions and the absence of definitions of the terms does not “*enable*” media service providers or individuals “*to regulate their conduct according*

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<sup>29</sup> ECoHR decision in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, at <https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:%5B%22Centro%20Europa%207%20S.R.L.%20and%20Di%20Stefano%20v.%20Italy%20C2%A7%20139%22%5D%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22:%5B%22001-111399%22%5D%22%7D>.

<sup>30</sup> Paragraph 1 of Article 55 2) of the Law on Broadcasting says “it is prohibited to distribute programs or advertisements that incite violence or hatred toward a person or a group of persons based on disability, ethnicity, social origin, gender, sex, gender identity, nationality, race, religion or belief, sexual orientation, skin color, genetic characteristics, language, political or other opinions, belonging to a national minority, property, place of birth or age, except for cases where this is necessary considering the content of the program and there is no intent of the distribution of hate speech. A program or advertisement should not be regarded as containing hate speech as determined by this paragraph solely because of its critical and/or offensive content.”

<sup>31</sup> Paragraph 3 of Article 56(1) of the Law on Broadcasting (as amended.)

<sup>32</sup> Article 2 (z19): “obscenity is an action which is in conflict with ethical norms established in society and which has no social and political, cultural, educational or scientific value.”

<sup>33</sup> Paragraph 25, General comment No. 34.

<sup>34</sup> ECoHR decision in *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 2012, at <https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:%5B%22Centro%20Europa%207%20S.R.L.%20and%20Di%20Stefano%20v.%20Italy%20C2%A7%20139%22%5D%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22itemid%22:%5B%22001-111399%22%5D%22%7D>.

to the law.” Further, the vagueness of the Law concentrates power in the hands of the Commission and allows for biased interpretations.<sup>35</sup>

**Thus, the Law in question does not meet the requirement to be “*prescribed by law*” because it provides for vague and ambiguous restrictions of the freedom of expression, the application of which is not “*foreseeable*” and does not allow its addressees to “*predict the consequences*” of one’s conduct. The Law also confers unfettered discretion for the restriction of freedom of expression on the Commission. The equivocal formulations jeopardize the right to freedom of expression itself.**

## 2. Pursue Legitimate Aim

A permissible restriction on freedom of expression must “*pursue a legitimate aim.*” Both the ECHR and the ICCPR provide an exhaustive list of the possible permissible grounds for restricting freedom of expression.

The restriction of freedom of expression is permissible if it is “*...in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*”<sup>36</sup>

These principles are further enshrined in the Constitution of Georgia.<sup>37</sup>

### INSUFFICIENT REASONING

According to the Explanatory Note, the aims of the Law include:

- “*Having an effective mechanism for responding to such violations (dissemination of incitement to violence, hatred, and terrorism in media service provider’s programming or advertising) is a prerequisite for Georgia’s full participation in the EU’s Creative Europe program 2021-2027 with a budget of 2.44 billion Euros. According to a letter of the Directorate General for Communications Networks, Content and Technology (DG CONNECT, dated 30.06.2023), to continue its participation in cross-sectoral and media strands of the Creative Europe program, Georgia should improve the national legislation. A similar obligation is contained in the twelve priorities determined by the European Commission for Georgia, which need to be fulfilled by Georgia for the candidacy status.*”
- “*The draft law aims to improve the Georgian “Law on Broadcasting” in accordance with the recommendation of the European Commission and to create an effective*

<sup>35</sup> “Amendments to the Law on Broadcasting may become a mechanism for punishing critical media in Georgia – experts”, 19.10.2023, at: <https://jam-news.net/amendments-to-the-law-on-broadcasting/>

<sup>36</sup> Paragraph 2 of Article 10 of ECHR.

<sup>37</sup> Article 17 of the Constitution (Rights to freedom of opinion, information, mass media and the internet.) states that: “1. Freedom of opinion and the expression of opinion shall be protected.” 2. Every person has the right to receive and impart information freely. 3. Mass media shall be free. Censorship shall be inadmissible...” “5. The restriction of these rights may be allowed only in accordance with the law, insofar as is necessary in a democratic society for ensuring national security, public safety or territorial integrity, for the protection of the rights of others, for the prevention of the disclosure of information recognized as confidential, or for ensuring the independence and impartiality of the judiciary.” The Constitution of Georgia dated 24 August 1995, No 786-6, at <https://matsne.gov.ge/en/document/view/30346?publication=36>.

*mechanism to prevent the spread of programs and commercials containing hate speech and incitement to terrorism.”*

None of the aims cited in the Explanatory Note of the Law correspond to the permissible grounds for restricting freedom of expression provided in the ECHR, ICCPR, or the Constitution of Georgia. Furthermore, the reasoning provided by the authors of the Law relates only to the provisions of the amended Article 14 of the Law on Broadcasting that extends the mandate of the Commission in cases of incitement to violence, hatred, and calls for terrorism. The reasoning is not relevant to the provision introducing amendments to Article 56 of the Law on Broadcasting, especially in the part of the provisions that extend the punitive powers of the Commission related to the newly established prohibition on broadcasting programs or an advertisement containing “*obscenity*”.

The Explanatory Note refers to a June 30, 2023 letter of DG CONNECT, which concerns the participation of Georgia in cross-sectoral and media strands of the Creative Europe program, and provides advice to improve the national legislation. First, this letter is not “*recommendations of the European Commission*” as it is presented in the Explanatory Note, and secondly, the above-mentioned letter does not concern the regulation of “*obscenity*” that is addressed by the Law.

#### LACK OF CO-REGULATION OPPORTUNITY

The CoE Opinion states that:

*“... representatives of the [CSOs] and media outlets interviewed...cited examples of ‘interpretation creep’ by ComCom to extend the scope of broadcast content regulation over recent years. They have also stressed the high risk of political pressure on ComCom given the current political landscape and constituency of the Parliament...” “...In these circumstances, it is recommended that hate speech regulation is a matter for co-regulation under an improved co-regulatory mechanism...”<sup>38</sup>*

The CoE Opinion also highlights that “*hate speech in advertising is subject to self or co-regulation in nearly all EU Member States.*”<sup>39</sup> The government was also advised to involve key stakeholders in the development of the amendments to the Law on Broadcasting.<sup>40</sup>

It is the authors’ understanding that any future regulation of free speech should be developed in a participatory manner to ensure a balance between regulation and self-regulation.

Contrary to this recommendation, the Law concentrates supervisory powers under the mandate of the Commission, thereby limiting the functions of the self-regulatory bodies as their decision on several critical matters can be appealed by the Commission.

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<sup>38</sup> *Id.* P. 27 of the CoE Opinion, at <https://rm.coe.int/eng-georgia-legal-opinion-law-on-broadcasting-feb2023-2777-8422-2983-1/1680aac48e>.

<sup>39</sup> *Id.* CoE Opinion.

<sup>40</sup> “Working Group of media lawyers, representatives from relevant CSOs, broadcasters, and ComCom is important to be put in place in order to consider the responses to the consultation process and together draft amendments in line with the recommendations in this Opinion and the consultation responses.”

*Id.* p. 37 of the CoE Opinion.

## LACK OF DEMONSTRABLE EVIDENCE

The government has not demonstrated any evidence as to why the self-regulation mechanism is ineffectual in enforcing restrictions provided for in Article 55 (2) and paragraphs 2 and 3 of Article 56(1) of the Law on Broadcasting, as amended by the Law. Without such evidence, the government has not provided the legitimate aim of tightening sanctions for these violations in a situation where incitement to violence, hatred, and terrorism are already prohibited by the Law on Broadcasting.

As for the amendments to paragraphs 2 and 3 of Article 56(1) of the Law on Broadcasting, which introduce new restrictions on the right to freedom of expression, including a ban on undefined “*obscenity*”, the government has not provided any argumentation on why it decided to authorize the Commission to supervise the implementation of these provisions and use sanctions, instead of administering them through the self-regulatory mechanism. The argument of “complying with the EU directive” is not valid in the case of this restriction as the AMSD does not concern issues of broadcasting content “*infringing upon human/citizen dignity and basic rights and freedoms that contains obscenity*”. The government has also not provided specific evidence on how broadcasting “*obscenity*” can violate human/citizen dignity and basic rights and freedoms.

On October 27, 2023, the EU Delegation clearly stated: “The European Commission will continue a very close monitoring of the application of the Law on Broadcasting - the concept of “*obscenity*” is not part of the Directive and there is no need to regulate this under the Directive.”<sup>41</sup>

## VIOLATION OF EUROPEAN COMMISSION RECOMMENDATIONS

Furthermore, the recommendations of the EU Commission referred to in the Explanatory Note suggest the opposite of the solutions employed by the Law. On June 17, 2022, the EU Commission adopted a Communication on Georgia’s application for membership of the EU.<sup>42</sup> According to the communication, the European Commission recommends that Georgia be granted candidate status, once 12 priorities are addressed. The 12 priorities include:

- “Undertake stronger efforts to guarantee a free, professional, pluralistic, and independent media environment, notably by ensuring that criminal procedures brought against media owners fulfill the highest legal standards, and by launching impartial, effective, and timely investigations in cases of threats against the safety of journalists” (priority 07); and
- “Ensure the involvement of civil society in decision-making processes at all levels” (priority 10).<sup>43</sup>

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<sup>41</sup> “EU Delegation: The European Commission will continue a very close monitoring of the application of the Law on Broadcasting – the concept of ‘obscenity’ is not part of the Directive and there is no need to regulate this under the Directive,” InterpressNews, October 27, 2023, at <https://www.interpressnews.ge/en/article/127896-eu-delegation-the-european-commission-will-continue-a-very-close-monitoring-of-the-application-of-the-law-on-broadcasting-the-concept-of-obscenity-is-not-part-of-the-directive-and-there-is-no-need-to-regulate-this-under-the-directive>.

<sup>42</sup> “The Twelve Priorities: In Its Opinion On Georgia’s Application, The European Commission Recommended That Georgia Be Granted Candidate Status, Once It Has Addressed A Number Of Key Priorities,” European Commission, June 16, 2022, at <https://www.eeas.europa.eu/sites/default/files/documents/12%20Priorities.pdf>.

<sup>43</sup> *Ibid.*

The Law expands the supervisory and punitive powers of the Commission over the media. It creates an opportunity for the Commission to use unreasonable and harsh sanctions on media, which can be considered harmful and restrictive to the media environment and, therefore, a step back in terms of ensuring “*a free, professional, pluralistic, and independent media environment.*”

Besides, the Law was adopted hastily after being submitted to the bureau of the Parliament of Georgia on October 16, 2023, and adopted on October 19, 2023. Key stakeholders, media representatives, and civil society were not consulted before or during the process of the law’s adoption. Furthermore, amendments to Article 56 were introduced after the first reading of the law, one day before adoption. This contradicts the recommendations of the EU Commission, in particular, Priority 10, which requires the government to “*ensure the involvement of civil society in decision-making processes at all levels.*” This also contradicts the Proposed Implementation Roadmap for revising the Law on Broadcasting proposed by the CoE.<sup>44</sup>

**Thus, the reasoning provided in the Explanatory Note does not comply with the “to pursue a legitimate aim” requirement. The Law’s provisions are not justified adequately, either being introduced without any justification or indication of the legitimate aims or referring to aims inapplicable to the ECHR and ICCPR. Furthermore, the provisions of the Law and their adoption process did not provide for a co-regulation opportunity, despite the CoE’s opinion, and lack demonstrable evidence as to why the self-regulatory mechanism has proven ineffectual in preventing the dissemination of “obscenity.” The Law’s provisions and the adoption process further contradict the reasons given as the basis of the Law’s adoption, violating the recommendations issued by the European Commission.**

### 3. *Necessary in a Democratic Society*

The third component of the three-part test is examining whether the restriction is “*necessary in a democratic society*”. To determine whether the law in question complies with this third requirement, the principle of “*proportionality*” is applied by answering the following question: “Was the aim proportional to the means used to reach that aim?” In this equation, the “aim” is one or more of the values and interests provided by paragraph 2 of Article 10 of ECHR, for the protection of which states may interfere with the freedom of expression. The “means” is the interference itself.

The decision on proportionality is based on the principles governing a democratic society. To prove that interference was “*necessary in a democratic society*”, the government should demonstrate that a “*pressing social need*” existed, requiring that limitation on the exercise of freedom of expression. The ECoHR has repeatedly defined that “[t]he adjective

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<sup>44</sup> *Id.* P. 37 of the CoE Opinion states that: “A thorough and systematic process of consultation on revisions to the Broadcasting Law, as initially proposed by Parliament, needs to be put in place, with facilitated Roundtables and the opportunity for Stakeholders to request changes/corrections relevant for the industry. As part of this process, every opportunity should be given to consider proposals by broadcasters to set up a co-regulatory mechanism. It is understood that this proposal exists...” Furthermore, a Working Group of media lawyers, representatives from relevant CSOs, broadcasters and ComCom is important to be put in place in order to consider the responses to the consultation process and together draft amendments in line with the recommendations in this Opinion and the consultation responses.”

*'necessary', within the meaning of Article 10 paragraph 2, implies the existence of a 'pressing social need'.*<sup>45</sup>

A similar approach is provided in General Comment No.34: *"Restrictions must not be overbroad... "Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected..."*<sup>46</sup>

In the case of the Law, it should be evaluated whether transferring the supervisory and punitive powers from the self-regulatory bodies of broadcasters to the authorities of the Commission is proportional and corresponding to a *"pressing social need"* when it comes to administering the prohibition on *"incitement to violence, hatred and calls for terrorism"* and the ban on *"obscenity."*

## PROPORTIONALITY

In determining the response to the above-mentioned question, it is also important to consider that contrary to self-regulatory bodies, the Commission is authorized to use a range of sanctions, including suspension of a license (up to three months) if a broadcaster violates the requirements of the legislation of Georgia or license provisions and if a written warning and fine has been already applied as a sanction against that license holder.<sup>47</sup> If the broadcaster fails to eliminate the violation specified by the Commission in the license suspension period, the Commission may decide to revoke the license.<sup>48</sup>

Decisions of the Commission can be appealed in the court, but this does not suspend the execution of the decision, except for cases when the imposed fine exceeds 1% of the annual income of the broadcaster, but not less than GEL 5000 (USD 1,855), or if the decision concerns the issue of suspension/revocation of the broadcaster's authorization.<sup>49</sup>

As already observed, proportionality is a matter of compliance between the legitimate aim and the means of interference in the right to reach the aim. *The least intrusive instrument amongst those that might achieve their protective function should be considered and applied when restricting freedom of expression.*

Absent a clear rationale, it is uncertain whether the government has considered whether the law *provides a proper balance* between the restrictions and the right to freedom of expression or other human rights, or if the government has considered applying less intrusive mechanisms for achieving the stated aims of the Law. The possibility of eventually imposing harsh sanctions (such as a suspension of a broadcaster's license) may push the media to abstain from broadcasting any subjectively dubious content, including criticism of public figures.

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<sup>45</sup> See, for example, *Observer and Guardian v. the United Kingdom*, 26 November 1991, paragraph 59(c); in *Sunday Times (No. 1) v. the United Kingdom*, 1979, § 59. The ECoHR has noted that, whilst the adjective "necessary", within the meaning of Article 10 (2) (art. 10-2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."

<sup>46</sup> Paragraph 34. of the General Comment No 34.

<sup>47</sup> Paragraphs 2 and 3 of Article 73 of the Law on Broadcasting.

<sup>48</sup> Paragraph 1 (d) of Article 74 of the Law on Broadcasting.

Paragraphs 7 and 8 of Articles 8 of the Law on Broadcasting.

Furthermore, existing Georgian legislation already contains different measures for responding to the incitement of violence and hate speech, according to the gravity of the circumstances involved. For example, the Criminal Code of Georgia includes provisions imposing criminal punishment on acts of incitement to violence, hatred, and terrorism. According to the Law of Georgia “On the Elimination of All Forms of Discrimination,” incitement to violence and hatred is regarded as incitement to discrimination and falls under the mandate of the Ombudsman’s Office.<sup>50</sup> Under existing regulations, there is no need for another government body to supervise and punish incitement to violence and hatred.

The government has not provided any argumentation on why the sanctions and/or recommendations applied to broadcasters within self-regulatory mechanisms are inappropriate or ineffective in prohibiting hate speech or obscenity and in complying with the requirements of the AMSD.

Besides, Georgian civil society and media are concerned with the level of independence and impartiality of the Commission, concerns also reflected in the mentioned CoE Opinion.<sup>51</sup>

As for the possibility of the Commission suspending and/or revoking a license or authorization of media organizations, such a sanction would be inappropriate and disproportional even in the case of the existence of a fully independent regulator. Even before the amendments to the Law on Broadcasting, the CoE Directorate General Human Rights and Rule of Law assessed the compliance of the Law on Broadcasting and recommended removing Article 72.2:

*“Art. 72.2 enables the Commission to suspend a service effectively on a second violation. As suspension of service is a significant interference with freedom of expression, any suspension must comply with the provisions of Art.10 of the ECHR. Suspension for the second offense may raise the risk of disproportionality in the context of Art.10. Therefore, it is recommended that Art. 72.2 be deleted.”<sup>52</sup>*

The CoE experts recommended removing from the Law the possibility of the Commission to suspend services for any type of violation, not just for the violation of the prohibition of hate speech.

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<sup>50</sup> See paragraph 5 of Article 2 of the Law on The Elimination of All Forms of Discrimination. See also paragraphs 1-4 of Article 2, at <https://matsne.gov.ge/en/document/view/2339687?publication=0>.

<sup>51</sup> Id. Page 7 of the CoE Opinion: “The National Regulatory Authority, the Communications Commission (ComCom) cannot be said to be independent according to the criteria laid down by AVMSD (the EU’s Audiovisual Media Services Directive at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0013>) and the Council of Europe’s standards on the independence of regulatory authorities, which require the independence of the National Regulatory Body to be ensured. This requirement applies regardless of whether the governing party holds a significant majority of seats in Parliament. There are a number of shortcomings in the law to support this conclusion, including the fact that a list of candidates to be members of ComCom are put together by the government through a non-transparent procedure, and Parliament then selects candidates by majority vote. Whenever the ruling party has a majority, as is currently the case, this means all members are effectively submitted and selected by the governing party, contrary to CoE standards. Furthermore, members may only be removed from office with a three-fifths vote by Parliament, even if they have a conflict of interest or are not attending meetings as required by law (meaning that the government can keep its selected candidates in post regardless of violations of the law as set out in the Regulations of Parliament.”

<sup>52</sup> Id. P. 31 of the CoE Opinion.

As for the broadcasting content containing “obscenity,” such a restriction was not a part of the Law and draft amendments by the time of the CoE’s evaluation. On October 27, 2023, the EU Delegation stated: “The European Commission will continue a very close monitoring of the application of the Law on Broadcasting - the concept of “obscenity” is not part of the Directive and there is no need to regulate this under the Directive.”<sup>53</sup>

Therefore, suspension and/or revocation of the authorization or license is a disproportionate sanction for violating the vague and broad restrictions provided in Articles 55(2) and 56(1) of the Law on Broadcasting, even if these violations are conducted after a warning or penalty is issued to the respective broadcaster.

Considering the high level of political polarization in the leadup to the 2024 parliamentary elections, the right to suspend and/or revoke licenses and authorizations of broadcasters for the violations provided in Articles 55(2) and 56(1) may be perceived as a potential threat to independent media.

#### CRITERION OF PRESSING SOCIAL NEED

The Law does not provide for an “appropriate response to a pressing social need,” given that the Law on Broadcasting already includes prohibitions on incitement of violence, hatred, and calls for terrorism. Thus far, the government has provided no evidence of real-life examples of instances when the pre-existing mechanisms in the Law on Broadcasting failed to appropriately address such cases. To justify the prohibition and sanctioning of the placement of a program or an advertisement containing “obscenity”, the government should have demonstrated not only the proportionality of possible sanction but also the pressing social need that motivated such a restriction.

The right to freedom of expression applies not only to the content that is favorably received by the audience but also to any type of expression that can cause discomfort to its audience. The ECoHR has indicated that: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the ECHR], it applies not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance, and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”<sup>54</sup>

The government has not provided any justification of the “pressing social need” necessitating restrictions related to “obscenity,” how the restrictions are proportionate to such necessity, how the restriction will prevent the infringement “upon human/citizen dignity and basic rights and freedoms,” and why the same goal could not be achieved with

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<sup>53</sup> “EU Delegation: The European Commission will continue a very close monitoring of the application of the Law on Broadcasting – the concept of ‘obscenity’ is not part of the Directive and there is no need to regulate this under the Directive,” InterpressNews, October 27, 2023, at <https://www.interpressnews.ge/en/article/127896-eu-delegation-the-european-commission-will-continue-a-very-close-monitoring-of-the-application-of-the-law-on-broadcasting-the-concept-of-obscenity-is-not-part-of-the-directive-and-there-is-no-need-to-regulate-this-under-the-directive>.

<sup>54</sup> *Handyside v. the United Kingdom* judgment of 7 December 1976, § 49.

less intrusive interference. The government has provided no evidence that such a restriction was necessary in a pluralistic and democratic society.

Moreover, the government has not demonstrated any evidence to suggest that it is necessary and/or appropriate to transfer supervisory and punitive powers to the Commission and therefore entitle the public body to use harsh sanctions. The government has neither explained how such a body, whose purpose is to regulate broadcasting, will make decisions related to human rights violations, nor how this state body is best positioned to make decisions on a subject matter that is far from their professional expertise.

On the contrary, representatives of media outlets, rights groups, and the opposition have criticized the amendments, warning of a “very big danger” of censorship and suppression of media in the adopted Law.<sup>55</sup>

Considering the concerns raised by civil society, it would have been appropriate for the government and the drafters of the Law to hold an open dialogue with Georgian CSO representatives to search for the least restrictive measures, if any, to address the existing issue.

## Conclusion

As discussed above, any permissible restriction on the right to freedom of expression must meet the three criteria of (i) being prescribed by law, (ii) necessary in a democratic society, and (iii) in pursuit of a legitimate aim. As evidenced by this Analysis, the Law fails to meet these requirements.

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*The contents of this document are the authors and do not necessarily reflect the views of USAID or the United States Government.*

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<sup>55</sup> “Georgian Dream rushes through controversial amendments outlawing ‘obscenity’”, 19 October 2023 at: <https://oc-media.org/georgian-dream-rushes-through-controversial-amendments-outlawing-obscenity/>; GD Registers in Parliament Controversial Amendments to Broadcasting Law related to Regulation of Hate Speech – at: <https://civil.ge/archives/564033>