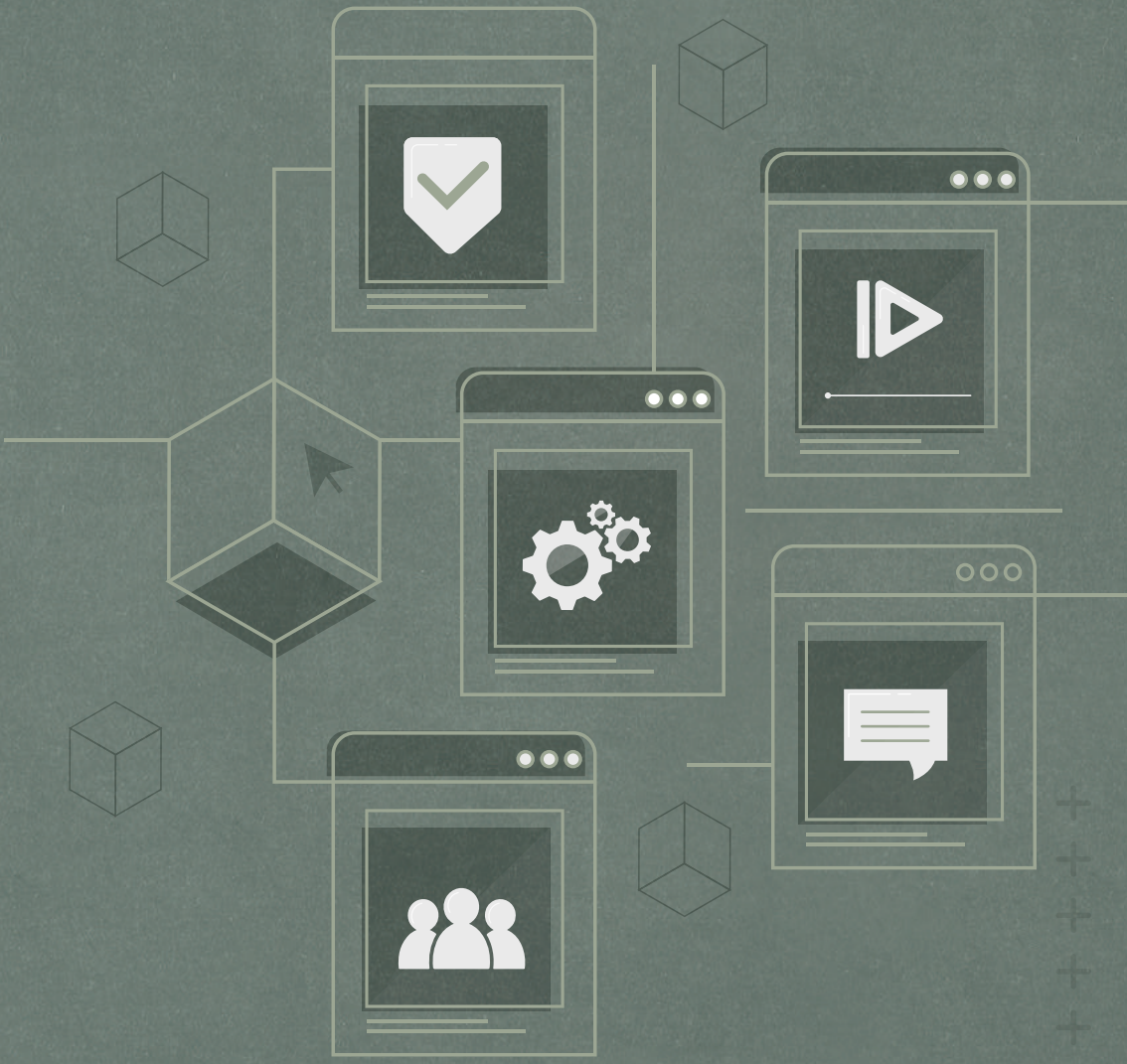
INTERNET FREEDOM AND DIGITAL RIGHTS IN GEORGIA:

SYSTEMIC CHALLENGES



INTERNET FREEDOM AND DIGITAL RIGHTS IN GEORGIA:

SYSTEMIC CHALLENGES

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INTRODUCTION

The virtualization of public life is an inevitable consequence of technological development. Each form of physical communication is gradually emerging as a digital alternative. The public's dependence on technology and the Internet is increasing, which leads to a growth in the importance of the digital sphere. Specifically, technological development affects all the fundamental values of the states - the quality of democracy and the Rule of Law and the protection of basic human rights.

Naturally, law, as a tool for establishing the operating rules between the State, society, and the individual, cannot leave such an important area without regulation. At the same time, there are no universal legal solutions to the challenges and opportunities that arise as a result of technological development.

Human rights are recognized by the Constitution[1] and many international treaties of Georgia, which are directly applicable as laws in Georgia.[2] Due to technological development, many fundamental rights already exist in the digital sphere—for example, freedom of expression, privacy and property rights, etc. Nevertheless, the potential of the fundamental rights to be realized digitally does not automatically make them into digital rights, nor does it preclude them from being labeled so. In particular, the various requirements related to Internet freedom and digital rights often fall under a preexisting area protected by a specific fundamental right. For example, monitoring peoples' activity on the Internet is an issue covered by human privacy.[3] However, it is also an essential component of Internet security and freedom.

The report reviews the key digital rights challenges related to Internet access and Internet security, privacy, and freedom of expression. The constitution and the legislation regulating digital rights, the bodies/persons responsible for fulfilling these requirements, and the main challenges that may threaten the realization of digital rights in Georgia will be analyzed below.

[1] Paragraph 2 of Article 4 of the Constitution of Georgia "The State acknowledges and protects universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognized human rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution."

[2] Paragraph 5 of Article 4 of the Constitution of Georgia „The legislation of Georgia shall comply with the universally recognised principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia".

[3] Judgement N1/1/ 625,640 of the Constitutional Court of Georgia of April 14, 2016 on the case "the Public Defender, the citizens of Georgia - Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, NGO "Open Society Georgia Fund", NGO ,,International Transparency – Georgia" and the NGO "Human Rights Center" V. the Parliament" **https://bit.ly/3eedaG4**

[4] Freedom House Policy Recommendations on Internet Freedom 2021. **https://bit.ly/3mpHzpt**

1. FREEDOM TO EXCHANGE INFORMATION VIA THE INTERNET: INADMISSIBLE PRODUCTION

One of the legal issues in regulating the exchange of information via the Internet is the question of which state body is responsible for deciding what information may or may not be disseminated through the Internet.

The Georgian legislation does not envisage a unified, exhaustive checklist to guide what information is not permissible to be transmitted via the Internet. The closest normative act to such a list is Resolution No. 3 of March 17, 2006, of Georgian National Communications Commission "On the Approval of the Regulations in Respect to the Provision of Services and Protection of Consumer Rights in the Sphere of Electronic Communications" (hereinafter, the Resolution or Resolution on consumer protection). The Resolution is a binding legal act, but does not constitute a legislative act. Paragraph ii of Article 3 defines the notion of inadmissible production.

According to this norm, inadmissible products are "[…] production transmitted by means of electronic communications, such as pornography, items featuring especially grave forms of hatred, violence, invasion of a person's privacy, as well as slanderous, insulting, violating the principle of presumption of innocence, inaccurate, and other products transmitted in violation of intellectual property rights and the Georgian Legislation".

The cited norm is still valid today. However, it does not enable the State, in any case, to restrict or otherwise prevent the dissemination of information that, in its opinion, falls within the cited definition of an inadmissible product. More specifically, on August 2, 2019, the Constitutional Court of Georgia delivered a precedent-setting Judgment.

Judgment N1275[5] established necessary formal guarantees for the protection of freedom of expression. The constitutional complaint in question disputed established rules restricting the transmission of inadmissible products. In particular, the repealed norms obligated domain registrars and Internet service providers (hereinafter, ISPs) to limit the distribution of such products. The domain registrar had an obligation to block the website, while the ISPs were obligated to restrict access to the website. Paragraph ii of Article 3 of the Resolution on consumer protection lists nine categories of inadmissible production. Six of them failed to meet the requirements set by formal constitutional control.

[5] Judgement №1/7/1275 of the Constitutional Court of Georgia of August 2, 20169 on the case "Aleksandre Mdzinarashvili v Georgian National Communications Commission".

	INADMISSIBLE PRODUCTION	DECLARED TO BE UNCONSTITUTIONAL	IS NOT REVIEWED YET
1.	Pornography		x
2.	Items featuring especially grave forms of hatred	V	
3.	Invasion of a person's privacy	V	
4.	Slanderous	V	
5.	Insulting	V	
6.	Violating the principle of presumption of innocence	V	
7.	Inaccurate	V	
8.	Products transmitted in violation of intellectual property rights		x[6]
9.	Products transmitted in violation of the Georgian Legislation		x

The Constitutional Court assessed the formal constitutionality of the content indicated by the symbol "V." Specifically, whether the Communications Commission could decide on the legality of disseminating the information on the one hand and, on the other hand, independently determine the mechanisms for restricting the dissemination of such information.

[6] The copyright infringement case was considered by the Constitutional Court in the context of constitutional claim N1531. See. ruling of the Constitutional Court of Georgia 111/9/1531 of June 11, 2021 in the case of "Akhali Kselebi Ltd v. Parliament of Georgia"

1.1 INADMISSIBILITY OF DELEGATING SUBSTANTIVE REGULATION OF FREEDOM OF EXPRESSION.

Firstly, the Constitutional Court clarified the essence, purpose, and impact of freedom of expression on public or political lives and pointed out that content filtering of thoughts and information belongs to a field of high political and public interest.[7]

Afterward, the Constitutional Court noted that substantive regulation of freedom of expression is not an area that requires periodic clarification and a flexible regulatory mechanism. The need for delegation is not due to the necessity for effective regulation."It is inadmissible that the substantive restriction of freedom of expression, the exercise of it and the prospects for its protection depend on the discretion of body other than the Georgian National Communications Commission and/or the Parliament of Georgia; [it is inadmissible that] the standards of interference are designed per the position, values, and ideas of these [other than Commission and Parliament] bodies."

At the time of the Judgment, Article 17, Paragraph 7 of the Constitution of Georgia had already entered into force. According to it, "The institutional and financial independence of the national regulatory body – established to protect media pluralism and the exercise of freedom of expression in mass media, prevent the monopolization of mass media or means of dissemination of information, and protect the rights of consumers and entrepreneurs in the field of broadcasting and electronic communications – shall be guaranteed by law." The Constitutional Court saw the Communications Commission as the regulatory body referred to in the cited norm. However, this did not change the substance of the reasoning developed by the Court.

"Content filtering of information and determining the restriction of which information/opinion is constitutionally justified should be done by the supreme legislative body based on a transparent law-making procedure, and the standards proposed by any other body in this regard are inherently non-authoritative."

[7] "Without freedom of expression, it is inconceivable to provide a vital discussion for society. This right is an important precondition for the existence of a democratic and legal state. In the case under consideration, on the basis of the disputed norms, the Georgian National Communications Commission determines what type of thoughts and information is inadmissible. Specifically, in accordance with the disputed regulation, the Georgian National Communications Commission considered inadmissible and banned the distribution of particularly severe forms of hatred and violence, violation of privacy, slander, abuse, violation of the presumption of innocence, or inaccurate products. Accordingly, the content regulation of expression is established, which implies the restriction of the dissemination of the thought/information due to its content. Restriction of freedom of expression, through the introduction of substantive regulation, is one of the most severe forms of interference with this right. Mandatory determination of what content of thought/information is inadmissible implies the imposition of an "information filter" on the minds of individuals. A democratic state undoubtedly means a free society, a free information space, an environment where everyone is guaranteed a free exchange of views, a free debate. Where free speech is not guaranteed, there is no space for development, for freedom. Thus, the restriction of freedom of expression, in particular, its substantive regulation, is an issue in which the determination of each aspect is a matter of high political and public interest. Judgement № 1/7/1275 of the Constitutional Court of Georgia of August 2, 20169 on the case "Aleksandre Mdzinarashvili v Georgian National Communications Commission", II-36.

The first standard of this Judgment is the inadmissibility of delegating the substantive regulation of freedom of expression.

1.2 CONTENT REGULATION OF FREEDOM OF EXPRESSION VS. ENFORCEMENT OF EXISTING RULES.

The substantive regulation of freedom of expression must be distinguished from the enforcement of existing substantive restrictions. No state body other than the Parliament of Georgia can determine what information cannot be disseminated. However, it is not as strict in enforcing the restriction already defined by the legislative act as required by the Constitution.

The Constitutional Court of Georgia separately assessed the content of the unconstitutional norms that defined it and the rules for enforcing the substantive regulation. In particular, ISPs and domain registrars were required to take steps to block unauthorized products.

The Constitutional Court has indicated that the power to regulate technical issues related to the implementation of the law regulating the substantive regulation of freedom of expression may be delegated by the Parliament to another body. In particular, after defining the material requirements for freedom of expression, the definition of enforcement mechanisms restricting the dissemination of relevant data does not fall within the substantive regulation of freedom of expression. These are connected to the technical issues of implementation, and the Parliament is authorized to delegate it to another body.

The content of the disputed norms, which imposed certain obligations on the domain registrar and ISPs to prevent the distribution of inadmissible production, was assessed separately. Namely, the extent to which the Parliament of Georgia has delegated to the Commission the authority to regulate the named issues was discussed.

1.3 DEFINING MEASURES TO ENFORCE THE SUBSTANTIVE REQUIREMENTS OF FREEDOM OF EXPRESSION

Under the Subparagraph B of Paragraph 2 of Article 10[3] of the Resolution on Consumer Protection, the Communications Commission has imposed an obligation on the domain registrar to block the website if its owner does not remove inadmissible production in the event of a prior warning. In addition, in the event of notification, the Commission instructed ISPs about the necessary measures to eliminate inadmissible production.

It is clear from the Judgment of the Constitutional Court that the establishment of normative rules by the Commission or another body to enforce the restriction of content disguised via the Internet will not be formally contrary to the Constitution. The legislative will is necessary to ensure formal compatibility of such rules with the Constitution. In particular, the Parliament must delegate the appropriate authority. Additionally, the norm prescribing this measure must be clearly formulated.

At the substantive hearing, the Communications Commission indicated that it had been authorized by the Parliament of Georgia to settle the matter. To confirm this, the Communications Commission named six legislative norms.

The Constitutional Court held that none of them had given the Commission the power to establish the order for enforcing the rules restricting the Internet content. It should be noted that the Judgment discusses in detail the two legal norms that gave the Commission the right to adopt a Resolution on consumer protection. The Constitutional Court clarified that "the use of electronic means of communication can lead to many different legal dilemmas in the context of service delivery and/or consumer protection. For example, relationships related to intellectual property, personal data, and cybercrime. [The norms named by the Commission] may not be interpreted in such a way as to delegate all matters relating to the provision of electronic services and the protection of the rights of consumers. "

The Constitutional Court concluded that the Parliament had not delegated the Communications Commission the power to restrict freedom of expression. The Constitutional Court highlighted that the normative content of the disputed norms by which the Commission established the rules to restrict the transmission of products containing particularly severe forms of hatred and violence, violating privacy, slander, insulting, violating the presumption of innocence or inaccurate products were not formally compatible with the Constitution of Georgia.

1.4 COPYRIGHT AND RELATED INFRINGING PRODUCTS AND PORNOGRAPHY

According to the Constitutional Court's recording notice 1/8/1275 of October 19, 2018,[8] and ruling 1/9/1531 of June 11, 2021,[9] the Court rejected the call for considering the constitutionality of the normative content of the inadmissible products related to the ban on the distribution of "pornography" and "copyright infringing" products. The Constitutional Court stated that the distribution of pornography was a criminal act under the Criminal Code and that the distribution of copyrighted products was expressly prohibited under Georgian legislation relating to copyright protection. As the relevant norms of Georgian law were not disputed, the Constitutional Court did not discuss the normative content of inadmissible products about pornography and copyright infringement.[10]

1.5 CONSEQUENCES OF THE CONSTITUTIONAL CONTROL INTERVENTION IN THE CONCEPT OF "INADMISSIBLE PRODUCTS."

The substantive regulation of freedom of expression must be distinguished from the enforcement of existing substantive restrictions. No state body other than the Parliament of Georgia can determine what information must not be disseminated. However, it is not as strict in enforcing the restriction already defined by the legislative act as required by the Constitution.

The Constitutional Court of Georgia evaluated the content of unconstitutional norms that defined the rules for the execution of content regulation separately. **In particular, ISPs and domain registrars were required to take steps to block inadmissible products.**

In this regard, the Constitutional Court has indicated that the power to regulate technical issues related to the implementation of the Law regulating the substantive regulation of freedom of expression may be delegated by the Parliament of Georgia to another body.

In particular, after defining the material requirements for freedom of expression, the definition of enforcement mechanisms restricting the dissemination of relevant production does not fall within the substantive regulation of freedom of expression. These are connected to the technical issues of implementation, and the Parliament of Georgia is authorized to delegate it to another body.

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[8] Recording Notice №1/8/1275 of October 19, 2018 „Citizen of Georgia Aleksandre Mdzinarashvili v Georgian National Communications Commission", II-20-23.

[9] Ruling №1/9/1531 of June 11, 2021 "Akhali Kselebi LTD v Georgian Parliament"

[10] The Constitutional Court used different legal arguments in Ruling №1/9/1531 of June 11, 2021. The logic of some parts of the ruling is vague, but in our view, the Constitutional Court held that in the area of copyright and related rights, the Commission had delegated authority, since the law explicitly prohibited the distribution of copyright infringement products and, at the same time, it was not vague.

As a result of the standard established by the Constitutional Court, it has been repealed and/or a legal ground was created for the abolition of every regulation restricting the content that sets the substantive regulation of freedom of expression.

At present, there are three circumstances in the Resolution on consumer protection where an ISP or domain registrar may restrict the dissemination of specific information through the Internet:

- Pornography;
- Products transmitted in violation of intellectual property rights;
- Other products transmitted in violation of the Georgian Legislation.

Among the listed circumstances, the term "other products transferred in violation of the legislation of Georgia" carries certain risks. At first glance, any normative requirement in force throughout Georgia can be covered by it. Such general provisions may entail risks depending largely on the model, the public authorities or individuals involved in the enforcement process, and the statutory safeguards accompanying digital rights.

2. INTERNET CONTENT REGULATION: THE EXISTING MODEL AND ITS CHALLENGES

"The Constitution of Georgia is the supreme law of the state"[11] that defines the basic architecture of the arrangement of state bodies as well as the protection of fundamental human rights. This architecture limits the margin of appreciation of the state and sets out the minimum requirements that must be met by any sector and area, including digital regulation. Naturally, the Constitution does not contain a very detailed framework; however, in the absence of specific requirements related to digital rights in the Georgian legislation, the analysis of these requirements is necessary in order to pursue a sound policy on digital rights.

As a result of the amendments to the Constitution in 2018, two major innovations were added to the state's supreme Law regarding digital rights.

According to Article 17, Paragraph 4 of the Constitution of Georgia, access to the Internet and free use of the Internet are recognized as fundamental human rights – "Everyone has the right to access and freely use the internet."[12]

In addition, paragraph 7 of the same Article prescribes the need to guarantee the financial and institutional independence of the body established to protect the rights of consumers and entrepreneurs in electronic communications. – "The institutional and financial independence of the national regulatory body – established to protect media pluralism and the exercise of freedom of expression in mass media, prevent the monopolization of mass media or means of dissemination of information, and protect the rights of consumers and entrepreneurs in the field of broadcasting and electronic communications – shall be guaranteed by law."[13]

It is noteworthy that both of these amendments have been implemented in Article 17, which is the primary legal guarantee of freedom of expression in Georgia.

[11] Paragraph 4 of Article 4 of the Constitution of Georgia.

[12] Paragraph 4 of Article 17 of the Constitution of Georgia.

[13] Paragraph 7 of Article 17 of the Constitution of Georgia.

2.1 INTERNET ACCESS: PROTECTED AREA AND QUESTIONS ABOUT THE IMPORTANCE OF THIS RIGHT

– "Everyone has the right to access and freely use the internet" - This entry in the basic law naturally enhances the importance of Internet freedom in the Georgian legal space. However, it is unclear what independent content can be referred to in this provision of the Constitution.

Firstly, it should be noted that the Constitutional Court has never considered the cited constitutional provision. This norm defines two independent protected areas; the first is "access to the Internet," and the second is the "right to free use of the Internet." Below, we present the views on the interpretation of these norms.

2.1.1. Right to access the Internet

The right to access the Internet, in our view, is linked to the technical, infrastructural ability of the user to have access to the Internet as a global network. The existence of a constitutional right implies the imposition of particular negative and/or positive demands on the state. The state has an obligation, at a minimum, not to hinder the development of network infrastructure and not to technically restrict access to the Internet. On the positive side, the right to free access to the Internet can be seen as an obligation of the state to facilitate the development of boarding infrastructure through the implementation of various normative or economic measures.

2.1.2. The right to freely use the Internet

The Internet can be used to realize almost all basic rights. Starting with the right to property and ending with the right to a fair trial. However, this does not mean that Paragraph 4 of Article 17 of the Constitution covers all rights that have ways of digital realization. For example, restricting the defendant from attending an online court hearing will be protected by the right to a fair trial and not by access to the Internet. Moreover, in our view, not every restriction on freedom of expression can be addressed in the constitutional provision guaranteeing the free use of the Internet. Limitations on disseminating certain information via the Internet should still be protected by the first paragraph, not the 4th paragraph of Article 17 of the Constitution.

Fundamental human rights existed and evolved for a long time before the advent of the Internet. Each right recognized by the Constitution of Georgia contains the criterion of the legality of its restriction. The development of digital technologies provides ways of further realization of human rights. Thus, the measure of the legitimacy of standard cases of limitation of Internet use should be the specific fundamental right that has been violated by the restriction of freedom of access to the Internet.

For example, social networks and forums in Georgia are freely accessible, and general standards of freedom of expression govern their use. Nevertheless, people in Georgia can expect to become victims of persecution or harassment for their publicly expressed positions on the Internet. In 2020, the Constitutional Court of Georgia agreed to consider the constitutional claim of a notary public, against whom disciplinary proceedings were initiated due to an opinion expressed through the social network "Facebook."[14] The norm of Georgian legislation that obligates a notary public to maintain political neutrality has been substantially considered by the Plenum of the Constitutional Court of Georgia, including the right to free use of the Internet.

In our view, the scope of the right protected by the unrestricted use of the Internet should also include such large-scale restrictive measures imposed by the state, which substantially harm the freedom of the Internet. For example, banning the use of VPN (Virtual Private Network) or revoking the right to use specific social networks (for example, temporarily blocking WordPress and Youtube platforms in Georgia in 2016) [15].

As mentioned above, no authoritative explanations have been made regarding the scope of Paragraph 4 of Article 17. However, the Constitutional Court of Georgia will have to do so within the constitutional claim N1524.[16]

2.2 OBLIGATIONS OF INTERNET SERVICE PROVIDERS IN TERMS OF CONTENT FILTERING

According to Paragraph 1 of Article 25 of Resolution on Consumer Protection, "The protection of rights and legitimate interests of consumers in the sphere of electronic communications is supervised by the Commission, where operates the agency of Public Defender of Consumers Interests operates." Subparagraph (g) of Paragraph 4 of the same Article sets the obligation for ISPs to "to respond to the received information concerning the allocation of inadmissible production and adopt appropriate measures in order to eliminate it."

It follows from the cited norm that the ISP is not obligated to carry out internet screening on its initiative to detect inadmissible products. Beyond that, all issues related to accessing information posted on the Internet are vague and raise many questions. Is It essential to determine who can provide the information to the ISP? Is it the responsibility of the ISP to enter into an evaluation debate and determine the extent to which information posted on the Internet is an inadmissible product? By what means is the placement of inadmissible products restricted?

14 recording notice 293/1-3/1524 of the Constitutional Court of Georgia of July 29, 2020 on the case "Bachana Shengelia v. Minister of Justice of Georgia".

15 Freedom House; Freedom on the Net 2016 - Georgia

16 recording notice №3/1-3/1524 of the Constitutional Court of Georgia of July 29, 2020

2.2.1. Internet Service Provider Obligation to Restrict Unauthorized Products: Legal Uncertainties

Subparagraph (g) of Paragraph 4 of Article 25 of the Resolution on consumer protection sets the obligation for ISPs to "to respond to the received information concerning the publication of inadmissible production and adopt appropriate measures in order to eliminate it."

The cited norm uses the terms "information" and "appeal." At the same time, neither the norm nor the other requirements set out in the Resolution stipulate who may initiate the appeal and/or specifically what kind of evidence should be submitted to the Commission.

The research revealed that one of the tested methods is the provision of information by the Commission to ISPs. The Commission implements these appeals based on customer appeals. Otherwise, the user is mediated by the Commission to the ISP. However, this is only one and not the only method of providing information to the ISP.

Subparagraph (g) of Paragraph 4 of Article 25 of the Resolution on consumer protection, as well as other provisions of this normative act, does not restrict any natural or legal person, as well as a state agency, from contacting ISPs and submitting "information" about the placement of inadmissible products. It should be noted that the Resolution on consumer protection explicitly regulates the "quality standard" of the information provided. That is, what type of evidence must be presented for Internet "content" to be considered an inadmissible product.

As an example, as mentioned above, "information transmitted in violation of Georgian law" is considered an inadmissible product so far. The Commission uses this legal basis to restrict access to online sites where people are offered sexual services in exchange for money. Communications Commission points out Article 172^3 of the Code of Administrative Offenses and indicates that prostitution is an administrative offense. It should be noted the Commission's notices to the ISP do not contain specific legal instructions regarding the restriction of access to the Internet.

The content structure of the Commission notice is as follows:

- The essence of the message provided by the user to the Commission (for example, the user informs us that on the website www.example.ge, posted the photos of sex workers and contact information).
- The Commission's explanation that prostitution is an offense and information transmitted in violation of the Law is considered an inadmissible product.
- An instruction to respond to a "user's" appeal.

It turns out that the Commission provides ISPs not with mandatory legal instructions, but with citizens' letters. The role of ISPs and the scope of free access to qualifying specific information as inadmissible products is unclear.

In addition, the legislation establishes some mandatory rules of conduct and even defines the relevant state bodies for the implementation. The normative content of inadmissible products, which prohibits the "transfer of products in violation of the requirements of the legislation of Georgia," should be interpreted so that the ISPs and/or the Communications Commission indirectly integrates the functions of other state bodies. For example, based on a user's appeal, the Commission and/or ISP should not decide whether disseminating information infringes the Georgian law, e.g., personal Data Protection Legislation, unless there is prejudicial evidence (e.g., the Inspector General's Office or a court ruling that the dissemination of information on the Internet violated the requirements of the Constitution and access to relevant information should be restricted).

Various technical approaches can be used to restrict access to products disseminated through the Internet. A normative act in Georgia does not specify what capabilities the Communications Commission should have to fulfill its obligations under Article 25 (4) (g) of Resolution on consumer protection.

It should be noted that there are various technical possibilities in terms of blocking and filtering Internet content. During the research, it was revealed that DNS blocking (Domain Name System Blocking) is actively used in Georgia. This technique allows one to completely block a web page, but not the specific information posted on the web page. It may, in some contexts, pose a significant problem in terms of the proportional restriction of digital rights.

It should be noted that there are various technical possibilities in terms of blocking and filtering Internet content. During the research, it was revealed that DNS blocking (Domain Name System Blocking) is actively used in Georgia. This technique allows one to completely block a web page, but not the specific information posted on the web page. It may, in some contexts, pose a significant problem in terms of the proportional restriction of digital rights.

2.2.2. A model for controlling the dissemination of information that is dangerous to a child

According to Paragraph 9 of Article 66 of the Code on the Rights of the Child, "An internet service provider (ISP) is obligated to develop mechanisms enabling the blocking of the access of a child to information hazardous to the child, upon the request of a user." Under Paragraph 5 of Article 99 of the mentioned Code, On February 28, 2020, the Communications Commission approved the Regulation on the Rules of Placement of Information Hazardous to Children on the Internet. The regulation established certain obligations for ISPs and website owners. Three main principles are distinguishable from them:

- Website owners must notify the Communications Commission of their website address and age category.[17]
- Based on the information provided by the Internet pages, the Commission establishes a special ranking list of Internet pages.
- ISPs use a special rating list to restrict Internet content.

Based on a special ranking list of ISPs, access is restricted at a particular customer's request and not on their initiative. In particular, per the first paragraph of Article 6 of the Regulation on the Rules of Placement of Information Hazardous to the Child on the Internet, "The Internet service provider is obligated to develop mechanisms that will enable it, at the request of a specific subscriber, to block (restrict access to) a child's access to child-hazardous Internet sites, based on a special rating list of child-hazardous Internet sites."

Per Article 5 of the Regulation, the obligation to assign age marks to Internet content was envisaged as a way to protect children from dangerous content . Children's websites were banned from posting information that endangered children and a registration obligation was imposed on minors under 18. At the same time, an amendment was made to the Code of Administrative Offenses and a liability was set. Specifically, "Posting information that is dangerous for a child on the Internet and in a general education institution, a library and a specialized children's institution, in violation of the rules of access to the Internet for the child or non-compliance with the decision of the body authorized to exercise appropriate control" will result in a fine of 1000 GEL, and in case of recurrence, a fine of 3000 GEL.

2.2.3. Copyright protection on the Internet

Both movies[18] and various software[19] are freely available on the Georgian Internet in violation of copyright. There is an impression that specific issues are regulated by oral agreements between the owners of the "pirated" websites and the interested parties. For example, Georgia's popular "pirated" websites do not place copyrighted films until they are shown in Georgian cinemas.

There are no severe deterrents for blocking Internet content and thus hindering freedom of information in Georgia. Nevertheless, the legislation governing this area contains some ambiguities, and the practice of blocking Internet content is not transparent. Lack of transparency and legal opacity can create fertile ground for the abuse of this mechanism.

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17 Article 4 of the Regulation "on the Rules of Placement of Information Hazardous to the Child on the Internet: "If the owner of the website does not inform the Commission of the address of his / her website or the website does not have a relevant age mark or is assigned an age mark incompatible with the current legislation and the Commission has information about such website based on monitoring or application submitted to the Commission, the Commission is authorized to include the Internet site in the special ranking list of Internet sites that pose a threat to the child, assigning him / her appropriate age markings."

18 See www.imovies.ge

19 See http://www.file.ge/

3. INDEPENDENCE OF INTERNET SERVICE PROVIDERS: THE INSTITUTE OF SPECIAL MANAGER

As discussed above, ISPs have a special role in realizing digital rights. ISPs are private companies and thus must have the ability to make decisions independently within the bounds of the law and resist illegal requests from government agencies.

As a result of the amendments to the Law of Georgia on Electronic Communications on July 17, 2020, the Communications Commission has been authorized to appoint a special manager in the company if it has breached its obligations relating to a merger or acquisition of shares, stocks, or operating assets, including the obligation to notify the Commission about the transaction in advance.[20]

The Parliament adopted the amendments in an expedited manner. The amendments were largely linked to the case of Caucasus Online Ltd. Specifically, the issue concerned selling the shares of the company's final owners without notifying the Commission. Caucasus Online is an authorized person in electronic communications and, accordingly, is subject to the legislation in force in Georgia in the field of electronic communications.[21] It should be noted that since 2008, Caucasus Online has been the sole owner of a 1,200-kilometer submarine fiber-optic cable that provides Internet transit from Europe to the South Caucasus and the Caspian Sea region.[22] The Company sold its shares without prior notice to the Communications Commission, followed by a sanction from the Commission and a request to restore the original condition.

3.1 NEGATIVE CONCLUSION OF THE VENICE COMMISSION ON THE CURRENT MODEL OF THE SPECIAL MANAGER

On March 22, 2021, the Joint Opinion No. 1008/2020 of the Venice Commission and Directorate General of Human Rights and the Rule of Law of the Council of Europe was published.[23] The Opinion reviews the compatibility of the current model of the institution of the special manager (hereinafter referred to as the "special manager" or the manager) with the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"). Namely, the Opinion discusses the

20 Article 46¹ of the Law of Georgia on Electronic Communications

21 "Recommendations of the Venice Commission on Amendments to the Law on Electronic Communications have not been implemented yet", Author: Mariam Gogiashvili, September 29, 2021. See the Link

22 See the Link http://www.co.ge/ka/441/

23 JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE ON THE RECENT AMENDMENTS TO THE LAW ON ELECTRONIC COMMUNICATIONS AND THE LAW ON BROADCASTING, No. 1008 / 2020, 22 March 2021. See the Link

compatibility of the appointment of a special manager and the relevant procedure with the right to property and freedom of expression. The Opinion focuses on the transparency of making legislative changes to the right to a fair trial.

3.1.1. THE INSTITUTION OF A SPECIAL MANAGER AND PROPERTY RIGHTS

Article 1 of the First Protocol to Convention recognizes and protects property rights. The Venice Commission used the principle of proportionality to evaluate the institution of the special manager. The principle of proportionality implies three elements of establishing a relation between the legitimate aim of the restriction of the right and the form of the restriction of the right: suitability, necessity, and proportionality in a narrow sense. It should be noted that concerning property rights, the Venice Commission found that the institute of special manager in the current version does not meet any of the requirements of the principle of proportionality.

The Venice Commission has indicated that the purpose of appointing a manager is to ensure a competitive environment in the market for ISPs, thereby protecting consumers of electronic communications services from the dangers posed by unreported and illegal mergers/acquisitions in the electronic communications market, as well as obligations imposed on critical infrastructure owners by the Communications Commission.

3.1.2. THE INSTITUTE OF THE SPECIAL MANAGER IS NOT A SUITABLE TOOL FOR ACHIEVING A LEGITIMATE GOAL

The Venice Commission clarified that there is no pre-assessment document that could determine the extent to which and in what ways the institution of the special manager mitigates the risk of the distorted market.[24] In addition, the Venice Commission drew attention to the fact that a special manager had already been appointed at Caucasus Online, although since the other party to the unauthorized transaction was not bound by Georgian law, the special manager could not enforce the Commission's decision. The Opinion pointed out that the manager appointed by the Communications Commission had full managerial power. However, the reality was that he still could not rescind the transaction, which the Commission considered dangerous in the first place. Therefore, the Venice Commission concluded that the interim governing institution had failed to achieve the objectives for which it had been set up.[25]

[24] Para. 28

[25] Para. 29

The Venice Commission explained that the risks of unreported and illegal property transfer could not be reduced by managerial action alone. If the state intended to regain control, it should focus on property conditions and restitution. [26]

3.1.3. A LEGITIMATE AIM CAN BE ACHIEVED BY USING LESS RESTRICTIVE MEANS.

The Venice Commission has indicated that the Georgian state did not use the least restrictive means of achieving its goals. In conclusion, pre-intervention would lead to far less stringent measures to eliminate specific risks. Additionally, if a communications company were to attempt to create a non-competitive market, the Communications Commission would have every opportunity to protect the rights of consumers and ensure access to others on critical infrastructure. According to the Venice Commission, the Parliament instead chose a method with only an indirect deterring effect. A deterrent effect alone could not be a legitimate aim.

3.1.4. THE CURRENT MODEL OF THE SPECIAL MANAGER IS CUMBERSOME AND FAILS TO MEET THE REQUIREMENTS OF NARROW PROPORTIONALITY

The Venice Commission pointed out that the preconditions for the appointment of a special manager were vague and could not meet the requirement of certainty. The Commission points out that "critical infrastructure" has been repeatedly used in virtual meetings. However, the preconditions for the manager's appointment (such as harm to the country's economic interests, damage to the competitive environment, and consumers' interests) are broader than just protecting such infrastructure.[27] According to the Venice Commission, it is inadvisable for the Parliament to delegate such vague powers without guidelines. [28]

The Venice Commission paid particular attention to the fact that the powers of the special manager were vast[29] and more akin to a liquidator's. The Venice Commission indicated that it had no information about a similar regulatory authority in the European context.[30] The Opinion expressed concerns that the duration

[26] Para. 32

[27] Para. 34

[28] Para. 33

[29] Para. 35

[30] Idem

of the manager's appointment is not fixed and predictable. The term of office of the manager shall expire when s/he implements the relevant decision of the Communications Commission. However, if s/he fails to do so, term of office shall depend entirely on the discretionary powers of the Communications Regulatory Commission.[31]

3.1.5. THE INSTITUTION OF A SPECIAL MANAGER POSES A THREAT TO FREEDOMS OF MEDIA AND EXPRESSION (ARTICLE 10 OF THE CONVENTION)

The Venice Commission clarified that the institute of the special manager applies to electronic communications and internet providers, who often have dual licenses. In other words, they provide electronic communications services and, at the same time, are broadcasters representing the media. Freedom of the media, in turn, falls within the scope of Article 10 of the Convention. In the Venice Commission's view, several functions of the special manager allowed the Communications Commission to intervene in media editorial policy. Apart from this, the appointment of the manager, as well as the possibility of his/her appointment in a company with a dual license, may have a detrimental effect on the independence of the broadcaster.[32] In terms of protection of freedom of expression and media, the Venice Commission saw the risk of violating the principle of net neutrality.

The Venice Commission concludes that there should be an explicit guarantee in the law that the manager will not be used against the broadcaster's editorial policy. The provision in its current version [Art.46 No.1] risks interfering with media freedom and negatively affecting editorial policy.[33]

In light of the above arguments, the Venice Commission considers that the current version of the special manager regulation is contrary to the Convention. In particular, the existing institution of the manager fails to meet the requirements of the principle of proportionality and legitimacy for the following reasons:

- The institute of the special manager fails to achieve the goals for which it was set up. Despite its full governing power, it still fails to reverse the circumstances that the Communications Commission deems threatening in the first place.
- The state does not use the least restrictive means to achieve its goals. The legislative amendment has only an indirect deterring effect, which does not ensure the proportionality of implemented changes.

31 Para. 36

32 Paras. 52, 53

33 Paras. 46, 47, 48, 49

- The manager's powers are extensive and more closely resemble those of a liquidator. The term of office of the manager is uncertain. The Venice Commission indicates that it has no information about a regulatory body with similar powers across Europe.

- The institute of the special manager applies to companies that carry out broadcasting activities - represent the media. The appointment and the possibility of the manager's appointment may negatively affect editorial independence.

- It is necessary to take additional measures to exercise the right to a fair trial. An appeal against the decision to appoint a special manager should automatically lead to suspending the execution of the relevant decision.

3.2 MEASURES TAKEN BY THE PARLIAMENT OF GEORGIA AND THE COMMUNICATIONS COMMISSION FOLLOWING THE VENICE COMMISSION'S OPINION

Despite the Opinion of Venice Commission criticizing the legal instrument used, the Georgian Parliament has not yet made any legislative amendments. Amendments have not even been initiated.

A special manager had been appointed at Caucasus Online even before the Venice Commission published its Opinion. Since then, the chairman of the Communications Commission has replaced several special managers, although the original state has not been restored so far. The Communications Commission continues to periodically fine the company. The impression is created that the institution of a special manager has the real purpose of punishing and intimidating the company. Otherwise, a special ruler is not a means to an end, but an additional punitive measure.

There are some questions about the compatibility of the existing model of the institution of a special manager with fundamental human rights. The introduction and functioning of this institution set a dangerous precedent in terms of the independence of ISPs.

It is challenging to imagine how the institution of a special manager could be designed so that it is compatible with the Venice Commission's Opinion (the reasoning developed by the Venice Commission at the stage of the usefulness of the restriction of property rights). Therefore, we believe that the Parliament of Georgia should completely abandon the institution of a special manager.

4. RISK OF MASS ELECTRONIC SURVEILLANCE: THE CHILLING EFFECT ON INTERNET USE

This part of the report will focus on safeguards to protect privacy while exercising digital rights. Namely, the Georgian model of metadata collection and the chilling effect on the right to use the Internet freely will be discussed.

4.1 STATE'S DIRECT ACCESS TO THE ELECTRONIC COMMUNICATIONS COMPANY'S NETWORK INFRASTRUCTURE AND CENTRAL DATA BANK

In 2015, a comprehensive reform was carried out in Georgia regarding legitimate electronic and non-electronic surveillance. As a result of the reform, the state gained direct technical access to the infrastructure of companies providing electronic communications (including Internet) service providers. The technical implementation model of the reform, as it stands, is as follows.

The State Security Service has established a legal entity under public law - the Operational-Technical Agency of Georgia. According to the first paragraph of Article 81 of the Law of Georgia on Electronic Communications, the Agency has been authorized to have stationary or semi-stationary technical capability for real-time communication of communications transmitted through the infrastructure of an electronic communications company and its identifying data. Subject to subparagraph (b) of the first paragraph of the Article, the Agency is empowered to require to have a stationary technical capability for real-time delivery of the content of the communication and its identifying data to the monitoring system of the Authorized Authority, transmitted through its infrastructure, per the architecture and interfaces defined by the stationary technical capability of real-time communication.

One of the central parts of the reform was establishing a central data bank. Per Article 11 of the Law on LEPL Operative-Technical Agency, the Central Data Bank was created. The identified communications data made throughout Georgia at the Central Data Bank - the so-called Metadata- is saved for at least one year. For the functioning of the database, Article 8^3 of the Law of Georgia on Electronic Communications gave the Agency the authority to access relevant databases of the Electronic Communications Company. "The technical procedure and procedure for copying the databases identifying electronic communications shall be determined by a normative act of the authorized body."

According to the Subparagraph Z^{69} of Article 2 of the Law of Georgia on Electronic Communications, electronic communication identification data are:

- user identification data;
- data necessary for tracing and identifying a communication source;
- data necessary for identifying a communication addressee;
- data necessary for identifying communication date, time and duration;
- data necessary for identifying the type of communication;
- data necessary for identifying user communication equipment or potential equipment;
- data necessary for identifying the location of mobile communication equipment;[34]

Otherwise, the executive has direct technical access to electronic communications network infrastructure, including ISPs. Among other measures, it copies and records in a centralized form the identification data accumulated as a result of electronic communications throughout Georgia. At the same time, the Operative-Technical Agency is obliged to obtain the content data of Internet communications.

Georgian legislation provides for essential safeguards to protect a person's privacy in the process, but numerous risks undermine the importance of free internet access.

4.2 THE CHILLING EFFECT ON THE FREE USE OF THE INTERNET: THE ESSENCE OF THE RIGHT

Direct access of the executive power to the network infrastructure of electronic communications companies was appealed by the Public Defender of Georgia to the Constitutional Court on April 3, 2015. Soon after, another complaint was filed by civil society representatives. One of the requests was to declare unconstitutional the rules permitting the copying and storing of identifying data.

The Constitutional Court upheld the complaint, including in the area of collecting identifiable data. The Constitutional Court stated that "Metadata [identifying data] is information about the location of mobile phones, incoming or outgoing calls, open or anonymous searches or other online activities. As a result of metadata analysis, it is possible to determine the individual's behavior, social relations, and personal characteristics, which provide essential information about this individual with the communication content. The combination of such data enables the competent authorities to have sufficient information about such areas of personal life as daily habits, temporary or permanent residence, real-time

[34] Subparagraph Z^{69} of Article 2 of the Law of Georgia on Electronic Communications

movement, activities, social connections, social environment. Therefore, this data provides an opportunity to create a personal and mobility profile of the person, which individually or in many cases may be sufficiently informative about the intimate space. In terms of informativeness does not fall significantly short of information exchanged directly due to telecommunications. Therefore, this information can give a relatively detailed picture of many aspects of personal space.

Consequently, the possession/storage of such information by the State Security Service brings a feeling, a motivation to think that personal space is under the supervision control of the state. Naturally, this can negatively affect human development, activities per their own will, and decisions that lead to behavior regulation. As a result, obtaining this information is a very intensive interference in a person's private life." [35]

Based on the presented explanation and other arguments, the appealed model of large-scale data collection and storing it in central bank was considered to have failed to meet the requirements of the right to privacy and the right to free personal development.

Due to the Constitutional Court's Judgment, the state changed the rules for processing and controlling information in identifying databases. The current model is still being challenged in the Constitutional Court, although the Constitutional Court has been considering the case for five years.

As a result of this Judgment, the concept of a chilling effect on personal life, including the free use of the Internet, was formed. The use or refraining from specific means of electronic communication by a person for fear that he may be subjected to electronic surveillance has a chilling effect on the right to free development of the individual.

4.3 POSSIBLE CASES OF MISUSE OF TECHNICAL CAPABILITIES BY THE STATE AND OVERSIGHT BODIES

Illegal covert electronic surveillance is a severe problem in Georgia. This was confirmed by the leak of the files of the State Security Service on September 13, 2021. In particular, many documentary materials were posted on the Internet and sent to the media. Data was allegedly created by the State Security Service, which included processing information obtained from covert surveillance. The spread materials were mostly in text form and exceeded 10 gigabytes. The authenticity of the materials was confirmed by many people, including journalists, representatives of non-governmental organizations and clergy.[36] The Prosecutor's Office of Georgia has launched an investigation, although the public is still unaware of the effectiveness of the investigation.

[35] Judgement N1/1/ 625,640 of the Constitutional Court of Georgia of April 14, 2016 on the case "the Public Defender, the citizens of Georgia - Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tughushi, Zviad Koridze, NGO "Open Society Georgia Fund", NGO ,,International Transparency – Georgia" and the NGO "Human Rights Center" V. the Parliament", II-113.

[36] https://idfi.ge/ge/idfi_responds_to_the_leak_of_secret_surveillance_documents

The State's direct access to the infrastructure of electronic communications companies in an environment where covert electronic surveillance is one of the significant challenges in public and political life naturally increases the chilling effect on the free use of the Internet. Under these circumstances, people may refrain from using electronic communication and the Internet.

It should be noted that the chilling effect can be reduced through institutional independence and influential powers of the oversight bodies. At the end of 2021, Georgia experienced a significant setback in this direction. Currently, the State Inspector Service has oversight powers on the misuse of the technical capacity. Under Article 18 of the Law of Georgia on the State Inspector Service, Inspector is inter alia obliged to control and monitor the secret investigative actions and activities carried out in the central bank of electronic communication identification data. More specifically, the Office of the State Inspector is equipped with the technical and legal tools to ensure the oversight of the operational, specialized Agency.

At the end of 2021, the Parliament made legislative changes in an unexpected and accelerated way.[37] Per amendments, the State Inspector's authority and her deputies were terminated. The bill's goal was to reorganize and separate the investigative and personal data protection functions. However, it was suggested by civil society that this was a direct attack on an independent agency.[38] The implemented changes were also negatively assessed by the international community.[39]

In any case, the early dismissal of the head of an independent oversight body elected by the Parliament for a fixed time substantially reduces the guarantees of institutional independence of the oversight body. It enhances the chilling effect on the Georgian population.

[37] On Changes to the Law "On State Inspector Service". December 30, 2021. Website: 13.01.2020 https://matsne.gov.ge/ka/document/view/5337579?publication=0

[38] See https://idfi.ge/ge/ngos_njoint_statement_94625

[39] See https://georgia.un.org/en/168152-united-nations-concerned-over-decision-georgian-authorities-abolish-state-inspectors-service

5. CONCLUSION

The Internet is generally accessible in Georgia. Nevertheless, people can expect negative legal consequences when publicly expressing their opinions and positions online.

Georgian legislation recognizes the legal basis for blocking and filtering Internet "content." An important part of this legal basis was declared unconstitutional. ISPs play an essential role in terms of blocking and filtering Internet content. Although no reported cases of misuse of the Internet Content Blocking Mechanism in Georgia, legal ambiguities, and a lack of transparency carry misconduct risks.

The state "copies the identifiable data accumulated throughout Georgia, including the Internet", from electronic communications companies and stores it in the Central Bank for at least 12 months. With the evidence that allegedly indicates mass illegal electronic surveillance in Georgia, this fact has a chilling effect on the right to free use of the Internet. With the precedent of early termination of the term of office of the Head and Deputies of the State Inspector, the Parliament of Georgia has substantially diminished the guarantee of institutional independence of the body controlling the lawful use of mass electronic surveillance devices in the executive power.

6. KEY FINDINGS

- Internet access and free use of the Internet are rights guaranteed by the Constitution of Georgia. Various articles of the Constitution of Georgia cover singular components of digital rights.
- A significant part of the restrictions on freedom of expression enshrined in the Resolution on customers protection has been declared unconstitutional by the Constitutional Court.
- Restriction of Internet content in Georgia is permissible if it constitutes pornography, infringes a copyright and/or other requirements under Georgian law.
- The current legal model of restricting Internet content risks unjustified and disproportionate restrictions on receiving and disseminating information via the Internet.
- The rights and obligations of the ISPs and domain registrators in terms of restricting Internet content are not clearly defined.
- The current model for restricting Internet content is not transparent. Quantitative and qualitative data on blocked websites/information and requesting institutions are unavailable in Georgia.
- Georgian law allows the Communications Commission to appoint a special manager for an ISP. The institution of the special manager has not been modified in accordance with the conclusions of the Venice Commission.
- The state copies from the electronic communications companies and for at least 12 months store the identifying data accumulated in the electronic communications throughout Georgia.
- In Georgia, the Internet is generally free, although the chilling effects of using the Internet freely are strong.
- The early termination of the State Inspector's Service leadership has damaged the degree of institutional independence of the oversight body of the State Security Service.

7. KEY RECOMMENDATIONS

- The legal model for blocking and filtering Internet content must be defined with sufficient clarity.
  - Clearly define the rights and obligations of internet service providers;
  - Define the authorized entities/persons or standards in charge of the appeals to block internet "content" from users
  - Define the quality requirements of the information regarding the inadmissible content provided to the Internet service providers.
- Transparency of content blocking and filtering on the Internet should be increased. Periodic reports on the use of this mechanism should be compiled and published. The minimal requriements for these reports need to be defined.
- The existing model for the appointment of a special manager at an electronic communications company should be abolished or established per the recommendations of the Venice Commission.
- The Constitutional Court of Georgia must decide timely so-called surveillance cases (N3/4/N885-924, 928-929, 931-1207, 1213, 1220-1224, 1231) timely.
- The Prosecutor's Office of Georgia should timely, efficiently, and transparently investigate possible systemic covert electronic surveillance cases in Georgia.