

GAP ANALYSIS AND LEGISLATIVE ACTION PLAN – FRAMEWORK DIRECTIVE

1 Introduction

1.1 Document purpose

Annex XV-B of the Association Agreement cites which parts of EU Legislative need to be implemented in Georgian Law in the field of Electronic communication networks and services. Relevant EU Legislative includes the: Framework Directive, Authorization Directive, Access Directive, Universal Service Directive, Directive on Privacy and Electronic Communications and the Radio Spectrum Decision.

This overview summarises an analysis of gaps between the currently applicable Georgian law and the parts of the Framework Directive (the „**Framework Directive**“ or the „**Directive**“) which, according to the Association Agreement, must be implemented in Georgian law by 1 September 2017.”

1.2 Scope of review

The review has been conducted for the purposes of performance of consulting services for the project „Georgia - Information Communication Technology Sector Development: Harmonisation of laws, regulation of next generation access and regulatory development“ (the „**Project**“) and is intended to be confidential and covered by the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege and/or protection. All documents prepared in connection with the review, including this document, are intended to be confidential and privileged and produced for the sole purpose of providing legal advice within the scope of the Project.

This document is provided to and is capable of being relied on exclusively by GNCC and EBRD. The document may not be disclosed to, used by, or relied on by third parties without our explicit written consent, except as otherwise explicitly provided by us within the Project. Even if given, the consent will neither imply nor create any contractual relationship between third parties and us.

We conducted the review under the EU law in the scope stipulated in the Project and based on the English translations of the relevant laws and/or other documents were provided to use by GNCC. We are not qualified to provide legal advice under Georgian law. Unless we state differently in the document, we did not take into account any other law and any other document other than those provided to us by GNCC.

1.3 Association Agreement Requirements

According to the Association Agreement Georgian Law must be approximated with the following provisions/parts of the Framework Directive:

- strengthening the independence and administrative capacity of the national regulator in the field of electronic communications
- establishing public consultation procedures for new regulatory measures
- establishing effective mechanisms for appeal against the decisions of the national regulator in the field of electronic communications
- defining the relevant product and service markets in the electronic communications sector that are susceptible to ex ante regulation and analyse those markets with a view to determining whether significant market power (SMP) exists on them.

1.4 Color code and document structure:

This overview analyses individual requirements contained in the Accession Agreement in relation to the Framework Directive and indicates initial conclusions by the following color code:

No Gap / Harmonised	Partial Gap / partially harmonised but additional legislative measures needed	Gap / not yet harmonised	Not applicable

When „No Gap“ is identified, we provide no further comments.

When „Partial Gap“ or „Gap“ is identified, we provide further comments on the nature of the gap and initial recommendations regarding how such gap could be addressed. Our initial recommendations are incorporated in this legislative Action Plan, taking into account also the outcome of our discussions with GNCC.

„Not applicable“ refers to the parts of the Framework Directive that cannot apply in Georgia because Georgia is not yet a Member State. This would typically include provisions that implement certain competences or coordination roles of the European Commission or other bodies, such as BEREC.

In the last chapter of this document we provide initial guidance on the harmonisation of Georgian law with the remaining parts of the Framework Directive, which are not included in the Association Agreement.

1.5 Abbreviations and terms used

- ECA –Law of Georgia on Electronic Communications,
- BRA –Law of Georgia on Broadcasting,
- COA –Law of Georgia on Competition,
- INRA –Law of Georgia on Independent National Regulatory Authorities,
- GAC – General Administrative Code of Georgia
- GNCCC – GNCC Charter
- SMP – significant market power

2 Executive Summary

We have identified the following gap areas, where Georgian law would need to be further harmonized with the Framework Directive:

- The relationship and cooperation between GNCC and the Competition Agency is not clearly defined. The Competition Agency shall cooperate with GNCC in matters concerning breaches of COA in the electronic communications sector. GNCC has no obligation to cooperate with the Competition Agency. Generally, it seems that GNCC takes limited account of competition law in carrying out its competences. We would recommend that the ECA defines areas in which GNCC shall consult the Competition Agency, including the merger control process and the market analysis process. The consultations would be aimed, inter alia, at avoiding that the Competition Agency and GNCC adopt different approaches to similar issues. We would recommend to include

in the ECA (possibly also in the COA) provisions on consultation processes and exchange of information between the agencies. Also, a Memorandum of Understanding signed by GNCC and the Competition Agency might solidify their agreement to cooperate and advise each other, in lieu of legislation obliging them to cooperate

- From the legislative standpoint, there seems to be no gaps in relation to the right to appeal GNCC's decisions. We have not identified any facts indicating that the *de facto* effectiveness of the appeal mechanisms would be limited.
- The procedure of definition and analysis of the relevant markets in Georgia follows generally the mechanisms and rules provided for in the Framework Directive and in the Commission Guidelines. There are several gaps and deviations, including in particular related to different definitions (SMP, joint SMP), statutory presumptions (joint SMP), different SMP criteria and missing rules ensuring regularly repeated market analyses.
- GNCC does not adhere to the list of the proposed regulated markets in Commission Recommendation and the ECA does not provide a clear process under which GNCC would determine its own markets susceptible to ex ante regulation.

3 Detailed Gap Analysis

A GNCC's Independence and Administrative Capacity

	Framework Directive		Georgian Legislation	Gap
Art 3/1	Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.	Art 5 ECA	Activities in the field of electronic communications shall be regulated by the Commission.	
		Art 6/1 ECA	Main directions of state policy in the field of electronic communications, taking into account the proposals of the Ministry of Economy and Sustainable Development of Georgia, shall be developed by the Government of Georgia and submitted to the Parliament of Georgia for approval.	
		Art 6/2 ECA	Main areas of state policy in the field of electronic communications shall be directed by the Prime-Minister of Georgia. The main directions of state policy in the field of electronic communications approved in accordance with the procedure established by the legislation of Georgia shall be implemented by the Government of Georgia within the powers granted by the Constitution of Georgia, this Law and the Law of Georgia on the Structure, Powers and Rules of Procedure of the Government of Georgia.	
		Art 6/3 ECA	In exercising its powers, the Commission shall be guided by the main directions of state policy in the field of electronic communications.	
Art 3/2	Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the	Art 11/1 ECA	In the field of electronic communications, the Commission shall independently regulate the activities of authorised persons and the use of the radio frequency spectrum and/or numbering resources by licence and/or permit holders, also it shall adopt legal acts, monitor and control their execution, impose sanctions, within the powers determined by this Law, for identified violations in accordance with this Law and the Administrative Offences Code of Georgia.	
		Art	2. A person with a conflict of interest defined in paragraph 1 of this article	

	regulatory function from activities associated with ownership or control.	11/2,3,4 BRA	<p>may not be a member of the Commission.</p> <p>3. A person whose family member has a conflict of interest defined in paragraph 1(c-f) of this article may not be a member of the Commission.</p> <p>4. A person with a conflict of interest provided for by this article may not be an employee of the staff of the Commission, except for maintenance personnel.</p>
		EBRD report	<p><i>Based on the EBRD's 2012 electronic communications sector comparative assessment (http://www.ebrd.com/downloads/legal/telecomms/georgia-2012.pdf) it appears that the market has been liberalised in Georgia. Therefore, we assume that GNCC is independent on any operators.</i></p>
Art 3/3	Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.	Art 12/2,3 ECA	<p>2. The budget of the Commission shall be financed by regulatory fees paid and by other sources of finance provided for in this Law, the Law of Georgia on Broadcasting and the Law of Georgia on Legal Entities under Public Law.</p> <p>3. Regulatory fees shall be one of the primary sources for financing the budget of the Commission; they are related to the exercise of powers granted to the Commission by the legislation of Georgia and shall not be treated as income earned from economic activity. The expenses determined by the budget of the Commission shall be covered from the annual regulatory fees. In the field of electronic communications, the regulatory fee shall be paid by authorised persons, and in the field of broadcasting, by persons determined by the Law of Georgia on Broadcasting.</p>
		Art 12/2,3,4 BRA	<p>2. The budget of the Commission is funded by a regulation fee and other funding sources provided for by this Law, the Law of Georgia on Electronic Communications and the Law of Georgia on Legal Entities under Public Law.</p> <p>3. A licence fee is a sum paid by an applicant for a broadcasting licence for the temporary use of the radio frequency spectrum, the amount and the procedure of payment of which are defined by the Commission in accordance with the legislation of Georgia, under the Regulation on Holding Auctions for Obtaining the Right to Use Radio Frequency Spectra and/or Numbering Resources. Licence fees are fully transferred to the State Budget of Georgia.</p> <p>4. A regulation fee is one of the main sources of funding the budget of the</p>

		Commission. It is related to the exercise of powers granted under the legislation of Georgia by the Commission and is not considered to be income generated through economic activities. Regulation fees are used to cover expenses defined in the budget of the Commission.
	Art. 1/2 INRA	2.This Law establishes: the independence of the independent regulatory Authorities operating in Georgia from political pressure of any kind, from improper influence and illegal interference of State Authorities or other persons, as well as from any acts as may infringe on their independence; the authority to effect perfect regulation of any specific field; the responsibility to ensure the transparency and reliability of decision-making process; the main principles of the creation, activities and organization of independent regulatory Authorities.
	Art 4/1,2 INRA	1. In its activities, an independent regulatory Authority shall be guided by the principles of independence, publicity and responsibility. 2. Any interference in the activities of an independent regulatory Authority, control of the said activities and demanding accounts of such activities shall be inadmissible, if this is not explicitly provided for by the applicable law.
	Art 7/3 INRA	The Regulation Fee must be determined in a way as to suffice to cover the expenses provided for by the Budget of an independent regulatory Authority.
	Art 1/6 GNCCC	The Commission has the staff to carry out the functions assigned under the Georgian legislation.
		<i>We understand that GNCC also carries out its internal restructuring aimed at strengthening its resource management, in particular in relation to staffing and expertise. (http://www.transparency.ge/en/blog/protracted-reorganization-georgian-national-communications-commission)</i>

Art 3/3a	Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for ex-ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities.	Art 6 ECA	<p>1. Main directions of state policy in the field of electronic communications, taking into account the proposals of the Ministry of Economy and Sustainable Development of Georgia, shall be developed by the Government of Georgia and submitted to the Parliament of Georgia for approval.</p> <p>2. Main areas of state policy in the field of electronic communications shall be directed by the Prime-Minister of Georgia. The main directions of state policy in the field of electronic communications approved in accordance with the procedure established by the legislation of Georgia shall be implemented by the Government of Georgia within the powers granted by the Constitution of Georgia, this Law and the Law of Georgia on the Structure, Powers and Rules of Procedure of the Government of Georgia.</p> <p>3. In exercising its powers, the Commission shall be guided by the main directions of state policy in the field of electronic communications.</p>
		Art 6/1,2 BRA	<p>1. The Commission, members of the Commission and employees of the staff of the Commission are independent in exercising their powers and abide only by the law. Unlawful influence on and intervention in their activities are inadmissible, and a decision made as a result of such influence and intervention is deemed void.</p> <p>2. A person concerned may apply to court for avoiding and preventing unlawful influence or intervention, and for nullifying decisions made as a result of such intervention and influence.</p> <p>3. Only the Commission may select, appoint and dismiss employees of the staff of the Commission, as determined by the legislation of Georgia.</p>
		Art 4/1-3 INRA	<p>1. In its activities, an independent regulatory Authority shall be guided by the principles of independence, publicity and responsibility.</p> <p>2. Any interference in the activities of an independent regulatory Authority, control of the said activities and demanding accounts of such activities shall be inadmissible, if this is not explicitly provided for by the applicable law.</p> <p>3. The main principles determining independence are:</p> <p>(a) Prohibition of any kind of control over an independent regulatory Authority; submission of reports only to the Georgian President and</p>

			<p>Parliament pursuant to the procedure established by the applicable law;</p> <p>(b) Determination of the responsibility of a regulatory Authority and Commissioners only by court of law, pursuant to the procedure established by the procedural legislation;</p> <p>(c) Appointment of Commissioners only pursuant to the procedure established by the applicable law;</p> <p>(d) Prohibition of transferring the public functions (including the function of ensuring the equilibrium of interests of licence holders and consumers), assigned under the applicable law, to other Authorities and persons of private law.</p>	
		Art 1/6 GNCCC	6. The Commission has the staff to carry out the functions assigned under the Georgian legislation.	
Art 3/3a (cont.)	Member States shall ensure that the head of a national regulatory authority, or, where applicable, members of the collegiate body fulfilling that function within a national regulatory authority referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the national regulatory authority concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the national regulatory authority, or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published.	Art 14/1 INRA	<p>1. Commissioner shall be appointed to the office and dismissed from the office pursuant to the procedure established under the applicable law.</p> <p>2. Except as otherwise provided for by the applicable law, the Commissioner shall be dismissed from the office for one of the following reasons:</p> <p>(a) Coming into force of the verdict of guilty taken by a court of law;</p> <p>(b) The violation of the norms of ethics;</p> <p>(c) Failure to discharge professional duties within the time limits established by the applicable law;</p> <p>(d) Decision of the court on the recognition of a Commissioner as legally incapable or gone missing, or on his/her pronouncement dead;</p> <p>(e) The loss of the Georgian citizenship;</p> <p>(f) Retirement;</p> <p>(g) Death.</p> <p>3. Commissioner shall have the right to appeal against the decision on his/her dismissal from the office pursuant to the procedure established under the Georgian Legislation.</p>	

		Art 54/1 GAC	1. Unless otherwise provided for by law, an individual administrative act shall enter into force upon making it officially available for a party in the manner determined by law or on the day of its publication.	
		Art 55/1 GAC	1. An individual administrative act shall be published if so provided for by law.	
<p><u>Gap 1 – Publication of decisions on dismissal</u></p> <p>The Directive requires that decisions on commissioners’ dismissal are published.</p> <p>The decision on dismissal is governed by the procedure of General Administrative Code of Georgia which stipulates that the administrative decisions shall be published only if provided by the law. Neither the ECA nor INRA stipulate publication of decisions on dismissal. The reviewed Georgian legislation also does not include right of the dismissed commissioners to request such publication.</p> <p>The partial gap could be remedied by expressly specifying that such decisions shall be automatically published, or at least a mandatory publication upon request of the dismissed officials shall be mandated.</p>				
<p><u>Action plan</u></p> <p>Legislation: BRA</p> <p>Section: 10</p> <p>Proposed change: Implement a provision under which a decision on the dismissal of the Commissionaires shall be published by GNCC on GNCC’s website.</p> <p>Notes: We understand from our discussions with the GNCC that the Georgian Parliament issued in the past one decree on a dismissal of a commissioner and voluntarily published this decision on its own website. We propose to implement the obligation to publish the decision in the BRA. This would not prevent a voluntary publishing of such decision by the Parliament. We do not propose to implement such change in the INRA to avoid an impact on the Commissionaires of other independent regulatory authorities.</p>				
Art 3/3 (cont.)	Member States shall ensure that national regulatory authorities referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member	Art 12/1 in ECA as well	By 1 December of each year, the Commission shall prepare and publish the next year’s budget that contains all the expenses of the Commission, including the expenses related to the remuneration of the Commission and its	

	States shall also ensure that national regulatory authorities have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC).	as BRA	staff, as well as revenues.	
Art 3/3b	Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective national regulatory authorities.	N/A		
Art 3/3c	Member States shall ensure that national regulatory authorities take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.	N/A		
<u>Comment</u>				
The Directive requires that the NRAs take utmost account to BEREC positions and recommendations.				
While GNCC may take BEREC positions and opinions into account, we believe that it would not be appropriate to formally adopt adherence to BEREC views into Georgian law, among other things because GNCC is not involved in BEREC and cannot influence its positions.				
Art 3/4	Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Where more than one authority has competence	Art 11/2/h ECA	2. Main objectives of the Commission are to: h) maintain open, public and transparent relations with the public;	

	to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.		
<p>Gap 2 – Scope of GNCC’s tasks</p> <p>The Directive requires that the NRAs shall publish their tasks in an easily accessible form. In addition, it requires that the NRAs cooperate and consult with other authorities, for example competition agencies.</p> <p>GNCC’s tasks are clearly listed in the ECA which may be accessed on the GNCC’s website. We assume that the obligation of clear definition of tasks is implemented and no further specifications of the tasks is needed. On the other side, the relationship between GNCC and the Competition Agency is not clear as well as the division of tasks between these two authorities.</p> <p>This partial gap would be remedied by specification of relationship between the GNCC and the Competition Agency, either in the ECA, the COA or both laws, or through a Memorandum of Understanding signed by GNCC and the Competition Agency.</p>			
<p>Action plan</p> <p>Legislation: Memorandum of Understanding</p> <p>Section:</p> <p>Proposed change: Sign a Memorandum of Understanding between the Competition Agency and the GNCC in which the relationship and common interests will be specified, including exchange of information.</p> <p>Notes: We understand that GNCC intends to sign a Memorandum of Understanding establishing such cooperating between the GNCC and the Competition Agency. We note that such Memorandum of Understanding between the NRA and the NCA is commonly used and constitutes a sufficient legal measure.</p>			
Art 3/5	National regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as the originating authority.	Art 30 COA	Agency [competition agency] and the relevant regulating authority of the sphere of economy [including the GNCC] cooperate for investigation and enforcement of the violations in the regulated sphere of economy.

Gap 3 – Information exchange with Competition Agency

The Directive requires that the NRAs and the national competition authorities provide each other with information relevant for application of the EU regulatory framework.

The relationship between GNCC and the Competition Agency is not clearly defined and stipulated in the Georgian laws. Only a general provision in the Law of Georgia on Competition (Article 30) stipulates obligation on the Competition Agency to cooperate with other regulating authorities, including GNCC. However, the scope of cooperation is limited to situations connected to violation of the provisions of Law of Georgia on Competition.

We assess the lack of clarity as a partial gap and recommend that the relationship between the GNCC and the Competition Agency be specified, including clear rules for cooperation and exchange of information.

Action plan

Legislation: Memorandum of Understanding

Section:

Proposed change: Please see action plan relating to Gap 2 above.

Notes:

B Public Consultations

	Framework Directive		Georgian legislation	Gap
Art 6	<p>Except in cases falling within Articles 7(9), 20, or 21, Member States shall ensure that, where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives, or where they intend to provide for restrictions in accordance with Article 9(3) and 9(4), which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period.</p> <p>National regulatory authorities shall publish their national consultation procedures.</p> <p>Member States shall ensure the establishment of a single information point through which all current consultations can be accessed.</p> <p>The results of the consultation procedure shall be made publicly available by the national regulatory</p>	Art 16 INRA	<ol style="list-style-type: none"> 1. The sessions of an independent regulatory Authority shall be open to public, except for the cases provided for by the applicable law. The decisions of an independent regulatory Authority shall be published pursuant to the established procedure. 2. An independent regulatory Authority must retain the minutes of its sessions and other relevant documentation for the period of at least 7 years. Commissioner and interested persons may have unrestricted access to all records and other documentation available at the relevant regulatory Authority. 3. All decisions, records and other documentation of an independent regulatory Authority shall be available for public discussions. The procedure for the maintenance of confidentiality of the information kept by an independent regulatory Authority shall be determined by the regulatory Authority concerned in conformity with the Georgian Legislation. 	

	<p>authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.</p>	<p>Art 110/1-4 GAC</p>	<ol style="list-style-type: none"> 1. An administrative body shall make a decision only on the basis of an oral hearing. 2. Interested parties must be notified of an oral hearing at least seven days before the hearing and must be summoned to participate in the oral hearing. 3. The subpoena shall specify the powers of the administrative body to review the case and make a decision even without participation of an interested party, except as provided for by law. 4. If the number of interested parties exceeds 50, an administrative body may summon the interested parties to participate in the oral hearing by publishing a notice in the official gazette. The notice must contain the subject of the oral hearing, the name of the administrative body holding the hearing, the basis for initiating the administrative proceedings, and the time and place of the hearing. 	
		<p>Art 7/1-6, 9 BRA</p>	<ol style="list-style-type: none"> 1. Sessions of the Commission are open to the public. All resolutions, decisions, orders, records and other documents of the Commission shall be available for public discussion, except for the cases defined by the General Administrative Code of Georgia. 2. The Commission shall ensure the transparency and the participation of all persons concerned in the decision-making process of the Commission in accordance with the General Administrative Code of Georgia. 3. The Commission may hold closed sessions to maintain the confidentiality of information. Resolutions and decisions made at closed sessions shall be published after the removal of any information deemed to be secret, in accordance with the General Administrative Code of Georgia. 4. Sessions of the Commission shall be held at least twice a month. An extraordinary session may be convened by the chairperson of the Commission or by at least 2 members of the Commission. 	

		<p>5. The Commission shall publish information about an upcoming session, its place, time and agenda three days prior to the session, and about closing of a session if a relevant decision has been made.</p> <p>6. In the case of urgent necessity, the Commission may hold a session without observing the procedures under paragraph 5 of this article. In this case, the Commission shall immediately publish information about the time, place and agenda of a session, and about closing of a session if a relevant decision has been made.</p> <p>9. To ensure publicity, the Commission shall create its own website and regularly update information published thereon. Decisions of the Commission, including decisions on the approval of the budget of the Commission and reports on budget performance, shall be published on the website within three working days after making the relevant decision, whereas declarations of compliance provided for by this Law shall be published within three working days after they have been submitted to the Commission.</p>
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Gap 4 – Public consultations

The Directive requires that the NRAs run a public consultation prior issuing certain types of decision. The rules for such public consultations shall be published.

Although in general without the needed level of detail and procedure, the Georgian law does include an obligation of the GNCC to make its decisions available for public consultation. However, the exact scope and procedures, including the time period for consultation, the place of publication of the consultation or the procedure of settlement of comments, is not clear.

We recommend to remedy the partial gap by specifying which decisions must be preceded by public consultation in compliance with the Directive. We recommend that the rules for such public consultations shall be issued in the form of a secondary law by the GNCC and made available on the GNCC's website. In general, we recommend to specify rules for public consultations in more detail in accordance with the Directive.

Action plan

Legislation: ECA

Section:

Chapters I and II of the ECA and provisions relating to particular decisions of the GNCC

We propose to implement two different regimes – (i) the current public oral hearing carried out under the General Administrative Code, and (ii) a public consultation in a written form. While the public hearing will remain the default transparency measure, the ECA will stipulate GNCC decisions and measures which will be subject to a written public consultation in lieu of the oral public hearing. In these cases, the provisions in the ECA on public consultation will derogate from the general provisions of the General Administration Code on public hearing. The provisions on public hearing will therefore in these cases not apply.

In relation to timing obligations on the maximum duration of the administrative proceeding, we propose to (i) stipulate that the time for carrying out a mandatory public consultation will not be included in the time limits for the administrative proceedings, and (ii) stipulate that GNCC may in justified cases extend these time limits by a maximum period of additional three months..

Implement in the ECA an obligation to carry out a public consultation when issuing certain types of decisions. The list of decisions shall be exhaustive and shall be listed in the ECA. We propose that the following decision of the GNCC shall be subject to the written public consultation:

Proposed change:

- (i) decision on the imposition of SMP and the imposition of remedies,
- (ii) universal service obligations,
- (iii) secondary legislation and any implementing decrees or other measures with significant market impact not addressed to identified individual parties ,

We propose to implement a public consultation regime, in which the GNCC would publish a draft decision on its website and allow for any stakeholders to comment on the proposed decision for at least 30 days. Following the 30 days, GNCC would collect all the comments and assess them in a time period of 30 days which could potentially be prolonged in particular cases. Following the assessment period, GNCC would issue a document in which it would settle all the comments it received. The settlement would lead to either (i) acceptance of the comment, (ii) partial acceptance, or (iii) rejection. With the document of the settled comments, GNCC would also publish on its website all the comments it received and the updated decision which may or may not be modified in comparison to the proposal.

For any additional rules GNCC could issue a secondary decision in which it would stipulate for example rules for late submission of comments etc. These additional rules would not need to be implemented at the beginning as GNCC will gradually gain experience and acknowledge which rules need to be regulated in more detail.

The passive infrastructure amendment proposed a basic framework for public consultation. We propose to implement the same provision:

1) *Before the Commission issues a decision on:*

a) **XXX**

the Commission must publish at its website the proposal of such decision. The publication of the proposal must be in such a manner that the Commission deems appropriate for bringing the proposal to the attention of all persons who, in the Commission's opinion, are likely to be affected by the proposal.

2) *The Commission shall specify the period within which comments, representations and observations may be made to the Commission in relation to the proposal. The period must be at least 30 calendar days after the day of the publication of the proposal.*

3) *The Commission may give effect, with or without modifications, to the proposal following a public consultation under this Article **XXX** only if the Commission has considered every comment, representation or observation about the proposal that is made to the Commission within the period specified in the proposal in accordance with paragraph 2 above. The Commission shall publish the comments, representations and observations as well as the Commission's reactions weeks from the lapse of period stipulated in paragraph 2.*

4. *The Commission may issue rules and procedures for public consultations under this Article **XXX**.*

Notes:

We currently do not propose to publicly consult all auction rules or all decisions on licences as this would create unnecessary burden for the GNCC. However, should the authorisation and licensing regime change in the upcoming year, we propose to implement mandatory public consultations also for such decisions. For more detail on public consultations relating to the license decisions, please see gap analysis and action plan for the Authorisation Directive.

C Right to Appeal

	Framework Directive		Georgian legislation	Gap
Art 4/1	<p>Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.</p> <p>Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.</p>	Art 18 INRA	The decision of an independent regulatory Authority, in accordance with the jurisdiction, may be appealed against in the Constitutional Court of Georgia and the common-law courts of Georgia. Within the system of common law courts, decisions of an independent regulatory Authority shall be examined in the first instance only by district courts.	
		Art 12 INRA	The decisions of an independent regulatory Authority concerning the disputes as provided for in paragraph 1 of this Article may be appealed against in a court of law pursuant to the procedure determined under Article 18 of this Law.	
		Art 19/1/e ECA	An authorized party may: e) appeal a legal act of the Commission in court.	
		Art 42/7 ECA	The decision of the Commission may be appealed to a court.	
Art 4/3	Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. Member States shall provide such information to the Commission and BEREC after a reasoned request from either.	Art 13/1 ECA	1. The commission shall prepare an <u>annual report on its activities</u> and conduct a financial audit of its expenses and accounting statements in accordance with applicable rules.	

	Framework Directive		Georgian legislation	Gap
<p><u>Comment</u></p> <p>The Directive stipulates that Member States shall collect information on appeal procedures against decisions of their national regulatory authorities.</p> <p>While Georgian law does not impose a specific requirement on GNCC to collect data related to the number and duration of appeal procedures, it seems that <i>de facto</i> GNCC has in the past included some of this information in its annual reports. GNCC's Annual Report for 2015 for example lists the number of court disputes.</p> <p>We recommend that the procedures regarding collecting the required data on appeal proceedings be incorporated in GNCCC (GNCC Charter) or another suitable document.</p>				

D Relevant Market Definition and Analysis

	Framework Directive		Georgian legislation	Gap
Art 14/1	1. Where the Specific Directives require national regulatory authorities to determine whether operators have significant market power in accordance with the procedure referred to in Article 16, paragraphs 2 and 3 of this Article shall apply.	Art 21/1 ECA	1. In the field of electronic communications, the preliminary regulation of competition shall be carried out according to the <u>relevant and closely related segments of the service market</u> determined by the Commission and to the relevant geographic boundaries of the market.	
		Art 2/z9) ECA	z9) preliminary regulation of competition - identification by the Commission of an authorised person with significant market power and imposition on it of specific obligations preliminarily determined by this Law;	

Gap 5 – Relevant markets terminology

The ECA uses the term “segments of the services market”. At the same time the ECA also refers to the electronic communications market, which would presumably consist of all segments.

Although GNCC assigns similar meaning to the terms in the ECA as the Commission does to the terms used in the EU regulatory framework, we assess this as a partial gap and recommend that the ECA terminology be clarified and brought in line with the Directive and EU competition law in general.

Action plan

Legislation: ECA

Section: 21/1

Proposed change: Change terminology to “relevant market”.

Notes: The methodology used in the new proposal of market analysis methodology uses both terms “segment of the market” and “relevant

market” thus creating some confusion between the two.			
Art 14/2	2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.	Art 2/z13) ECA	Z13) significant market power - a significant market power of an authorised person over a relevant segment of the service market, which is a situation where the analysis conducted by the Commission confirms that an authorised person has no competitors, is protected from significant competition or its competitive position allows it to have unilateral substantial influence over this segment of the market and to limit competition.
		Art 2/g ECA	g) significant joint market power of authorised persons - a significant joint market power of two or more authorised persons over a relevant segment of the service market, which is a situation where an analysis conducted by the Georgian National Communications Commission confirms that the situation created in this segment of the market and characteristics of competition allow them to act in concert and obtain a joint non-competitive advantage in the market even when there are no structural or other types of links, including contractual relations, between them.
		Art 21/3,4 ECA	3. The study and analysis of the service market conducted in a relevant segment of the electronic communications market for the purpose of identifying authorised persons with significant market power shall be conducted by the Commission on the basis of the methodology and procedures for determining market competitiveness and for identifying authorised persons with significant market power; the methodology and procedures shall be approved by a resolution of the Commission. 4. In the field of electronic communications, the regulation of activities, the provision of competition in the relevant segments of the service market and the identification of authorised persons with significant market power in these segments in accordance with the primary and secondary criteria shall be carried out by taking account of the principles of objectivity, technological

		<p>neutrality, functional equivalence (homogeneous use of functional criteria), the minimum required regulation, as well as the principles of the imposition of proportionally balanced specific obligations, the stimulation of effective competition, transparency and non-discrimination.</p>	
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Gap 6 – SMP definition

The ECA seems to apply a slightly different test for significant market power (SMP) than the test set out in the Directive and in the EU competition law. The Directive defines SMP as position equivalent to dominance, that is to say a position of economic strength allowing it to behave to an appreciable extent independently of competitors, customers and ultimately consumers. The ECA defines SMP as a situation where an authorised person has no competitors, is protected from significant competition or its competitive position allows it to have unilateral substantial influence over this segment of the market and to limit competition.

First the Directive most likely refers to an undertaking, i.e. economic unit. We note that this is disputed and some NRAs argue that the SMP must be determined with respect to a person, i.e. legal entity (as opposed to an undertaking which may be composed of multiple legal entities without legal subjectivity). Given the clear tendency to consolidation on the Georgian market we would recommend to consider and evaluate, which option is preferable for the future regulation of the Georgian market.

More importantly, the SMP test stipulated in the ECA focuses on different criteria than the criteria developed by EU competition law. While EU competition law focuses on the ability to behave independently of competitors, the ECA focuses on the ability to influence market and limit competition. Consequently, the standard methodologies developed under the EU competition law cannot be used to determine SMP under Georgian law, because the SMP tests differ. The ECA also stipulates other two SMP tests: (i) no competitors and (ii) being protected from “significant” competition. The first test, no competitors, would be similar to the EU tests related to high market shares. We assume that this would be applicable for instance on the termination markets, where operators have 100 % market share in termination in their own network. The second test (being protected from “significant” competitors) is unknown to EU competition law or *ex ante* regulation and is unclear as to which situations it shall cover. We would thus recommend that the SMP test in the ECA be aligned with the EU standard test.

Action plan

Legislation: ECA, Market analysis methodology

Section: 2, 21

Proposed change:

Implement definition of operator with significant market power according to the Framework Directive, i.e. “an authorised person that, either individually or jointly with others, enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.”

Notes:

We propose to leave as much of the procedure and methodology rules as possible in the methodology and only include the basic principles, goals and rules in the ECA – the sequence of the decisions/actions, the decisions issued by the GNCC and the principles.

Art 14/2	In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Community law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 15. Criteria to be used in making such an assessment are set out in Annex II.	Art 21/11 ECA	11. Several authorised persons shall be <u>considered as persons having joint significant market power</u> if in the relevant segment of the service market: a) the total market share of two authorised persons is at least 60 per cent; at the same time, the market share of each of them must be at least 25 percent; b) the total market share of three authorised persons is at least 80 per cent; at the same time, the market share of each of them must be at least 15 percent.
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Gap 7 – Joint SMP definition

The ECA applies a different test for joint SMP than the Directive and EU competition law. We believe that this different approach to joint SMP is not sustainable and that the test would need to be aligned to the EU standard.

Having said that, we note that the EU standard test will impose on GNCC a significantly heavier burden of proof and may cause practical difficulties in markets where joint SMP is currently established by GNCC based on the above mentioned ECA test.

Action plan

Legislation: ECA

Section: 21

Proposed change: Delete Section 21/11 ECA and move any criteria to the market analysis methodology. In addition, we propose to implement in the ECA a general provision allowing the GNCC to impose different remedies on different geographical markets.

Notes: The change in the SMP presumption needs to be reflected in the transitional provisions of ECA to ensure that the new joint SMP test will apply only to future market analyses and will not impact the already determined joint SMPs.

Art 14/3	3. Where an undertaking has significant market power on a specific market (the first market), it may also be designated as having significant market power on a closely related market (the second market), where the links between the two markets are such as to allow the market power held in the first market to be leveraged into the second market, thereby strengthening the market power of the undertaking. Consequently, remedies aimed at preventing such leverage may be applied in the second market pursuant to Articles 9, 10, 11 and 13 of Directive 2002/19/EC (Access Directive), and where such remedies prove to be insufficient, remedies pursuant to Article 17 of Directive 2002/22/EC (Universal Service Directive) may be imposed.	Art 22/7 ECA	7. Competition in the relevant segment of the service market shall be deemed effective if no authorised persons with significant market power carries out its activities in that segment. Competition in the relevant segment of the market shall not be deemed to be effective if one or several authorised persons operating in that segment have joint significant market power. If an authorised person has significant market power in the relevant segment of the market, <u>it shall also be deemed to have significant market power in the closely related segment of the market.</u>
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Gap 8 – SMP on a closely related market

The ECA stipulates that an operator with SMP on one relevant market shall also have SMP in a closely related relevant market.

Presumption that the SMP operator on one relevant market also has SMP on a closely related market is not compliant with the Directive. The Directive does assume SMP on related market, but merely indicates the possibility of such position of the SMP operator on a related market.

We recommend to delete the presumption or at least change the presumption into a possibility as is anticipated in the Directive.

Action plan

Legislation: ECA

Section: 22/7

Proposed change: Change the wording from “shall also be deemed” to “may also be deemed”.

Notes: /

Art 15/1	<p>1. After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall, in accordance with the advisory procedure referred to in Article 22(2), adopt a Recommendation on Relevant Product and Service Markets (the Recommendation). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law.</p> <p>The Commission shall regularly review the recommendation.</p>	N/A	
Art 15/2	<p>2. The Commission shall publish, at the latest on the date of entry into force of this Directive,</p>	N/A	

<p>guidelines for market analysis and the assessment of significant market power (hereinafter 'the guidelines') which shall be in accordance with the principles of competition law.</p>		
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Gap 9 – List of relevant markets

The Directive mandates the European Commission to regularly issue a list of relevant markets and guidelines for market analysis.

The GNCC should take into account the mentioned lists of relevant markets, for example as the starting point for market analyses carried out by the GNCC and reflect this in a list of relevant markets issued by the GNCC. The markets on the list shall then be subject three-criteria test, defined and analysed. In order to comply with the guidelines for market analysis and assessment of SMP, we recommend that the GNCC issues secondary law with rules/methodology based on the Commission's guidelines.

Action plan

Legislation: ECA, Market analysis methodology

Section: 21

Proposed change:

In the ECA it shall be stipulated that the GNCC may issue a decree with a list of markets which it considers susceptible to ex ante regulation.

These markets shall include (i) the markets identified by the European Commission and (ii) any other markets GNCC deems appropriate. These markets would then not be subject to the otherwise mandatory three-criteria test, unless GNCC concludes that they may be already effectively competitive and wishes to confirm this. GNCC could also change the list of relevant markets susceptible to ex ante regulation any time.

GNCC may change the decree with a list of markets which it considers susceptible to ex ante regulation any time. In addition, GNCC may also designate a new market not listed in the decree by carrying out a three criteria

test in relation to such market.

Notes:

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Art 15/3	3. National regulatory authorities shall, taking the utmost account of the Recommendation and the Guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those identified in the Recommendation.	Art 21/2 and 5 ECA	2. For the purposes of preliminary regulation, the relevant segments of the service market shall be determined by the Commission according to criteria determining the service types and geographic boundaries of electronic communication services. 5. In making a decision to conduct a study and analysis of a service market, to identify authorised persons with significant market power, also to impose specific obligations on authorised persons with significant market power, the Commission shall take into account the terms and conditions of international agreements and treaties of Georgia, including the General Agreement of the World Trade Organisation on Trade in Services.
		Art 16/3 INRA	All decisions, records and other documentation of an independent regulatory Authority shall be available for public discussions.

Gap 10 – Competition law principles

The Directive stipulates that the NRAs shall define relevant markets in accordance with the principles of competition law. In addition, the NRAs shall take utmost account of the list of relevant markets identified by the Commission in its Recommendation and follow the Commission's guidelines for definition of relevant markets.

The ECA does not currently specifically stipulate that when carrying out the market analyses GNCC shall take into account the principles of competition law. We assess that this constitutes a gap compared to the Directive and recommend the relevant provision should be added to the ECA.

We believe that the obligation to follow the Recommendation shall by nature only apply in the Member States and that it would not be reasonable to incorporate it into the ECA before Georgia becomes a Member State. We recommend that GNCC could include in its Market Analyses Guidelines that it will take the Recommendation into account when determining the relevant markets.

Action plan

Legislation: ECA

Section: Chapter IV

Proposed change: Include in the ECA that the GNCC carries out the market analysis in compliance with the principles of competition law.

Notes: /

Art 15/4	4. After consultation including with national regulatory authorities the Commission may, taking the utmost account of the opinion of BEREC, adopt a Decision identifying transnational markets, acting in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).	N/A	
Art 16/1	1. National regulatory authorities shall carry out an analysis of the relevant markets taking into account the markets identified in the Recommendation, and taking the utmost account of the Guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.	Art 21/3 ECA	3. The study and analysis of the service market conducted in a relevant segment of the electronic communications market for the purpose of identifying authorised persons with significant market power shall be conducted by the Commission on the basis of the methodology and procedures for determining market competitiveness and for identifying authorised persons with significant market power; the methodology and procedures shall be approved by a resolution of the Commission.

Gap 11 – EC guidelines and recommendations

The Directive stipulates that the NRAs shall take into account the list of relevant markets identified by the Commission in the Recommendation on relevant markets. In addition, the Directive requires that the NRAs collaborate with competition authorities if appropriate.

The Directive is partially not applicable as the Commission’s Recommendation on the relevant markets only applies to the Member States.

The relationship between GNCC and the Competition Agency is not clearly defined and stipulated. Only a general provision in the Law of Georgia on

Competition (Article 30) stipulates obligation on the Competition Agency to cooperate with other regulating authorities, including GNCC. However, the scope of cooperation is limited to situations connected to violation of the provisions of Law of Georgia on Competition.

We assess this a partial gap and recommend that the relationship between the GNCC and the Competition Agency be specified, including clear rules for cooperation and exchange of information.

Action plan

Legislation: Memorandum of Understanding

Section:

Proposed change: In the proposed Memorandum of Understanding between the GNCC and the Competition Agency (please see action plan relating to Gaps 2 and 3 above) we propose to implement an agreement that GNCC would consult its decisions on market analysis or SMP designation with the Competition Agency.

Notes: We propose not to include mandatory consultations with the Competition Agency in the ECA. We propose to implement a Memorandum of Understanding between GNCC and the Competition Agency, as an initial step to mutual cooperation. Once there is a cooperation established at the level of the working teams of both authorities, mandatory consultations could be implemented in the ECA.

Art 16/2	2. Where a national regulatory authority is required under paragraphs 3 or 4 of this Article, Article 17 of Directive 2002/22/EC (Universal Service Directive), or Article 8 of Directive 2002/19/EC (Access Directive) to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.	Art 21/9 ECA	9. If, on the basis of the study and analysis of the relevant segment of the service market, the Commission establishes that one or several authorised persons have joint significant market power, it shall, considering the nature of the significant market power, determine specific obligations to be imposed on such persons in accordance with Chapter V of this Law.
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Art 16/3	3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.		N/A
<p><u>Gap 12 – Withdrawal of existing remedies</u></p> <p>The Directive requires that the NRA withdraws already existing remedies if the NRA concludes that the market is effectively competitive.</p> <p>There is a gap in the ECA that relates to the absence of steps for withdrawal of remedies. We recommend that a corresponding procedure be added to the ECA.</p>			
<p><u>Action plan</u></p> <p>Legislation: ECA</p> <p>Section: 21</p> <p>Proposed change: Implement a provision stipulating that remedies shall be withdrawn in case (i) the previously regulated market does not pass the three-criteria test, or (ii) no SMP operator is designated.</p> <p>Notes: /</p>			
Art 16/4	4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings which individually or	Art 21/9 ECA	If, on the basis of the study and analysis of the relevant segment of the service market, the Commission establishes that one or several authorised persons have joint significant market power, it shall, considering the nature of the

	jointly have a significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.		significant market power, determine specific obligations to be imposed on such persons in accordance with Chapter V of this Law.
Art 16/5	5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the Guidelines and, in a concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article.	N/A	
<u>Comment</u>			
The Directive requires that the NRAs follow the Commission's Guidelines for market definition and assessment.			
We believe that the obligation to follow the Guidelines shall by nature only apply in the Member States and that it would not be reasonable to incorporate it into the ECA before Georgia becomes a Member State. GNCC could include in its Market Analyses Guidelines that it will take the Guidelines into account when determining the relevant markets.			
Art 16/6	6. Measures taken in accordance with the provisions of paragraphs 3 and 4 shall be subject to the procedures referred to in Articles 6 and 7. National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7:	Art 16/3 INRA	All decisions, records and other documentation of an independent regulatory Authority shall be available for public discussions.
	(a) within three years from the adoption of a previous measure relating to that market. However, exceptionally, that period may be extended for up to	Art 22/5 ECA	5. The Commission shall make a decision on the commencement of the study and analysis of the service market: a) on the basis of a request of an authorised person, provided justification of the

<p>three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension;</p> <p>(b) within two years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission; or</p> <p>(c) within two years from their accession, for Member States which have newly joined the Union.</p>	<p>non-competitiveness of the relevant segment of the service market and of the need to commence the given study and analysis of the service market, and the Commission agrees with this justification;</p> <p>b) upon the request of state bodies that provide justification of a need to commence a study and analysis of the relevant segment of the service market, and if the Commission agrees with this justification;</p> <p>c) on its own initiative.</p>
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Gap 13 – Regular market analysis

The Directive stipulates that market analysis procedures shall be carried out in regular time frames, no longer than 3 years apart.

The ECA does not stipulate intervals for the GNCC to perform market analysis. Although the wording of the ECA does not prohibit the GNCC to perform such analysis in the intervals stipulated in the Directive, we consider it as a partial gap that could be remedied by stipulating mandatory time frames according to the Directive.

Action plan

Legislation:	ECA, Market analysis methodology
Section:	21
Proposed change:	Implement a provision that would require the GNCC to regularly each at least 3-4 years carry out market analysis procedure.
Notes:	We propose to specifically include this obligation in the ECA and specify the time period (when it starts and when it can be shortened or extended) in the market analysis methodology.

Art 16/7	7. Where a national regulatory authority has not completed its analysis of a relevant market identified in the Recommendation within the time limit laid down in paragraph 6, BEREC shall, upon	N/A	
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	<p>request, provide assistance to the national regulatory authority concerned in completing the analysis of the specific market and the specific obligations to be imposed. With this assistance, the national regulatory authority concerned shall within six months notify the draft measure to the Commission in accordance with Article 7.</p>		
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E Harmonisation of definitions

In the table below, we include a thorough gap analysis of definitions that are used in the Framework Directive as opposed to definitions stipulated in the ECA. We carried out gap analysis of terms defined in the Directive and in addition point out several definitions used in the ECA that we find as non-compliant with the EU framework. Please note that the gap analysis does not cover all the definitions stipulated in the ECA and the fact that certain definitions are not included in the table below does not mean that the definitions are compliant with the EU framework. Please find more detailed comments under analysis of the relevant definition.

	Framework Directive		Georgian legislation	Gap
Art 2/a	'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;	Art 2/x ECA	x) electronic communications network - a technological system of electronic processing, routing (switching), conveyance and transmission of calls and various information signals, including by wire (including fibre-optic), satellite, radio or optical equipment, and other technological means and operational technical resources including fixed (circuit -and packet-switched, including Internet) and mobile communications, digital broadcasting, and terrestrial broadcasting and cable networks. The provision of state defence, security and law enforcement authorities with electronic communication networks implies the existence of special electronic communication networks;	
Art 2/c	'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include	Article 2/w	Electronic communication services - services provided through public electronic communication networks and facilities and offered by an authorised service provider to an interested operator or user for a certain fee;	

	information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;			
<p>Gap 14 – Definition of EC services</p> <p>As opposed to the definition in the Directive, the ECA:</p> <ul style="list-style-type: none"> - the ECA does not exclude information society service or other services related to content, and - the ECA definition also includes only services provided over public networks. <p>We recommend to remedy this gap by modifying the definition according to the Directive.</p>				
Art 2/d	‘public communications network’ means an electronic communications network used wholly or mainly for the provision of electronic communications services available to the public which support the transfer of information between network termination points;	Art 2/z25 ECA	z25) public electronic communication network - a unified system of electronic communication networks, which is intended to provide publicly available unlimited electronic communication service to users;	
Art 2/da	‘network termination point (NTP)’ means the physical point at which a subscriber is provided with access to a public communications network; in the case of networks involving switching or routing, the NTP is identified by means of a specific network address, which may be linked to a subscriber number or name;	N/A		
Art 2/e	‘associated facilities’ means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network and/or an electronic communications service which enable and/or	Art 2/z32 ECA	z32) technical facilities - equipment and facilities of an electronic communication network used for forming, processing, conveying, transmitting or receiving electronic communication calls and information signals;	

	support the provision of services via that network and/or service or have the potential to do so, and include, inter alia, buildings or entries to buildings, building wiring, antennae, towers and other supporting constructions, ducts, conduits, masts, manholes, and cabinets;	Art 2/z44 ECA	z44) elements of electronic communications network - functionally separated (or separable) technical or technological facilities that are part of an electronic communication network, and their operational functional resources and capacities, which, by their characteristics, ensure: conveyance, transmission and routing (switching) of call and information signals; collection of billing information; management and interoperability of the terms and conditions of services provided to an end-user; portability of subscriber numbers; operational, information, ancillary and special services of the operator; synchronisation and signalling of networks; penetration into the call-related databases; multimedia; provision of digital broadcasting; conversion, coding, safety maintenance; paging; television processing of digital data and transmission via the Internet or other protocol, etc.;	
Art 2/ea	'associated services' means those services associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service or have the potential to do so and include, inter alia, number translation or systems offering equivalent functionality, conditional access systems and electronic programme guides, as well as other services such as identity, location and presence service;	N/A		
Art 2/f	'conditional access system' means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual	N/A		

	authorisation;			
Art 2/h	'user' means a legal entity or natural person using or requesting a publicly available electronic communications service;	Art 2/z16 ECA	z16) user - a natural or legal person who intends to use or that uses electronic communication services;	
Art 2/i	'consumer' means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession;	N/A		
Art 2/j	'universal service' means the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;	N/A		
Art 2/k	'subscriber' means any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services;	Art 2/a ECA	a) subscriber - an end-user who or which is provided with publicly available electronic communication services on the basis of a prior written contract entered into with the provider of electronic communication services;	
Art 2/m	'provision of an electronic communications network' means the establishment, operation, control or making available of such a network;	Art 2/y ECA	y) provision of electronic communication networks - the installation of networks, technical facilities or appropriate elements of a network, their operational management and maintenance, and conduct of economic activity via such networks, as well as granting access to interested authorised persons to these elements of the network, and to their resources and capacities;	
Art	'end-user' means a user not providing public communications	Art 2/n	n) end-user - a user who uses or intends to use the services	

2/n	networks or publicly available electronic communications services.	ECA	provided through public electronic communication networks and associated facilities for personal use and who does not intend to sell them to another user;	
The ECA definition is narrower than the definition in the Directive. We recommend to align it with the Directive.				
Art 2/o	'enhanced digital television equipment' means set-top boxes intended for connection to television sets or integrated digital television sets, able to receive digital interactive television services;	Art 2/z48 ECA	z48) digital television equipment - terminal equipment of an end-user, connected to or integrated in a television set, and intended for receiving digital and interactive television service;	
Art 2/p	'application program interface (API)' means the software interfaces between applications, made available by broadcasters or service providers, and the resources in the enhanced digital television equipment for digital television and radio services;	Art 2/p ECA	p) application program interface (API) - a software interface connecting consumer resources of the service types made available by a provider of digital broadcasting or electronic communication services and the functional resources of the technical facilities of digital broadcasting;	
Art 2/q	'spectrum allocation' means the designation of a given frequency band for use by one or more types of radio communications services, where appropriate, under specified conditions;	N/A		
Art 2/r	'harmful interference' means interference which endangers the functioning of a radio navigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radio communications service operating in accordance with the applicable international, Community or national regulations;	Article 2/z ²⁶	Harmful interference [definition] - interference that endangers the functioning of radio navigation equipment and/or terminal equipment of the user;	
Art 2/s	'call' means a connection established by means of a publicly available electronic communications service allowing two-	N/A		

	way voice communication			
<u>Action plan</u>				
Legislation:	ECA			
Section:	None			
Proposed change:	Although we have identified several inconsistencies in the definitions used by the Directive and in the ECA, we do not propose to modify the current definitions.			
Notes:	/			

This document has been prepared in connection with the project “**Georgia - Information Communication Technology Sector Development**” financed by the **European Bank for Reconstruction and Development**. Any legal advice contained in this document has been provided under the EU law. Georgian legislation has been taken into account based on the English translations provided to us by GNCC. We are not qualified to provide legal advice under Georgian law.

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