LEGISLATIVE NEWS

The Law of Georgia on Independent National Regulatory Bodies

VAKHTANG ZAALISHVILI*

On 21 June 2002 the Parliament of Georgia adopted the Law on Independent National Regulatory Bodies, which came into force on 15 October 2002. The Law aims to develop a uniform "sound legal and inclusive institutional environment..." (Article 1.1) for national regulatory bodies in Georgia. This might give the impression of an attempt to place the various legal provisions related to regulatory bodies in a single codification, in replacement of existing laws. Generally speaking, the similar legislative initiative, aiming at regulation of social relations in a more systematic and inclusive manner, than the existing one, is itself appreciable and simplifies the process of implementation of the adopted legal acts. However, this thesis could hardly be applicable with regard to the Law concerned. The reason for this is the size of the law itself. It runs to only twenty one articles and makes it impossible to cover in sufficient scope its rather ambitious task. Furthermore there are a number of legal and simple logical remarks with regard to the shortcomings of the Law and its incompatibility with the legislation in force. Below we shall seek to display some of these – the most important ones in my opinion.

As already mentioned, a number of general and special legislative acts have effect in parallel with the adopted Law. These acts regulated both the legal and organisational status and the rights and obligations of such bodies in an explicit and systemic manner.

The Law of Georgia on Legal Persons of Public Law provides for the possibility of assignment of special power of state regulation to specific subjects of law in the political, state, social, educational, cultural and other public fields.

Such a delegation of power is admissible only according to a special sectoral law, that as a general rule is effected by the President through his ordinance. Thus, the Law concerned not only defines the legal status of a legal person of public law in its General Provisions part, but provides for the system of applicable legal acts.

As regards the Law on Independent National Regulatory Bodies, by virtue of Article 2 it applies to the National Communications Commission of Georgia, the National Energy Regulatory Commission of Georgia, the State Agency for Regulation of Oil and Gas Resources and "every body, which under Georgian legislation will acquire the function of independent regulation of a specific field in future and which under this Law and the Georgian legislation is an independent regulatory body".

* GEPLAC Legal Expert.

The principle on the basis of which the State Agency for Regulation of Oil and Gas Resources was included into the list of independent regulatory bodies is rather ambiguous. The Agency is a state subordinated establishment and consequently is accountable to the executive power unlike legal persons of public law that are separated from state management bodies and carry out their public activities independently. Given the status of the Agency its inclusion into the scope of application of the Law contradicts at least the definition of "an independent regulatory body", provided by the Law itself (Article 3(g)).

Particular mention should be made of the last paragraph of Article 2 – Para. d); It is not clear whether the Law should be applicable only to regulatory bodies to be created in future, or the authors intended to cover the existing legal persons of public law in other sectors as well by virtue of the last phrase – "... and which is an independent regulatory body under this Law". We focus on the last phrase given the fact, that the Paragraphs a), b) and c) of Article concerned provide a list of definite bodies, but the enumeration is suddenly interrupted and does not cover such an establishment as the State Insurance Supervision Service of Georgia, which is also a legal person of public law with similar functions.

The definitions given in the law raise more questions than they answer. Article 3 attempts to introduce such new terms, as: "undue influence and illegal interference". The purpose of the definitions remains unclear, as existing legislation is already familiar with such an action termed "coercion" (Criminal Code of Georgia, Article 150), qualifying it as a crime and providing for a respective sanction. The terms "illegal", "unlawful action" are also universally acknowledged and well-established for both criminal and other actions, resulting in respective legal consequences. Thus, there is no need to define the same type of action with some new term.

Mention should also be made of the term – "political pressure". Its content derives from the two terms above and is based on political goals and motivation. This type of action is subject to criminal prosecution irrespective of the subjective part (motive, purpose) of its elements. Hence, there is no need to define it for a second time in a more detailed manner.

Similar to the above quoted terms, some other definitions provided for by the Law, like "a family member", "power", "capacity" and "person" are already explicitly defined by respective legislative acts.

Along with the above-discussed tautology, the definition of the term "person" should as well be highlighted. Under the Law this terms covers both natural and legal persons, as well as "bodies of state power, of the executive power, local government and self-government bodies, other state bodies". Presumably, the definition aims to outline the legal status of the participants of regulated relations that later could be logically bound with the establishment of the scope of their liability. A similar classification of subjects exists in the civil law where the state is a subject of private law relations. Its status is equalised to that of

a legal person, although its body, through which it participates in private law relations, is not a legal person itself (except for the legal persons of public law). In the case of private law relations everything is clear from the point of view of liabilities; as regards the administrative and criminal law, none of them is aware of the concept of responsibility neither of a state body nor the state itself. They limit themselves only with the liability of a natural person. Hence, both the definition of the term "person" in this Law and the inclusion of the state in such a fragmented way ought to be inadmissible.

Further on, the Law provides for some general provisions of a declarative nature. Some rules are merely copied from various sectoral laws. But this is not the main shortcoming. There are more fundamental concerns. Article 2(c) under which Paragraphs 3 and 4 of Article 4 of the Law should not apply to the State Agency for the Regulation of Oil and Gas Resources. They provide the basic principles of independence and the inadmissibility of any type of control with regard to a regulatory body is one such principle. At the same time Article 6 (3), which is fully applicable to the Agency states that "any effort of any person to exercise jurisdiction over the authority of an independent regulatory body shall be considered illegal, and the consequences thereof shall not be legally valid". It is apparent that we have to deal with mere carelessness during the elaboration of the Law.

Article 15.1 is worth mentioning as well. It states that in the case of a conflict of ethics and interests a commissioner may be subjected only to the procedure provided by the Law. Consequently, it excludes the application of such an important set of rules in the Law on the Conflict of Interests and Corruption with regard to commissioners, as it is the liability for a corruption crime (Chapter 5). At the same time Article 15(6) directly refers to the applicability of provisions of the Law related to financial declaration.

Along with the above comments, it could be generally said that the Law concerned could hardly be implemented as the main focus is drawn upon securing the independence of the regulatory bodies that are explicitly regulated by existing sectoral legislation. Apart from this, the legislative techniques of the Law is of rather low proficiency, which is manifested in the mentioned deficiencies. It is apparent that the Law was adopted in a hasty manner and is the source of uncertainty both for participants of regulated relations and for those state bodies responsible for its implementation.