

Practice of Imposing Administrative Sanctions on the Coverage of Public Opinion Polls in the Pre-election Period



Practice of Imposing Administrative Sanctions on the Coverage of Public Opinion Polls in the Pre-election Period

Author: MARIAM PATARIDZE

Editor: TAMAR KINTSURASHVILI

Media Development Foundation

www.mdfgeorgia.ge

www.mediameter.ge

INTRODUCTION

This monitoring report reflects the practice of responding by the Georgian National Communications Commission (GNCC) and courts to violations of the legislative requirements for the coverage of public opinion polls in the period preceding the 2016 parliamentary elections.

The monitoring rests on the analysis of documents which include materials requested from the GNCC and the pre-election media monitoring reports of Media Development Foundation (MDF) which, inter alia, analyses the coverage of public opinion poll results by broadcast and online media outlets.

Although the legislative requirements became obligatory on 8 June, i.e. upon the launch of pre-election campaign, this report covers the period between 22 July and 8 October because the GNCC started to take administrative actions against broadcasters after 22 July, that is the day it warned broadcasters about the necessity to observe the requirements of the law.

KEY FINDINGS

The following trends have been observed in reacting to violations of the requirements prescribed by the Election Code of Georgia (Article 51.11) for the coverage of public opinion polls in pre-election periods:

- GNCC set a precedent by asking Rustavi 2 to submit additional documentation to verify the reliability of a public opinion poll commissioned by the broadcaster to the German-US company GFK, and initiating an administrative proceeding.
- The GNCC selectively drew up acts of administrative offence against broadcasters for violating requirements of Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code which specifies the procedure for publishing public opinion poll results. In particular, the GNCC did not react to the violations of the mentioned procedure by the Georgian Public Broadcaster (GPB), GDS and Obieqtivi TV companies.
- The GNCC reacted to two violations by Imedi TV with more than a month’s delay, only after the international monitoring mission¹ published its preliminary conclusions on 31 October, following the runoff parliamentary election, in which the GNCC’s inconsistent approach was discussed based on Rustavi 2 and Imedi cases.
- Selective and inconsistent approach was shown by the court too by applying 1,500 GEL worth financial sanctions only against those broadcasters that were critical about the authorities (twice against Rustavi 2, and Tabula) and against two regional broadcasters (Trialeti, Argo) while limiting itself to verbal warnings against other TV channels, although Imedi TV company violated the procedure three times.
- The Tbilisi City Court, when considering one of violations of Subparagraph “f” of Article 51.11 of the Election Code by Rustavi 2, treated the private TV company as an administrative body while the media coverage of opinion poll as the rule of publication of information envisaged by the General Administrative Code.
- Administrative actions taken by the GNCC against five news agencies were not based on the regular monitoring which it conducted; therefore, it is unclear on what grounds were these five news agencies selected for penalizing.

¹ OSCE Office for Democratic Institutions and Human Rights; OSCE Parliamentary Assembly; the Parliamentary Assembly of the Council of Europe; the European Parliament.

LEGISLATIVE REGULATION

The Georgian legislation regulates the coverage of public opinion polls in pre-election period. The aim of the law is to protect voters from being manipulated and provide them with comprehensive information about all those important factors which may affect the perception of opinion poll results.

The procedure for the coverage of public opinion polls in pre-election periods contains three main conditions: 1. An opinion poll must be reliable; 2. When publishing it, 11 necessary data must be indicated; 3. It must not be published on the election day when voters take decisions.

Reliability of public opinion polls. Paragraph 11 of Article 51 of the Election Code specifies the criteria which a media outlet shall consider when taking a decision on the publication of public opinion polls. Namely:

- A public opinion poll shall be based on the acknowledged scientific methodology of representative random selection that provides 95% credibility of results with a margin of error not exceeding 3% (11a);
- It shall be published after double-checking the credibility of its methodology and objectivity of its results (11b);
- It shall be feasible to provide convincing scientific explanation if there are significant discrepancies or changes in the results of the same or other comparative public opinion polls (11c);
- It shall not constitute a tool for manipulating public opinion or fundraising and it shall not be conducted via telephone, mail, and/or internet (11d);
- It shall be based on transparent methodology that enables providing an independent double-check of the results (11e).

The above regulation, which was specified in the law since 2001,² had not been applied by the GNCC before. An attempt to interpret it was undertaken during the 2016 parliamentary election in relation to Rustavi 2, when the GNCC asked the broadcaster to submit additional documentation to verify the reliability of the opinion poll conducted by GFK. Given that the GNCC initiated an administrative proceeding on this issue,³ we will separately discuss it in future, after the GNCC takes a decision on it.

² Article 731 (8a-e) of the Organic Law of Georgia on the Election Code of Georgia, <https://matsne.gov.ge/ka/document/view/15622#> (Election Code of Georgia, wording of 2001).

³ On 5 October, the GNCC initiated an administrative proceeding against Rustavi 2. The ground of proceeding was the submission of incomplete documentation with regard to the GFK public opinion poll.

Publication of necessary data. Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code also specifies 11 mandatory data which a media outlet must publish when covering public opinion poll results. These are:

1. an organization having conducted a public opinion poll;
2. a person having ordered or funded a public opinion poll;
3. the exact formulation and sequence of questions put in a public opinion poll;
4. the time of conducting field opinion poll;
5. the number of individuals interviewed and the method of selection;
6. in what area or among what category of people the selection was conducted;
7. whether the survey is based on the opinions of all respondents;
8. the number of respondents who refused to participate in the poll, who did not answer a question, or who could not be interviewed;
9. the sample size;
10. the margin of error;
11. information about any other factors that might have caused a significant impact on the results.

The GNCC drew up acts on administrative offences against 12 broadcasters and five online news agencies for publishing opinion poll results concerning the 2016 parliamentary elections in violation of the law.

The court practice showed inconsistency in imposing sanctions for administrative offences on broadcasters. In particular, among from national broadcasters, the court penalized only Rustavi 2 (twice) and Tabula while issued a verbal warning to Imedi TV company. (Details are provided later in the text).

Restriction on the publication of opinion poll results over a specific period of time. Paragraph 5 of Article 50 of the Election Code prohibits the publication of public opinion poll results concerning elections, except the possible number of voters and the turnout on a polling day, within 48 hours before the polling day and until 20:00 of that day.

Sanctions. Article 82 of the Election Code envisages a fine of 1 500 GEL for the publication of pre-election opinion poll results without indicating the required data or in violation of other procedures

related to publication. The discretion to react to violations of the above mentioned requirements lies with the GNCC⁴ which draws up acts of administrative offences while courts take decisions on penalizing violators.

⁴ Articles 93(2) of the Election Code of Georgia.

PRACTICE OF 2016 PARLIAMENTARY ELECTIONS

1. GNCC and court responses to publication of public opinion poll results

The GNCC began to monitor election media coverage for 8 October 2016 parliamentary elections on 8 June 2016, the day the election campaign was officially announced. Over the period of four months, the GNCC conducted round-the-clock monitoring of 53 TV companies. All general broadcasters, the GPB and Adjara TV of the Public Broadcaster were subject to the monitoring.⁵

On 22 July, the GNCC released a statement calling on media outlets to abide by the requirements of the law and reminding them of administrative sanctions envisaged in the law for the failure to fulfill the requirements.⁶ After this warning, the GNCC drew up the total of 14 acts on administrative offences against seven national⁷ and five regional⁸ broadcasters for covering public opinion polls in violation of Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code.

The GNCC drew up the acts of administrative offences on the basis of media monitoring which it conducted. It is worth noting that acts of administrative offences were not drawn up against only three broadcasters – the GPB, GDS and Obieqtivi although these broadcasters, according to the pre-election monitoring report of the Media Development Foundation,⁹ also violated the requirements for the coverage of public opinion polls. In particular:

- On 29 July, GDS covered the public opinion poll conducted by the National Democratic Institute (NDI) in violation of the requirements;
- On 29 July, Obieqtivi covered the NDI public opinion poll and on 23 September, a public opinion poll conducted by Wilson Perkins Allen Research (WPA) in violation of the requirements;
- On 23 August, the GPB covered the GFK public opinion poll commissioned by Rustavi 2 and JPM opinion poll commissioned by Imedi in violation of the requirements.

By acting so the GNCC displayed a selective approach to three TV companies - the GPB,¹⁰ GDS¹¹ which is owned by the family of former Prime Minister and founder of the ruling Georgian Dream political party Bidzina Ivanishvili, and Obieqtivi¹² which has links with the Alliance of Patriots.

⁵ <http://www.gncc.ge/ge/news/press-releases/2016-wlis-8-oqtombris-saparlamento-archevnebis-winasaarchevno-periodis-mediamonitringis-shualeduri-angarishi-0806-2016-0807-20161.page>

⁶ <http://gncc.ge/ge/news/press-releases/saqartvelos-komunikaciebis-erovnuli-komisია-winasarchevno-kampaniis-periodshi-mediasashualebebis-mier-sazogadoebrivi-azris-kvlevis-shedegebis-gamoqveynebastan-dakavshirebit-gancxadebas-aqveynebs.page>

⁷ Rustavi 2, Maestro, Imedi, Pirveli Stereo, Tabula, Starvisia, SDASU TV.

⁸ Kvemo Kartli TV, Trialeti, Argo, Rioni, Odishi.

⁹ MDF, Media Monitoring Report of the 2016 Parliamentary Elections in Georgia.

<http://mediameter.ge/en/research/media-monitoring-report-2016-parliamentary-elections-georgia>

¹⁰ Mediameter, MDF, 1st Channel of Georgian Public Broadcaster <http://mediameter.ge/en/media-profiles/channel-1-public-broadcaster>

It should also be noted that the GNCC drew up the acts on administrative offences against Imedi TV for two violations of the requirements with more than a month’s delay, only after the international monitoring mission,¹³ on 31 October, published its preliminary conclusions following the runoff parliamentary election, in which inconsistent approach of GNCC was discussed based on Rustavi 2 and Imedi cases. In particular, the document says:

“On 20 October, the GNCC published its fifth media monitoring report covering the period from 23 September to 8 October. Most of the detected violations were related to compliance with disclosure rules in the publication of opinion polls. In this regard, the GNCC’s decisions were inconsistent, taking administrative action against Rustavi 2 and not Imedi for a similar violation.”¹⁴

As Table 1 shows, the GNCC reacted instantly to a violation by Rustavi 2 whereas dragged its feet concerning two violations by Imedi. Even though the GNCC did not formally violate the specified timeframes, following from the aim of the law – to protect voters from being manipulated by opinion polls, it should have reacted to violations by all media outlet with similar promptness.

Table 1. GNCC response to violations of the requirements for the coverage of public opinion polls

Court response	Date of publication of preliminary conclusions by the international observation mission	Date of GNCC response	Date of covering opinion poll	Media outlet
Verbal warning	31 October	8 November	29 September	Imedi
Fine-1500 GEL		7 October	1 October	Rustavi 2
Verbal warning		8 November	5 October	Imedi

The court also displayed inconsistency in applying sanctions and, as shown in the table below, imposed 1500 GEL fines only on those media outlets (Rustavi 2 and Tabula) that were critical of the government as well as on regional broadcasters (Trialeti and Argo) while limited itself to verbal warnings to other broadcasters (Imedi, Maestro, 1st Stereo, SDASU TV, Starvisia). It should be noted here as well that

¹¹ Mediameter, MDF, About GDS. <http://mediameter.ge/en/media-profiles/gds-tv>

¹² Mediameter, MDF, About Obieqtivi. <http://mediameter.ge/en/media-profiles/obieqtivi>

¹³ OSCE Office for Democratic Institutions and Human Rights; OSCE Parliamentary Assembly; the Parliamentary Assembly of the Council of Europe; the European Parliament.

¹⁴ Pg. 7. <http://www.osce.org/odihr/elections/georgia/278146?download=true>

although Imedi TV violated the requirements three times, the court issued only verbal warnings on all the three occasions; this shows that the lack of uniformity of practice and selectiveness of approach.

Table 2. Practice of applying sanctions against broadcasters for violating public opinion poll provisions (Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code)

	GNCC drew up an act on offence	GNCC did not draw up an act on offence	Court imposed 1500 GEL fine	Court issued a verbal warning
National TV	Rustavi 2 Rustavi 2 Imedi Imedi Imedi Tabula Maestro 1st Stereo SDASU TV Starvisia	GDS (29 July) Obieqtivi (29 July) GPB (23 August) GPB (3 September) Obieqtivi (23 September)	Rustavi 2 Rustavi 2 Tabula	Imedi Imedi Imedi Maestro 1st Stereo SDASU TV Starvisia
Regional TV	Argo Trialeti Odishi Rioni Kvemo Kartli TV		Argo Trialeti	Odishi Rioni Kvemo Kartli TV

At the Tbilisi City Court, Rustavi 2 asserted with regard to the coverage of opinion poll on 1 October that it did not violate requirements of the law because the presenter of the program informed audience about the availability of additional information about the opinion poll on the webpage of the TV company.

The Tbilisi City Court rejected the arguments of the TV company and substantiated its decision on imposing the financial sanction on Rustavi 2 by referring to the following circumstances:

First: According to Article 2 of the Law on Broadcasting, broadcasting is accessible to 90% of the population wherease webpage was not accessible to the same amount of citizens.

Second: In the opinion of judge Leila Mamulashvili, the publication of information related to the public opinion poll on the webpage cannot be considered the publication in accordance with the procedure specified in Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code because the information was not available in accordance with the procedure specified in Article 56 of the General Administrative Code.

Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code does not specify types of publication in which media outlets must indicate the necessary data prescribed by the law while Article 51 (Information support to election campaigning) covers all types of media outlets; the latter is also proved by the practice of GNCC which took administrative actions for violation of the mentioned article not only against broadcasters but also against online news agencies.

Argument that the access to information was not ensured under Article 56 of the General Administrative Code means that the court treated the media coverage as the publication of information envisaged by the General Administrative Code while the private TV company as an administrative body. This is a wrong interpretation of the law for the following reasons:

- Article 56 of the General Administrative Code provides for the procedure of publishing individual administrative acts;
- According to Article 2(d) of the same Code, the discretion of publication of individual administrative acts lies with an administrative body alone.¹⁵

The private TV company Rustavi 2 as well as any other private broadcaster cannot be considered an administrative body for the purposes of Election Code.

The court treated the case of Imedi TV company differently: on all three instances¹⁶ of violations of the procedure for coverage of public opinion polls, the court released the TV company from an administrative liability and only limited itself to the issuance of verbal warnings. The Tbilisi City Court considered all three violations by Imedi of lesser importance, not causing any material damage. Moreover, in its decision of 17 November on the third violation of Imedi, the court referred to earlier similar violations; however, this does not reflect an actual situation.

The court showed inconsistency in imposing sanctions in regards with regional broadcasters too, penalizing TV companies Trialeti and Argo with 1500 GEL fines while issuing verbal warnings to other regional broadcasters (Odishi, Rioni and Kvemo Kartli TV).

Consequently, by imposing non-uniform sanctions on broadcasters, the court establishes an inconsistent practice.

¹⁵ **Article 2(d)**: individual administrative act – an individual legal act issued by an administrative body under the administrative law establishing, modifying, terminating, or confirming the rights and obligations of a person or a limited group of persons. The decision of an administrative body to refuse to address an applicant’s issue within its competence, as well as any document issued or confirmed by an administrative body that may have legal consequences for a person or a limited group of persons, shall also be deemed an individual administrative act.

¹⁶ Date of covering the opinion polls: 1st instance – 2 September; 2nd instance – 29 September; 3rd instance – 5 October 2016.

2. GNCC and court responses to the coverage of public opinion polls in online media

As noted above, Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code does not specify types of media outlets which are required to comply with the procedure of covering public opinion polls. Consequently, this requirement of the law applies to all types of media. In 2016, the GNCC, which is vested with the power to take administrative actions against violations of the mentioned article, monitored broadcast media alone. As the practice of previous years shows, the GNCC applied this norm to online media only on the basis of applications from nongovernmental organizations. For example, during the midterm parliamentary election in Sagarejo in 2015, the GNCC drew up administrative offences acts against two news agencies on the basis of application from the International Society for Fair Elections and Democracy (ISFED).¹⁷

During the 2016 parliamentary election, the GNCC reacted to violations of Subparagraph “f” of Paragraph 11 of Article 51 by online media outlets on five occasions; it is however ambiguous on what grounds were these news agencies selected. The pre-election media monitoring conducted by the Media Development Foundation¹⁸ revealed instances which, as seen from Table 3, were left without response from the GNCC; this is yet another indication of selective approach in taking administrative actions. Namely, the GNCC failed to fulfill the obligation assumed under the law, for example, in case of PIA (30 July), IPN (29 July and 23 September), and Marshalpress (29 July) news agencies.

As regards the court practice, the court instead of penalizing issued verbal warnings to all the five agencies.

Table 3. Practice of applying sanctions against online media for violating public opinion poll provisions (Subparagraph “f” of Paragraph 11 of Article 51 of the Election Code)

GNCC drew up an act on offence	GNCC did not draw up an act on offence	Court issued a verbal warning
IPN.GE	IPN.GE (29 July)	IPN.GE
MARSHALPRESS.GE	MARSHALPRESS.GE (29 July)	MARSHALPRESS.GE
AMBEBI.GE	PIA.GE (30 July)	AMBEBI.GE
GNN.GE		GNN.GE
KVIRISPALITRA.GE		KVIRISPALITRA.GE

¹⁷ The GNCC drew up administrative offences acts against news agencies www.reportiori.ge and www.mpress.ge; <http://www.gncc.ge/ge/news/press-releases/komisiam-sainformacio-saagentoebbs-wwwreportiorige-s-da-wwwmpressge-s-administraciul-samartaldargvevis-oqmebi-sheudgina.page>

¹⁸ MDF (1 April – 31 July, 2016), Pre-election Media Monitoring. <http://mdfgeorgia.ge/eng/view-library/43/>

RECOMMENDATIONS

To GNCC

- To establish a uniform practice, the GNCC should develop guidelines and set a uniform standard of responding to violations of law. This standard should envisage a response to instances of obvious and clear-cut manipulations and should take into account the severity of violation.
- The GNCC should determine what form of coverage may be considered the publication of necessary data about an opinion poll.
- The GNCC should avoid selective application of legislation and should react identically to similar violations detected by monitoring.
- The GNCC should react to violations made by online media and news agencies on the basis of monitoring rather than the principle of random selection.

To courts

- Courts should not apply selectively the financial sanction provided in Article 82 for the violation of standards for the coverage of public opinion polls and should establish a uniform practice.
- In case of repeated violation by a media outlet, courts should not limit themselves to verbal warnings.
- Courts should make a distinction, on the one hand, between an administrative body and a media outlet and on the other hand, between the procedures for publishing information envisaged in the General Administrative Code and media coverage.

To Parliament of Georgia

- Considering the existing practice, those provisions of the Election Code which regulate the coverage of public opinion polls in pre-election periods should be clarified in order to exclude non-uniform interpretation of the law.
- It is also important to define the types of media outlets which are subject to requirements of Subparagraph "f" of Paragraph 11 of Article 51 of the Election Code.

To media

- Media outlets must fulfill legal requirements for the coverage of public opinion polls in pre-election periods and publish all those data which are important to enable audience to assess them comprehensively.