IMPLEMENTATION OF THE EUROPEAN NEIGHBORHOOD POLICY ACTION PLAN FOR 2011 IN GEORGIA

ASSESSMENT OF CIVIL SOCIETY REPRESENTATIVES

COMPETITION POLICY, CUSTOMS PROCEDURES, INTELLECTUAL PROPERTY RIGHTS

The report is prepared within the framework of
Eurasia Partnership Foundation's (EPF)
European Integration Program

Tbilisi
January, 2012

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This publication was prepared by initiative of Eurasia Partnership Foundation (EPF), through a grant provided by the Swedish International Development Cooperation Agency (Sida). The views and opinions expressed in this report are those of the authors and should in no way be taken to represent those of EPF or Sida. Any mistakes or omissions are the responsibility of the author.

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About the Publication

This publication was prepared by the initiative of the Eurasia Partnership Foundation (EPF), within the framework of the European Integration Program. In September, 2011 EPF announced a grant competition entitled "Civic Monitoring of Implementation of the European Neighborhood Policy Action Plan (ENP AP) 2011 for Georgia". The competition targeted the assessment of obligations under ENP AP Chapter 4.5 "Trade-related Issues, Market and Regulatory Reform"; as well as the assessment of the measures taken to prepare the "Deep and Comprehensive Free Trade Area" (DCFTA).

The competition winners drafted reports covering the following themes:

- Competition Policy – Shota Murgulia;
- Customs Procedure – Bondo Bolkvadze;
- Intellectual Property Rights – Nino Evgenidze, Economic Policy Research Center.

ENP AP is a joint EU-Georgia document, which entered into force in 2006. The document defines the strategic objectives of EU-Georgia cooperation. It lays out a framework of reforms, the implementation of which should align Georgian legislation, norms and standards with those of the EU; thus contributing to economic growth, social cohesion, poverty reduction and environmental protection in Georgia, and to the sustainable development of the country. ENP AP covers almost all spheres of public administration. According to the document, the EU takes on the obligation to support Georgia in the implementation of those reforms and, conditional to achieved progress, to further develop cooperation with Georgia in multiple fields.

In the framework of the general ENP AP, annual plans which define a more concrete activity outline are being prepared.

Therefore, the ENP AP should function as a major reference tool for assessing the level of Georgia's EU integration as well as provide a favorable instrument for Georgian civil society to advocate for reforms in various fields.

Economic reform and the development of trade with the EU are crucial aspects of the ENP AP. To help promote these spheres, since 2008, at the initiative of the Georgian government, conclusion of an agreement on "Deep and Comprehensive Free Trade Area" was put on the agenda. Such an agreement predicts that a higher stage of EU-Georgia economic integration will be attained. To countries which strive to conclude such agreements with the EU, the latter requires that the legislation and practice governing a number of spheres be synchronized with their EU counterparts. These spheres include competition policy, customs procedure and intellectual property rights. The probable benefits of concluding this agreement presents a strong impetus for the Georgian government to facilitate the European integration process. It is remarkable that, before 2011, the EU was unwilling to enter into official negotiations on this topic with Georgia, until the Georgian side was able to prove that it is ready, through the implementation of reforms in a number of spheres, to see this complex process through to the end. The EU decided to enter into official negotiations on the DCFTA only from 2012.

Currently, there is a complex process underway, and in the best case, it should tentatively take at least two years to conclude the terms of the agreement.

The European integration process directly influences the lives of every Georgian citizen. It is of crucial importance to ensure the transparency of this process, through the civic monitoring of the government's actions and through the active involvement of Georgian society in the elaboration of the EU-Georgia cooperation format and the assessment of achieved results. The achievement of this goal is something towards which the given publication hopes to contribute.

Eurasia Partnership Foundation

I Competition Policy

1.1 Introduction and brief report overview

One of the priority areas identified in the European Neighbourhood Policy Action Plan (ENP AP) is the Anti-trust and Control on State Aids Policy. Regarding this priority area Georgia is required to:

- Ensure enforcement of the competition law, in particular through the optimization of the administrative capacity enhancing the independence of the Free Trade and Competition Agency;

- Converge with EU principles on competition according to Title V article 43 and 44 of the Partnership and Co-operation Agreement, and;

- Examine the possibility of establishing further transparency regarding state aid granted in Georgia, in particular by (i) elaborating general rules of state aid and by (ii) drawing up annual reports on the amounts, types and recipients of state aid.[1]

The European Neighbourhood Policy Action Plan 2011 established the following requirements in the sphere of competition policy:

- Strengthen institutional capacity of the Legal Entity of Public Law – Free Trade and Competition Agency;

- Draft the Law on Free Trade and Competition and submit it to Parliament;

- Train the personnel of the Free Trade and Competition Agency and relevant state agencies;

- Raise private sector awareness regarding competition law;

- Raise the awareness of judges on competition law.

One of the preconditions for launching negotiations on the Deep and Comprehensive Free Trade Area (DCFTA) was the improvement of the legislation on competition (in particular, the adoption of a new law) and the transformation of the Free Trade and Competition Agency into an effective, independent body.

Thus, with the goal of fostering EU-Georgia cooperation, Georgia assumed various important obligations in the area of competition policy. In this paper, we will try to analyze the progress which has been made in the implementation of these obligations.

Main findings

[1] European Union-Georgia Action Plan; Chapter 4.5.5: Competition Policy.

In 2011, the existing Georgian legislation governing the sphere of competition was not, in general, compatible with the equivalent EU legislation. Respectively, neither a dominant position of an enterprise nor abuse of the dominant position was prohibited.

State agencies in Georgia do not actually detect actions which restrict competition (in accordance with regulations envisaged in the EU legislation). Civil organizations, for their part, lack the resources and authority to both detect and prove unfair restrictions on competition because such processes require the thorough research of the sphere in question and of activities of concrete entrepreneurs. Therefore, the opinions expressed by civil organizations represent allegations alone. For example, several Georgian organizations have expressed partially-substantiated claims about the likelihood of deals (mainly, cartel-type agreements) within the fuel and pharmaceutical markets, restricting competition.

In 2011, measures supporting the institutional enhancement of the Free Trade and Competition Agency and awareness-raising activities in both the public and private sectors were not implemented – save for one training session, one seminar and one conference. In 2011, an informational campaign plan was drawn up and a donor organization, which will finance the measures envisaged in the plan, was identified.

The requirement of submitting the Draft Law on Free Trade and Competition by the Government of Georgia to the Parliament was fulfilled in September 2011. At the end of 2011, that draft law was still under consideration.

It should be noted that the degree of society's involvement in law-drafting process was not high.

As of the time of writing, the current Law on Free Trade and Competition mainly emphasizes the regulation of actions restricting competition caused by state and/or local authorities and does not recognize the possibility of restricting competition through actions of other economic agents. The new draft law partially eliminates this deficiency.

The draft law provides a legal definition of a dominant position: the position of an economic agent(s) in which its actions and economic decisions are not essentially affected by competitors, suppliers and buyers and when it holds a significant market share (of no less than 40 percent of the corresponding commodity or service market (market turnover)). Experts believe that it would be an improvement to establish a number which is lower than the determined 40 percent of market share.

The draft law does not prohibit the concentration of enterprises except in cases when it would significantly restrict competition in a corresponding market and in which the dominant position is abused.

The definition of "concentration" and control thereof provided in the draft law are in conformity with EU Regulation #1/2003 on the Implementation of the Rules on Competition. The definition of state aid in the draft law also largely conforms to the EU regulation although state aid does not include the privatization process, the issuance of licenses and/or permits, or

those public procurements which are carried out with moneys allocated from the reserve funds of the President's, Government of Georgia's and/or the Tbilisi Mayor's office. According to 2011 data, these three entities controlled reserve funds totaling GEL 102 million.

The draft law envisages the consolidation of the Free Trade and Competition Agency and the State Procurement Agency into the Competition and State Procurement Agency. However, fines or/and sanctions envisaged in the draft law can only be imposed by the court except in those cases when an economic agent, as the result of investigation into a case, admits to violating the rules of competition and stops its anti-competitive activity on the basis of an Agency decree.

It would be better to empower the Competition Agency to implement certain measures to eradicate identified violations (for example, suspension of a contract). The Georgian Government has a wealth of experience in fighting corruption and depriving the Agency of its key function due to fears of corruption does not seem expedient.

The power of the Government of Georgia in the sphere of competition is quite high under the submitted draft law. The government is entitled to determine exceptions from the prohibition of anti-competitive agreements and to periodically approve priority directions in the Agency's activities. The Agency considers complaints and/or applications in accordance with priorities which have been approved by the government, and it is not responsible for any problematic results which may occur due to denial to consider those complaints and/or applications that do not fall under priority directions.

The fine amounts for anti-competitive actions specified in the draft law are much less than the fines established by EU regulation #1/2003. Tying the fine to profit or, in the absence of profit, to turnover, leaves open the possibility of manipulation by an economic agent. The draft law does not outline a sanction which envisages a daily penalty, with an accompanying daily rate and hence, the draft law needs to be reexamined regarding this issue.

The fine for the failure to provide information to the Agency is very low, thus enabling an illicitly-minded entrepreneur to artificially protract the Agency's investigation process.

1.2 Legislation and state policy

It remains difficult to legally prove alleged anti-competitive actions in Georgia because to do so requires the carrying-out of fundamental studies of the relevant sphere, an undertaking which requires great financial resources, along with the granting of the implementing body with the relevant administrative powers.

Claims regarding the lack of competition on Georgia's fuel market, which are prompted by identical prices at various filling stations, are often heard.

However, in 2011 the emergence of Gulf Oil International on the Georgian fuel market improved competition a little, and at the time of writing some small, though still insignificant, price differences can be observed.

Similar doubts arise regarding the pharmaceuticals market which is dominated by a handful of large players. Their activities are not controlled in respect to competition because the current legislation on Free Trade and Competition does not provide for such oversight.

The pharmaceuticals market is distinguished by its high prices. Demand for such products lacks significant elasticity and where there is no increase in supply, prices far exceeding the cost of production can be set. To improve the situation, the government took steps to simplify the rules for the registration of pharmaceutical production and the sale of certain pharmaceuticals. In 2011, a certain segment of the market experienced a price decrease.

"Unless a competitive environment is created and as long as there are two or three companies which can alter prices on the basis of a cartel-type agreement, the problem of price-fixing will remain unsolved in Georgia. Recent research shows that medication prices have inadequately increased. The difference between the prices of medication brought in at customs and the price as it's released in retail networks ranges between 100 and 1000 percent."[2]

The fact that the price of pharmaceuticals well exceeds the cost of their production was proven by discounts offered by drugstore chains in 2011. In certain cases, these discounts were as much as 30% off the original price. These discounts have been kept on some of the pharmaceuticals long after the promotion ended. This leads to a conclusion that drugstore chains engage in price gouging (that is in pricing goods much higher than is reasonable).

In 2011, a significant rise was seen in meat prices, which was connected to the fact that the Ministry of Agriculture of Georgia began to require that all cattle be slaughtered at the limited number of butcheries. The requirement that cattle be slaughtered at butcheries was established in the context of convergence with EU legislation in the area of food safety. However, this process did not imply that exclusive rights be granted to just a few slaughterhouses. Indeed, the government had enough time to make preparations (to communicate information about the expected change, for example) to ensure that more slaughterhouses would have been created, which would ensure the development of true competition and a more stable pricing system.

The main normative act regulating the sphere of competition in Georgia is the Law on Free Trade and Competition which has many shortcomings and is not in line with EU regulations. The law's emphasis is placed primarily on the regulation of anti-competitive actions of state and/or local authorities and does not recognize the possibility that competition can also be restricted by other economic agents.

The law does not provide a definition of dominant position and does not prohibit the abuse thereof; it does not regulate the issue of enterprise merger; does not prohibit cartel agreements

[2] Merab Janashvili, Chairman of the Association of Young Financiers and Economists in Georgia, http://www.radiotavisupleba.ge/content/article/2027078.html?s=1

between economic agents; and the Competition and Free Trade Agency is not equipped with proper functional, personnel and financial resources. In 2011, the Agency counted only nine employees and its total budget was GEL 180,000.

Shortcomings in the current law are described in detail in the analysis of the Draft Law on Free Trade and Competition.

In December 2010, with Decree #1551, the Government of Georgia approved the Comprehensive Strategy in Competition Policy. The development of this Strategy was an obligation assumed under the ENP. The Strategy provides a detailed description of problems regulating the sphere of competition and identifies the main thrust of the convergence of Georgian legislation with the European law. This document, however, is a strategy and it is necessary to have legally-specified arrangements for the implementation of the principles defined in the strategy.

1. 3 Implementation of obligations assumed under ENP AP / preconditions for the launch of DCFTA negotiations

Fulfilling the preconditions for launching negotiations on DCFTA in the area of competition policy is directly linked with the fulfillment of obligations assumed by the Government of Georgia under ENP AP in 2011, in particular, with the adoption of a new Law on Free Trade and Competition. Consequently, we deem it expedient to focus on the analysis of the mentioned draft law.

1.3.1 Drafting the Law on Free Trade and Competition and the submission of the draft law to the Parliament of Georgia

The government of Georgia submitted the Draft Law on Free Trade and Competition to the Parliament in September 2011. It should be noted that there was not a strong degree of involvement on the part of civil society in the drafting process. Interest toward this issue among experts is high and discussions with interested parties should have been conducted as a part of the drafting process. The process of drawing up and adopting the Comprehensive Strategy in Competition Policy at the end of 2010 was also marked by low degree of transparency.

The Swedish Competition Authority provided assistance to the Georgian Government in drafting the framework law. The aim of this cooperation was to bring the framework law in line with the equivalent EU legislation and best practice. In this respect, the opinion expressed by the Swedish Competition Authority was positive.[3]

1.3.2 Scope of action

The Draft Law on Free Trade and Competition, if adopted without changes, will apply to:

[3] Letter of Lasha Mgeladze, the Head of the Free Trade and Competition Agency, 11 December 2011.

- "Such actions occurring in a relevant market which wrongfully restricts competition and free trade in the commodity and service markets of Georgia;

- Such actions and/or decisions of state and/or local authorities, or such legal norms, which significantly restrict (or may restrict) a competitive environment and free trade."[4]

As noted above, the emphasis made by the Law on Free Trade and Competition, effective in 2011, is mainly placed on the regulation of anti-competitive actions on the part of state and/or local authorities and does not recognize the possibility that competition can also be restricted by other economic agents. The submitted draft law eliminates these shortcomings and aims at ensuring free trade and competition, in particular, by means of:

a) Facilitating the development of free trade and competition;

b) Liberalizing the market, and banning administrative, legal and discriminative barriers to entry to market on the part of state or/and local authorities;

c) Ensuring conditions for free market access by economic agents;

d) Banning the wrongful restriction of competition among economic agents;

e) Defending the equality of economic agents in their activities;

f) Prohibiting abuse of dominant position;

g) Banning the awarding of such exclusive powers to economic agents by state and/or local authorities, which wrongfully restrict competition;

h) Ensuring a maximum degree of publicity, impartiality, non-discrimination and transparency regarding the process of decision-making by an authorized body.

The law effective in 2011 does not regulate paragraphs d), e) and f) and it is a step forward that these issues are envisaged in the draft law.

The draft law provides a specific definition of "dominant position": an economic agent (or agents) operating in a particular market, whose actions and economic decisions are not essentially affected by competitors, suppliers and/or buyers and which holds a share of no less than 40 percent of the corresponding market (market turnover). Experts believe that it would be more prudent to set the maximum allowable market share at lower than 40 percent. However, most EU countries have set numbers ranging between 30 and 50 percent[5] and Georgia decided to go with an average rate.

[4] Paragraph 3, Article 1 of the draft Law on Free Trade and Competition.

[5] Subparagraph 4, Paragraph 4.1.3, Chapter 1 of the Decree #1551, dated 2010, of the government of Georgia on the Approval of Comprehensive Strategy in Competition Policy.

The legislation governing competition which was effective in 2011 did not regulate the concentration of enterprises. Under the draft Law submitted to the Parliament, concentration implies:

a) The merger of two or more independent economic agents, in which one or more economic agent merges with another, or when two or more economic agents merge into one new economic agent.

b) The acquisition by one person, who already controls at least one economic agent, of direct or indirect control of other economic agent on the basis of transaction.

Concentration in general is not prohibited save in those cases in which it significantly restricts competition in a corresponding market and directly causes the abuse of the dominant position.

The definition of concentration and the control thereof provided in the draft law are in conformity with EU Regulation #1/2003.

The EU legislation defines "state aid" as any support provided through state resources in a variety of forms which:

- promotes the economic activity of the recipient;
- is provided on a selective basis for specific companies or for production of concrete goods;
- may distort competition;
- affects trade between Member States.[6]

EU regulation #1998/2006 defines *de minimis* state aid as state aid of up to 200,000 Euros, granted over a period of three years to a particular enterprise. It is not required that the European Commission be notified of such aid. The definition of state aid in the draft law largely complies with this EU regulation although state aid does not include a privatization process, the issuance of licenses and/or permits as well as those public procurements which are carried out using moneys allocated from the reserve funds of the President's, Georgian Government's and/or Tbilisi Mayor's Offices. According to 2011 data, the amount of the above-listed reserve funds totaled GEL 102 million.

1.2.3 Competition and the State Procurement Agency

One of the shortcomings of the law effective in 2011 was the insufficient independence and competence of the Free Trade and Competition Agency. The submitted draft law provides for the establishment of the Competition and State Procurement Agency. It is noteworthy that the Comprehensive Strategy in Competition Policy envisaged the establishment of a competition

[6] Subparagraph 5, Paragraph 4.1.6, Chapter 1 of the Decree #1551, dated 2010, of the government of Georgia on the Approval of Comprehensive Strategy in Competition Policy.

agency which would also be responsible for monitoring the state procurement process. Under this draft law, however, the Competition and State Procurement Agency would be in charge of the enforcement of both the competition and state procurement laws. Consequently, the draft law envisages the replacement of the operating State Procurement Agency with the Competition and State Procurement Agency, and the direct involvement of this new agency into the process of state procurement as well as the monitoring of that process. It is noteworthy that such functions as competition legislation enforcement supervision, organization of the state procurement process and the monitoring of that process are essentially different from one another; hence, merging these roles into a single agency will not promote either the efficient enforcement of competition policy or the efficient supervision of state procurement.[7]

Complaints of alleged infringement can be filed with the Agency by any economic agent (complainant), which believes that it has directly sustained damages as a result of the distortion of competition. Evidence must be submitted along with a complaint. The complainant is regarded as a party to the dispute and the burden of proof rests with it.

An application to the Agency can also be submitted by an individual (applicant) who has not sustained any damage personally but who has information, or any type of evidence, about a breach of competition legislation. In such cases, the applicant is not regarded as a party to the dispute.[8] This is a positive development which encourages the exposure of legal infringements.

Under the draft law, both complainants and applicants pay the Agency service fee. The fee size is determined by the government. According to Article 94 of the Constitution of Georgia, the payment of taxes and duties is obligatory in the amount and in accordance with a procedure established by law. The structure and rules of the establishment of taxes and duties are specified only by the law. The provision in the Draft Law on Free Trade and Competition, empowering the government to determine fines and fees, contradicts the Constitutional requirements. With regard to this provision, the Constitutional Court of Georgia's decision N 2/1/187-188, dated 10 January 2003, declares that a fee established through a by-law is unconstitutional.[9]

The Agency is entitled to refuse to start an inquiry into a case if a complaint and/or application does not fall within the priorities identified by the government. In such a case, the service fee is not refunded. This provision significantly undermines the applicant's motivation to inform the Agency about violations of the law. Moreover, the Agency only reacts to submitted complaints and applications and does not monitor the areas of potential risk.

If the investigation of a case reveals a breach, the Agency forwards the case to the court[10] for a ruling. Fines and/or sanctions can be imposed only by the court except in those cases when an

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[7] Comments and Suggestions Regarding Georgian Government's Legislative Initiative: Draft Law "On Free Trade and Competition", Transparency International Georgia, 14 December 2011, http://transparency.ge/post/general-announcement/shenishvnebi-da-tsinadadebebi-sakartvelos-mtavrobis-mier-sakanonmdeblo-ini

[8] Paragraphs 1 and 2, Article 22 of the Draft Law on Free Trade and Competition.

[9] Comments and Suggestions Regarding Georgian Government's Legislative Initiative: Draft Law "On Free Trade and Competition", Transparency International Georgia, 14 December 2011, http://transparency.ge/post/general-announcement/shenishvnebi-da-tsinadadebebi-sakartvelos-mtavrobis-mier-sakanonmdeblo-ini

[10] Tbilisi City Court.

economic agent, as the result of investigation into a case, admits to violating the rules of competition and stops its anticompetitive activity on the basis of a decree of the Agency[11].

Granting the court the power to deliver a final decision, including the power to impose fines and/or sanctions, may protract the process of putting an end to anticompetitive activity. Moreover, empowering the court to make the primary decision deprives an economic agent, as well as the Competition Agency, of one instance of appeal.

It is important for the Agency to have the right to make certain decisions, for example, the right to suspend contracts and transactions. Waiting for a court decision will greatly extend the timeframe of each case. The decision of a competent body on establishing a fact of restricting competition which distorts the market must enter into force instantly, especially in cases in which the decision must be enforced immediately.[12]

It would be better to empower the Competition Agency to make a decision. It is true that this could increase the risk of corruption but the Georgian government has strong experience in fighting corruption and depriving the Agency of its key power on this ground seems inexpedient.

1.3.4 Exceptions

The submitted draft Law does not apply to commodity or service markets with a market turnover of more than 0.25 percent of the Gross Domestic Product (GDP).[13] Considering Georgia's GDP for the year 2010, 0.25 percent comprises approximately GEL 52 million. Given the limits defined in the draft law, monopolistic activity such as that which has been recently detected by the Georgian Government in the salt business, may not qualify for regulation.

The draft law grants great power to the Georgian Government in the competition sphere. In particular: the government is authorized to determine exceptions to the prohibitions of anticompetitive agreements.[14] Priority directions in the Agency's activity are periodically approved by the government. The Agency considers complaints and/or applications in accordance with priorities approved by the government and it is not responsible for any results which may occur due to a failure to consider complaints and/or applications which do not fall under the priority directions[15].

"One can say that the most significant shortcoming and so-called 'black hole' in this law is a possibility for applying exceptions by the government. That means that if the Agency receives a complaint against unlawful restriction of competition by a company in the market, the government can set this precedent and name the activity of that concrete company as an exception. Consequently, none of the sanctions provided in the Law will apply to such a

[11] Paragraph 7, Article 29 and paragraphs 2 and 3, Article 26 of the draft Law on Free Trade and Competition.
[12] Kakha Gogolashvili, http://24saati.ge/index.php/category/news/2011-11-04/21332.html
[13] Subparagraph f), paragraph 4, Article 1 of the draft Law on Free Trade and Competition.
[14] Paragraph 3, Article 9 of the draft Law on Free Trade and Competition.
[15] Paragraphs 1-3, Article 19 of the draft Law on Free Trade and Competition.

company. That seemingly small detail questions the efficiency of the entire activity of the Agency."[16]

1.3.5 Sanctions

The powers of the Competition and State Procurement Agency regarding economic agents, as defined in the draft law, predominantly comply with the equivalent EU regulations, however the effectiveness of sanctions and fines provided by the draft law is arguable.

In the EU, sanctions applied against the violation of competition legislation are divided into the following categories:

- A fine for failing to supply information or for the supply of incomplete/incorrect information;
- A fine when anticompetitive action is proved;
- A sanction for the protraction of anticompetitive action;
- A fine for the repetition of anticompetitive action.

According to the Draft Law on Free Trade and Competition, the failure to supply information to the Competition and State Procurement Agency for aims specified in the law, is punishable by GEL 1,000 to GEL 3,000 in fines for legal persons.[17] The size of the fine is inadequate with a potential unlawful action and negative effect thereof. With high probability, the majority of applications will refer to violations of competition conditions by subjects holding a dominant position. For such subjects, if a violation is proved, the above-quoted amount is not significant enough and will protract the investigation into the case by the Agency.

According to EU regulation #1/2003, dated 16 December 2002, the European Commission is authorized to penalize those subjects who fail to provide, or who provide misleading information requested in the process of hearing a case related to competition policy. The fine amount is set at a maximum of 1 percent of the subject's entire turnover in the preceding year. Even though the Georgian market is much smaller than the European market, the size of the fine specified in the submitted draft law is small and does not represent a real lever against violators of the law. If we apply the rule for calculating the fine amount under the EU regulation (a maximum of 1 percent of the entire turnover in the preceding year), the fine of GEL 3,000 (which is the maximum fine amount, according to the draft law), as an illustration, may be imposed on a subject which has an annual turnover of over GEL 300,000. Such turnover is small for Georgia and cannot be related to a dominant market position.

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[16] Salome Tetradze, Accelerated Competition Policy in Georgian-European Context, http://www.gfsis.org/index.php/ge/activities/projects/view/86/page/189/id/302/print/true -

[17] Article 32 of the draft Law on Free Trade and Competition.

The submitted draft law envisages penalizing an economic agent in cases of a significant restriction of competition. The fine amount shall not exceed 10 percent of the profit received by an economic agent during a financial year. If an economic agent has not received any profit during the financial year in question, the fine will be set at a maximum of 2 percent of the turnover.[18]

The European Commission is authorized to impose a fine on an economic agent for the violation of competition conditions. The fine amount shall not exceed 10 percent of the economic agent's total turnover for the preceding year[19].

The fine for restricting competition, as determined in the submitted draft law, is much less than the rate established in EU regulation #1/2003. Tying the fine to profit or, in the absence of profit to turnover, leaves the economic agent room to manipulate the situation. In case of a smaller profit, the size of the fine will be much less than the fine which is levied in case of the absence of the profit, which is illogical.

The European Commission is authorized, until after the violation has been eliminated, to impose a daily fine on an undertaking or association of undertakings, which shall not exceed 5 percent of the average daily turnover from the preceding year. The aim of this sanction is to quickly eliminate the anticompetitive action.[20]

The draft law submitted by the Government of Georgia does not envisage such sanctions. Regulation #1/2003 is a binding document for the EU Member States. This document defines the upper limit of the fines imposed and EU Member States are obliged to follow this regulation in their respective national legislations. The majority of EU Member States apply fines and sanctions which they have established within the norms defined in Regulation #1/2003. However, for those companies which operate within one state alone, that state's national legislation may define sanctions of a different size.

We will cite certain examples from EU Member States. Germany has fully brought its sanctions and fines into compliance with Regulation #1/2003, but permits exceptions for small and medium-sized businesses. These exceptions apply to those companies whose geographic area of operation is limited to the territory of Germany alone.
In Latvia, the Competition Council is authorized to detect violations committed by economic agents and impose corresponding fines.[21] The Law on Competition prohibits the abuse of a dominant position and the Competition Council is entitled to penalize an economic agent for such a violation. The fine amount for such a violation may comprise up to 5 percent of the turnover of the preceding financial year. If an economic agent fails to fulfill assumed liabilities, the Competition Council has the right to toughen sanctions – and to increase the fine amount to up to 10 percent of the total turnover of the preceding financial year. The Cabinet of Ministers issues additional regulations by which fines are specified, taking into account the gravity and

[18] Paragraphs 1 and 2, Article 35 of the draft Law on Free Trade and Competition
[19] Paragraph 2, Article 23 of the EU regulation #1/2003.
[20] Paragraph 1, Article 24 of the EU regulation #1/2003.
[21] Law of Latvia on Competition, http://www.kp.gov.lv/uploaded_files/ENG/Competition_law.pdf.

duration of the violation. A number of factors are taken into consideration when determining the gravity of a violation, such as: the type of violation, the results of that violation and the number of market participants involved in it. Through a Cabinet regulation, the Competition Council is allowed to reduce the fine imposed on an economic agent by a certain degree.

In Sweden, the decision about penalizing an economic agent is made by the Stockholm City Court on the basis of application by the Swedish Competition Authority. The fine amount depends on the gravity and duration of the violation. The amount of the administrative fine shall not exceed 10 percent of the economic agent's turnover in the preceding year.[22] According to Swedish legislation, an economic agent can be partially or entirely exempted from the imposed fine. To this end, the economic agent should apply to the Competition Authority and plead guilty to the violation.

1.3.6 The institutional enhancement of a legal entity of public law – The Free Trade and Competition Agency

By Presidential Decree #829, dated 19 December 2011, it was decided that the State Procurement Agency and the Free Trade and Competition Agency be reorganized and that a new legal entity of public law be established on their bases – the Competition and State Procurement Agency.

The aim of the Competition and State Procurement Agency is to ensure compliance with the Law on State Procurement and legislation concerning free trade; to supervise the legality of procurement procedures in the sphere of state procurements; to define the regulation policy for the procurement process, and; to eliminate barriers related to free trade and competition for natural and legal persons in Georgia.

The Agency's charter was approved by Decree #497 of the Government of Georgia, dated 27 December 2011.

State control of the Agency's activity is carried out by the Government of Georgia within the scope of and in accordance with the rule established by the relevant Georgian legislation.

This reform is in conformity with the models which exist in Europe in terms of subordination and control. In many EU Member States, the agencies which control competition are subordinated to their respective ministries of economy (as in Austria, Finland, Germany, Slovenia, and Latvia) or directly to the prime minister (as in Poland). However, in Hungary, for example, such an entity is directly subordinate to the Parliament of Hungary.

Article 3 of the charter of the Competition and State Procurement Agency defines the Agency's powers, which fit in with the aims set forth in the Laws of Georgia on State Procurement and on Free Trade and Competition.

[22] Swedish Competition Authority's webpage; http://www.kkv.se/t/Page____7094.aspx

The establishment of a new legal entity of public law has changed nothing in terms of how competition is regulated because the Law on Free Trade and Competition was not amended in 2011. Consequently, the reorganization of these two legal entities of public law has not yet brought about any positive effect in the area of competition policy.

1.3.7 The training of personnel of the Free Trade and Competition Agency and relevant state agencies; awareness-raising of private sector and judges regarding competition law

During 2011, significant measures for the institutional enhancement of the Free Trade and Competition Agency and activities designed to raise the awareness of the public and private sectors were not implemented. However, an action plan was developed and a donor organization was identified, which will finance the measures envisaged by this plan.

The Free Trade and Competition Agency launched a long-term assistance program together with the Swedish International Development Cooperation Agency (SIDA) and the Swedish Competition Authority. The project envisages the conduction of trainings and the implementation of an information campaign on competition policy issues with the aim of upgrading the qualification of public servants and judges as well as raising the awareness of the public sector, civil society and consumers.

Initial events implemented in 2011 within the framework of this project included a training session for Competition Agency employees and other public servants. The training focused on the deregulation of competition and best practices in the EU. A conference for business representatives was also held about planned amendments to competition legislation. The following day a seminar was held on the same topic for representatives of the Competition Agency.

1.4 Conclusions and recommendations

In 2011, the Government of Georgia partially fulfilled the obligations it assumed under the ENP.

The obligation for the submission of a Draft Law on Free Trade and Competition to the Parliament was fulfilled, although, significant remarks have been made regarding that draft law. Although the draft law was not adopted in 2011, this was not one of Georgia's obligations.

The submitted draft law conceptually complies with the European competition policy. The draft law however, has several serious shortcomings which, in the process of its enforcement, will enable the government to mitigate actual enforcement of the law. These shortcomings are: government power to determine exceptions from the prohibitions; small fines; a lack of power on the part of the Competition Agency to make final decision; an applicant's obligation to pay a service fee.

The obligation regarding the enhancement of the Free Trade and Competition Agency has been fulfilled in part. In the end of 2011, a new legal entity of public law – the Competition and State Procurement Agency – was established. However, this institutional enhancement cannot be assessed by means of this change until the new law enters into force.

The activity carried out in 2011 with regard to training the personnel of the Free Trade and Competition Agency and relevant agencies as well as raising the awareness of the private and judicial sectors on competition policy was not adequate. It is recommended that in addition to the SIDA support program, the state budget of Georgia also allocates funds for the implementation of the measures necessary for the achievement of this goal.

Effective control mechanisms in the competition sphere are not likely to be introduced by the government in 2012, given the decrease in the already inadequate funding that has been earmarked for that sphere (relevant Agency). It should be noted that the budget of the Free Trade and Competition Agency was GEL 180,000 in 2011 and it had nine employees. The budget of the State Procurement Agency totaled GEL 1,002,100 and it had 37 employees. The budget of the Competition and State Procurement Agency, established on the basis of those two agencies, has been set at GEL 1,171,900 for 2012, which is less than the 2011 funding. It is unclear how the new agency will be able to perform more functions with less funding. The 2012 State Budget represents a framework which must reflect funding commensurate to the increased functions of the Agency.

It is recommended that the Draft Law on Free Trade and Competition be reviewed and amended so the following is ensured:

- The role of government decreases in terms of determining the application of competition legislation to economic spheres so that priorities and exceptions are determined by the legislation.

- Fines for the violation of competition legislation are adequate with regard to potential unlawful action and its negative effect.

- The Competition Agency is empowered to make a final decision in order to bring a speedy end to anticompetitive action.

- The Competition Agency is responsible for monitoring economic sectors and its activity is not limited to reacting to submitted complaints and applications alone.
- The fee for submitting complaints and application to the Competition Agency is established by the law.

- The law envisages the refunding of the fee to an applicant in cases when information on the violation of legislation submitted by an applicant to the Agency has been proved.

References:

- Leszek Balcerowicz, *Freedom and Development*, Tbilisi, 2004.
- Slava Fetelava, *Theory of Competition and Anti-Monopoly Regulation in Georgia*, Tbilisi, 2007.
- EU-Georgia Partnership and Cooperation Agreement.
- European Neighborhood Policy, EU-Georgia Action Plan.
- Implementation Plan of the European Neighborhood Policy EU-Georgia Action Plan (ENP AP) 2011.
- The Treaty on the Functioning of the European Union.
- EU Regulation #1/2003 on the implementation of the rules on competition, dated 16 December 2002.
- Draft Law on Free Trade and Competition submitted to Parliament on 12 September 2011.
- Decree #1551, dated 2010, of the government of Georgia on the approval of the Comprehensive Strategy in Competition Policy.
- Decree #143, dated 26 February 2010, of the President of Georgia on the Establishment of Legal Entity of Public Law – Free Trade and Competition Agency.
- Letter of Lasha Mgeladze, the head of Free Trade and Competition Agency; 11 December 2011.
- Salome Tetradze, Accelerated Competition Policy in Georgian-European Context, October, 2011, http://www.gfsis.org/index.php/ge/activities/projects/view/86/page/189/id/302/print/true-
- Comments and Suggestions Regarding Georgian Government's Legislative Initiative: Draft Law "On Free Trade and Competition", Transparency International Georgia, 14 December 2011, http://transparency.ge/post/general-announcement/shenishvnebi-da-tsinadadebebi-sakartvelos-mtavrobis-mier-sakanonmdeblo-ini
- Sopo Chikhladze, Experts and EU Unhappy with Draft Law Initiated by Government, 24 Saati newspaper, 4 December 2011, http://24saati.ge/index.php/category/news/2011-11-04/21332.html
- Law of Latvia on Competition, http://www.kp.gov.lv/uploaded_files/ENG/Competition_law.pdf
- Kakha Mchedlidze, "Causes of Decrease and Increase in Medication Prices in Georgia," RFE/RL, 28.04.2010, http://www.radiotavisupleba.ge/content/article/2027078.html?s=1
- Swedish Competition Authority's webpage: http://www.kkv.se/t/Page____7094.aspx

During the preparation of this report, meetings, interviews and written communications were conducted with the following representatives of various agencies:

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- **Nodar Khaduri,** Full Professor at the School of Economics and Business at Tbilisi State University.
- **Davit Narmania,** Executive Director of Caucasian Institute for Economic and Social Research.
- **Giorgi Dzneladze,** Associated Professor at the School of Business and Law at Grigol Robakidze University.
- **Zviad Modebadze**, Coordinator of the Corporate Social Responsibility Program at the Centre for Strategic Research and Development of Georgia.
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II Customs Procedures

2.1 Introduction and brief overview of report

Obligations identified in the European Neighborhood Policy Action Plan (ENP AP) for Georgia in the sphere of customs are the following:

- Chapter 3. Priorities for Action. Priority Area 2:
  - Adopt and implement a new Customs Code in line with EU and international standards;
  - Adopt and implement the necessary implementing provisions to the revised Customs Code in order to simplify and streamline customs procedures;
  - Address the issue of customs ethics to bring them in line with EU and international standards;
  - Set up a mechanism to ensure that the trade community is regularly informed and consulted on customs procedures;
  - Strengthen the overall administrative capacity of the customs administration;
  - Increase transparency of customs rules and tariffs;
  - Ensure the correct implementation of customs valuation rules;
  - Implement the principles of risk-based customs control and post clearance audit;
  - Provide the customs administration with sufficient operational capacity in the sphere of IT;
  - Establish the necessary administrative capacities to ensure an effective and transparent licensing system.
- Chapter 4. General Objectives and Actions. 4.3.1. Cooperation on border management:
  - Enhance inter-agency cooperation among state authorities involved in border management;
  - Enhance cooperation with neighboring countries in border delimitation, demarcation and control;
  - Ensure full implementation of existing and planned multilateral and bilateral border cooperation agreements and protocols.
- Chapter 4. General Objectives and Actions. 4.5.1. Movement of goods:

- Reinforce customs controls on imports and exports of counterfeit goods;

- Develop an integrated border management strategy by strengthening co-operation between customs and other agencies working at the border;

- Develop EU-Georgia co-operation with regard to risk-based customs control.

Moreover, the EU considered the reformation of customs as a necessary condition for launching negotiations on the Deep and Comprehensive Free Trade Agreement (DCFTA) with Georgia.

Several customs-related initiatives in the European Neighborhood Policy Action Plan 2011 (see paragraph 12 and paragraph 20) also need to be singled out: improvement of a risk-assessment based control system; introduction of "one-stop-shop" principle regarding customs clearance within the Customs Clearance Zone(CCZ); signing of agreements on integrated management with bordering countries with a view towards the simplification of customs procedures.

The present study describes and assesses measures implemented by the Revenue Service in the area of customs in 2011. In the assessment section of this study, customs reform is analyzed in the context of obligations assumed under the ENP AP.

Reformation of the Georgian customs administration, which has been undergoing intensive implementation since 2005, continued in 2011 as well.

As in recent years, in 2011 changes to customs legislation and procedure were rapidly implemented. Overall, these changes must be assessed as positive developments.

The customs administration was granted the right to issue import-export licenses and permits in parallel with those state agencies that had been authorized to issue such licenses and permits. Thus, the private sector will now have an opportunity to choose for itself which agency to approach to apply for licenses and permits. The introduction of healthy competition between state agencies is expected to improve the quality of service.

Measures undertaken regarding the control of customs warehouses, which envisage the annulment of physical control on warehoused goods and the introduction of the audit as an alternative form of control, can also be considered a positive development. Moreover, the issue of VAT taxation on internationally shipped goods and related services has been put to rights on the legislative and procedural levels.

Procedures of standard international practice, such as advance customs declaration on goods and the "one-stop-shop" principle of service, were established.

Cooperation with the private sector can be assessed as revolutionary. Cooperation with business and establishment of customer-oriented services were among key objectives of the Revenues Service in 2011. Intensive discussion seminars were conducted with representatives of the private sector. The American Chamber of Commerce in Georgia and Office of Business

Ombudsman represented an important platform for the cooperation between private and public sectors in the area of customs.

Changes implemented for institutional development are also noteworthy. This aspect did not receive much attention during the early stages of the reforms, an oversight which partially eroded the sustainability of some positive reforms. Moreover, during the past two years, a number of organizations detected shortcomings in the institutional development of customs and provided the Revenue Service with recommendations on areas which needed more attention, such as: the preparation of a strategic development plan; improvement of the management of human resources; personnel training; the optimization of organizational structure, and so forth.

Some difficulties still remain in the area of customs valuation. In particular, the customs administration does not fully implement the rules for determining customs value which have been established by the World Trade Organization (WTO).

The year 2011 did not see any significant changes in the area of risk management. Furthermore, several new initiatives which were brought forth in 2010 with the idea that they would be enforced in 2011(including the risk management transit module), have not yet entered into force.

In 2011, the Revenue Service continued working intensively on the introduction of IT technologies. PIRS software, which is integrated with the border police, was installed and the availability of electronic services was improved.

The year 2011 also saw an intensification of international cooperation in the sphere of customs. An agreement was signed between Georgia and Turkey on the exchange of information between neighboring customs checkpoints along the border. The agreement was based on the memorandum of cooperation signed by the two countries in 2010.

The customs administration carried out intensive activity in the area of intellectual property rights protection. With the assistance of donor organizations, trainings were conducted for customs personnel with the aim of raising the awareness of customs officers about intellectual property as an issue, in general, and about the role of customs in the protection of intellectual property, in particular.

2. Legislation and State Policy

The Revenue Service (Georgia's combined tax and customs administration) was created in 2007, based on the analogy of similar successful services in several EU member states. Within the first five years of its establishment, the Revenue Service managed to become a stable state entity, focusing on development reform and customer relations with increasingly positive reviews from the business sector.

The Government of Georgia wants to reform the customs administration so that it converges with EU requirements. Proof of this is the 2006 Georgian customs legislation drawn up on the basis of EU customs code.

Since 2011, the Tax Code of Georgia has functioned as a framework document regulating the customs sphere. The provisions on the crossing of the economic border, which regulate legal and economic issues related to the import and export of all material assets to and from Georgia, have had a particular impact. Some of the areas defined by the Tax Code include: the status of imported and exported goods; customs approved treatments; the liabilities of owners of goods to the state budget; and restrictions and prohibitions imposed on the export-import of goods. The Tax Code formulates the framework principles and general rules of activity which, as a rule, are further specified in various bylaws.

A key bylaw regulating the customs sphere is Decree #993 of the Minister of Finance of Georgia, dated 31 December 2010. In addition, various decrees by the Minister of Finance of Georgia and Presidential ordinances regulate many other issues. Georgia is a signatory of a number of international conventions and treaties regulating the customs sphere (such as, The General Agreement on Tariffs and Trade (GATT)), which are considered superior to domestic customs regulations, according to Georgian Constitution.

The phytosanitary and veterinary-sanitary functions of the Georgian Customs Administration are worth mentioning. State policy in this area is implemented along the state border by the customs services in close cooperation with the Ministry of Agriculture.

Another successful example of inter-agency cooperation is the redistribution of border control responsibilities between the customs authority and border police. Passport control, vehicle inspection and anti-smuggling measures are implemented by the two agencies in coordination.

Intellectual property protection, which is regulated by the Law of Georgia on Border Measures Related to Intellectual Property, has recently become an important part of state customs policy.

Significant changes in customs administration which have been implemented during the past seven years include: the complete re-branding of the customs service; the development of new legislation; personnel reform; the modernization of infrastructure; and the introduction of IT technologies.

Looking at the processes which were underway in 2011, it becomes clear that the strategic aims of customs administration were:

1) To create a customer-oriented service and establish cooperation with the business sector;

2) To enhance institutional service.

The first aim was, presumably, prompted by the feeling that, for years, the reform process often brought no concrete results. On the contrary, it proved that the business sector, as a client of the customs service, had absolutely different expectations of and needs for the reform process.

The changes which were developed as a result of consultations with the private sector were implemented much more quickly and proved to be more efficient than earlier attempts at reform.

Another key aim is prompted by the fact that over the course of the reforms process there have been instances in which the need for certain concrete procedural changes has been agreed upon by all involved parties, however, the persistent institutional weakness of the customs administration (such as a poorly-functioning IT system and a lack of qualified human resources) hindered the fast and efficient implementation of the reforms.

In 2011, the key donor organizations assisting customs reform were the EU Mission and the USAID Technical Assistance Program.

2.3 Implementation of obligations assumed under ENP AP

2.3.1 Adopt and implement a new Customs Code in line with EU and international standards

Legislative changes

Amendments to customs legislation and procedure protocol have been intensively implemented during the past few years, and 2011 was no exception in this regard.[23] The rapid rate in which reforms have been implemented has placed quite a heavy burden on the private sector to keep pace –businesses have barely updated themselves to become compliant with new regulations and procedures when they have discovered that yet another set of changes have already been introduced.

It is necessary for the Revenue Service to establish a stable legislative framework and stable customs procedures which comply with international practice.

Import-export licenses and certificates

The customs body was authorized to issue certain compulsory, legally established/binding licenses, permits and certificates governing the import and export of goods. Previously, the licenses, permits and certificates affecting the import-export activities of separate commodity groups had been issued by various state agencies within the respective scopes of their competences on the basis of exclusive authority granted by the state. For example: the Ministry of Sustainable Economic Development issued permits on the import and export of dual use goods; entities subordinated to the Ministry of Agriculture issued permits and certificates for the export, import and transit of phytosanitary and veterinary commodities; and, the Ministry of Environmental Protection and Natural Resources issued permits for the import of materials of limited circulation.

According to a new initiative, the customs administration has also been granted the right to issue the above-listed licenses, permits and certificates. This does not preclude the ability of

[23] Tax Code of Georgia and Decree #993 of the Finance Minister of Georgia, dated 31 December 2010.

other state agencies to continue the issuance of permits and licenses within the scope of their competences. Rather, it provides business people with the choice of where to apply for the license or permit in question.

This change is a positive development as it is improves customer service and creates better comfort for the private sector.

Technical and safety requirements of customs warehouses

Through legislative and procedural amendments, a more flexible use of customs warehouses has become possible. In particular, the compulsory licensing and technical requirements for the opening of a warehouse have been replaced with alternative mechanisms of customs control. These changes are designed to improve the logistics for receiving goods imported to Georgia.

Instead of the technical norms for physical safety, customs now demands that risks against the loss of goods be insured only by customs guarantee. As an alternative method of control, customs now conducts the inspection of registration documents of goods stored in warehouses as well as carries out regular inventory. If a shortage is detected, corresponding customs duties will be covered by a customs warehouse guarantee.

This initiative must be assessed as a positive development as it supports both import companies and companies rendering logistical services to cargo transiting through Georgia. The enhancement of transit cargo logistics implies the development of regional warehouse centers in Georgia.

The advantage of warehouse regulations which comply with international practice is that they enable companies to use their own warehouse infrastructure as a customs warehouse without having to make additional investments to meet technical licensing requirements. Moreover, companies will be able to store both those goods which have been cleared by customs (placed under the customs warehouse regime) as well as other goods in one space.

It should be noted that this change was drawn up and implemented as the result of intensive dialogue with the private sector.

VAT taxation of service of international goods shipment

Until June 2011, the Georgian Customs Authority levied import taxes based on the value of goods (customs duty and VAT). Customs value contains only the transportation and logistics cost incurred up to the border of Georgia and does not contain cost incurred after the Georgian border has been crossed (see, Article 7, GATT). This is normal for the aim of customs duties.

An incorrect practice was a VAT scale based solely on customs value alone. According to international best practice, import VAT should be based on customs value plus all the cost the goods in question incurred in Georgia (for logistical, brokerage, packaging and insurance services) before they were cleared by customs.

Consequently, all logistical services in connection with foreign goods entering Georgia must be rendered VAT-free. The principle is that services rendered to foreign goods are part of the goods themselves and if the goods are released into free circulation that the related service is provided as part of goods. If goods leave the territory of Georgia through transit or re-export, VAT on services rendered to those goods is not charged and not retained in Georgia.

It is of principal importance that VAT is tied to the status of the goods in question; in other words, service to foreign goods is not subject to VAT, and the issue of VAT arises after a customs operation on goods has been determined (it is not limited to imports alone, it may also apply to temporary imports, processing, and so forth).

This incorrect practice was rectified by an amendment to the Tax Code adopted by Parliament in May 2011, which exempts international shipments and related services from VAT. This amendment was drawn up and implemented as the result of intensive dialogue with the private sector.

Rules for declaring goods

Positive changes have been observed in this sphere as well. The Revenue Service introduced the practice of pre-arrival customs declaration, that is, the declaration of goods and the fulfillment of all compulsory customs formalities by a company before the consignment's arrival. After the goods are brought into Georgia and physically presented to customs, they will then be released in the shortest possible time. Clearly, the advantage of this practice is that goods which have been declared in advance will not experience any delays in being released from customs. Even though at the time of writing, pre-arrival customs declaration applies only to imported goods, the initiative must be assessed as positive and will probably be gradually be applied on a larger scale.

Pre-arrival declaration is a common practice in many EU member states distinguished for their well-organized customs administration. In this context, it can be said that the Georgian customs authority has started implementing yet another initiative which serves the aim of harmonizing customs procedures with the best international practice.

One-stop-shop service in customs clearance zone (CCZ)

The first customs clearance zone was commissioned near Tbilisi in November 2010. The next two – in Batumi and Poti respectively –started operation in 2011.

The customs clearance zone is a classic example of the one-stop-shop principle. Each and every customs procedure here is simplified and transparent for importers and exporters and processes have been automated to the maximum extent.

One of the complaints voiced by the private sector with regard to the customs clearance zones is related to their rather high service fees (see the following section for a more detailed discussion of this issue). The point is that these service fees have been defined by resolution of

the Government of Georgia[24] when the tariff policy itself should be based on the WTO recommendations which advise that any fee for services rendered by the state to the private sector should not exceed the service cost. It appears that this principle is not being observed in the case of the services provided in the customs clearance economic zones.

2.3.2 Set up a mechanism to ensure regular consultation with/informing of the trade community on customs procedures

The attitude of the Revenue Service towards the business sector has fundamentally changed. A campaign conducted in 2011 clearly expressed a desire on the part of the Revenue Service to involve the private sector, on the largest possible scale, in the process of customs reform, which, in turn, ensures customer-oriented reform. Unlike previous years, the 2011 campaign was not a mere formality implemented for PR aims alone, but a genuine attempt to study and accommodate private sector needs.

At the initiative of the Revenue Service, working meetings were regularly held with representatives of the American Chamber of Commerce and the office of Business Ombudsman.

The establishment of such a relationship facilitates the achievement of two goals: 1) reforms become more carefully thought-out and customer-oriented; 2) the private sector is regularly consulted regarding ongoing processes in the customs sphere.

However, one of the shortcomings in the present state of the dialogue between the Revenue Service and the private sector is the absence of a formal, sustainable platform. This process has been initiated by a new customs management, but it is not fixed at an official (legislative and procedural) level. For the process to become sustainable and more stable, it is necessary to set up a structural unit in the form of a "Consultation Council" – a step that has been repeatedly recommended by international experts.[25]

One recent survey aimed at identifying problems in the relationship between the private sector and the customs administration was conducted by the research and consultation group of the Free University. Below is the list of the main problems facing the private sector, as they have been determined by the study and communicated to the Revenue Service: high customs duties; complicated rules for the declaration of goods; non-compliance of the commodity classification codes with international practice; procedures for storing goods in customs warehouse and for re-export; and the rules governing customs valuation.

[24] Resolution #96, dated 30 March 2010, of the Government of Georgia, on the establishment of service fees and rates, rendered by Legal Entity of Public Law Revenue Service.
[25] Customs Reform Strategy. USAID Economic Prosperity Initiative, 2011, p. 40.

2.3.3 Strengthen the overall administrative capacity of the customs administration

Structural and organizational changes in the Revenue Service

On 23 May 2011, the Georgian Ministry of Finance approved a new Revenue Service charter[26] according to which, the degree of the Revenue Service's institutional independence has actually remained the same. This entity remains a legal entity of public law under the Ministry of Finance.

This new charter yet again outlines more changes to the structure of the Revenue Service. A number of new departments were set up, and one existing department – the training center – was put under the jurisdiction of the Ministry of Finance.

It should also be noted that last year a new Revenue Service head was appointed.

Structural changes to the customs administration have been chaotic since 2004. This can be explained by the fact that customs reform lacks strategic planning. The structure of any organization must be in conformity with that organization's key goals and objectives and the Revenue Service often refocuses customs reforms and restates key goals and every time this happens it also has to change its structure

It would be expedient for the Revenue Service to establish a stable structure based on the best practices of other countries, which will have been well-thought-out in the context of future strategic reforms. It should also be noted here that there are many countries, including EU-members, which have successfully managed to combine their tax and customs services and have set up efficient revenue collecting body.

Human resources

Since 2005, the personnel of the customs service have been almost completely replaced. Mass replacement was part of the government's anti-corruption campaign. Personnel changes have indeed brought about positive results in terms of combating corruption, however, the need has now emerged for the Revenue Service to focus on the professional development of customs personnel.

According to the Head of the Revenue Service, Mr. Jambul Ebanoidze, the development of human resources has been one of the organization's top priorities and it should be noted that the Department of Human Resource Management was created and is being led by new management.

[26] Decree #303, dated 23 May 2011, of the Ministry of Finance of Georgia, on the approval of charter of Legal Entity of Public Law Revenue Service

One significant development in this area has been the preparation of job descriptions. This task was fulfilled with the help of the USAID technical assistance. As a result, job descriptions for 45 positions in eight main departments have been prepared.[27]

Job descriptions will help improve a number of practices and processes including: the process of selecting employees, the practice of identifying training needs, the practice of evaluating performance, motivation, and so forth. It should be noted that, according to a survey conducted within the framework of the EU technical assistance project, the lack of job descriptions was assessed as a major weakness of the customs administration.[28]

For the Revenue Service to ensure that drafting job descriptions becomes a sustained process, it is necessary that:

- The HR department management assign a person to that task;
- Existing job descriptions be updated regularly;
- The procedures for preparing job descriptions and the further handling of this process be developed and introduced as a normative act.

Another important responsibility is the organization of regular trainings to help upgrade of qualification of personnel. In this direction, an interesting development is the ongoing work on the introduction of the the World Customs Organization's (WCO) distance e-learning program. However, it is still unknown when this e-learning program will be established and which modules will be applied.

At present, the training regularly conducted for Revenue Service personnel is mainly focused on those short-term needs which emerge in the reform process.[29]

2.3.4 Proper introduction of customs valuation rules

The issue of applying the so-called "minimal values"[30] method remained topical in 2011 as well. Before 2009, this method was applied on a larger scale; however, later the customs authority turned away from it and largely started applying the transaction value method of customs valuation. One may assume that instances of the artificial reduction of customs values have been detected in practice and hence, since 2010, an already-tested method of customs valuation (minimal value) has been re-applied to certain commodity groups.

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[27] Development of job analysis and job descriptions in the Revenue Service, USAID, Economic Prosperity Initiative, 2011, pg. 4.

[28] Support of the Ministry of Finance's Revenue Service in Customs Sphere (EU project), 2010, pg. 41

[29] Training needs assessment in the Revenue Service, USAID, Economic Prosperity Initiative, 2011, pg. 3.

[30] A Price List of standard prices compiled by the customs authority which have been determined as the lowest customs clearance margin for separate goods. Such a method is often applied – both officially and unofficially – in developing countries. In such cases, the customs body applies various levers to force importers to clear their goods at the prices listed in the Price List.

According to Finance Ministry Decree #330, dated 8 June 2011, a new list of minimal rates for determining customs values by reserve method was approved.

The WTO categorically rejects the determination of any form of fixed minimal lower margin customs values. The function of customs valuation control must be delegated to a post-clearance customs audit group. It is also important to take this principle into account in the sense that the ENP AP requires strict observance of WTO rules in the area of trade.

A positive development in terms of custom valuation control has been the creation of a customs valuation database. The database contains processed information which allows the value of certain goods which fall under a risk group, and have been cleared at customs at a certain time to be determined. The database is used as a risk indicator. Any detected discrepancy between the information in the database and information submitted by an importer or exporter to customs may be a good indicator of possible wrongdoing. In such cases, a customs officer is entitled to conduct a customs audit.

2.3.5 Implementation of the principles of risk based customs control and post clearance control

According to a survey on customs procedure, conducted last year within the framework of the civil monitoring of the implementation of the ENP AP[31], intensive work on the development of the so-called "transit module" of risk management was underway in 2010. The transit module works to prevent illegal crossings of the Georgian border as well as carries out anti-smuggling measures. This program was at the testing stage which, usually, takes several months to complete. The development of the program was almost completed last year but, as it turned out, it has not been put into operation yet.

2.3.6 Equipping the customs administration with proper IT technologies

A significant change witnessed in 2011 was the joint introduction of PIRS software by the customs administration and the border police. This system is used for the registration of physical persons and vehicles crossing the Georgian border. The system raises the degree of coordination between the authorities involved in border management, as long as both border management authorities operate with a common database, and therefore helps avoid the duplication of information and procedures. Similar systems are broadly applied in many developed countries and represent a good example of integrated border management.

Work on the introduction of the electronic software system ASYCUDA World has almost been completed. Every customs office applies the ASYCUDA World system countrywide. Internet access to the customs system is already fully secure. Consequently, the practices of making online declarations and submitting electronic documents have become increasingly popular. However, few modules of the new program have not yet been installed including the automatic registration and control of tax payments, and the transit module of risk management.

[31] Bondo Bolkvadze, Customs Procedures, Implementation of ENP AP in trade and some related areas, Tbilisi, January 2010 (a report was prepared with the financial assistance of the Eurasia Partnership Foundation).

2.3.7 Cooperation with neighboring countries in border delimitation, demarcation and control

In this area significant progress has been seen in cooperation with Turkey. The customs administrations of Turkey and Georgia will exchange information about cargo moving via the customs checkpoint at Sarpi. This decision was made on the basis of a memorandum of understanding on the joint management of borders, signed by both parties in 2010. The memorandum covers both the Kartsakhi and Sarpi customs checkpoints.

The exchange of information will be conducive to coordinated activities between the two parties, which will result in on the streamlining of customs procedures and an increase in clearances. There is a whole set of border control measures, the implementation of which will allow customs offices of neighboring countries to assist one another. For example: a shipment crossing a border undergoes weighing and scanning procedures on both sides of the border, things which takes time. A customs officer may suspect some wrongdoing and decide to open a vehicle and inspect the goods being transported. For the same reasons, a customs officer on the other side of the border may also decide to inspect goods. If information is exchanged, a duplication of procedure can be easily avoided. It is sufficient to carry out such procedures on only one side of the border and then notify the other side about the findings.

One more avenue of cooperation would be the saving of resources necessary for the development of customs infrastructure, namely, expensive control tools which can be arranged in such a way as to be applied by customs offices on both sides. That would avoid the construction of two laboratories along one border.

Cooperation can be further deepened by the joint implementation of operations and the development of a joint system of risk management.

2.3.8 Reinforcement of customs controls on the import and export of pirated or counterfeit goods

In 2011, great attention was paid to the enhancement of the role of customs in the protection of intellectual property. Within the USAID technical assistance program, nearly fifty customs officers underwent training in this area. The training was aimed at raising the awareness of customs officers about issues affecting intellectual property in general, and about the role of customs in the protection of intellectual property, in particular. Training needs were identified by studies conducted under the aegis of various international organizations.[32]

At present, the main challenges with regard to the protection of intellectual property are: lack of expertise and experience; confusion regarding the role of customs in intellectual property protection, and; a lack of effective communication with holders of intellectual property rights. It is also necessary to establish deeper working relations between the customs service and the Sakpatenti (the key authority in charge of protecting intellectual property in Georgia).

[32] Customs Reform Strategy. USAID, Economic Prosperity Initiative, 2011, pg. 98.

2.4 Conclusions and recommendations

In 2011, reforms in the customs sphere were mainly implemented in the context of the ENP AP.

For the further convergence of customs procedures with the experience of EU member states, we provide following conclusions and recommendations:

- The structure of the Revenue Service is very unstable. A stable organizational structure, which will serve the strategic development plan, must be established.

- The development of human resources should remain a top priority. For this to happen, it is expedient for the Revenue Service to: continue work on the enhancement of human resources, including projects started in 2011; draw up a personnel management strategy which will regulate issues concerning motivation, professional development, and the performance evaluation of personnel, and; continue organizing training programs which must become the foundation for further development of the service.

- The customs administration is equipped with one of best operational IT technologies in the country, although work on the introduction of the ASYCUDA World operational system, or alternative systems, must be continued to ensure that the IT aspects of customs procedures are fully supported.

- The role played by customs in the protection of intellectual property rights needs to be further developed. The administration must continue enhancementof the customs role in the protection of intellectual property rights. To this end, an effective communications mechanism must be developed with holders of intellectual property rights and the Sakpatenti and the regular training-retraining of customs officers in the area of the protection of intellectual property rights must be conducted.

- The determination of customs value by so-called “minimal values” is a detrimental practice. The customs administration should drop the existing practice of customs valuation and bring its rules for determining customs values in line with the regulations laid out by the WTO.

- The fees which have been established for customs services are too high. The administration should revise its service fees in accordance with the recommendation of the WTO.

- The year 2011 was not productive in the area of risk-based control. The customs administration should introduce risk-based control in such areas as passenger control and border customs control.

References:

- Tax Code of Georgia.
- Decree #303, dated 23 May 2011, of the Ministry of Finance of Georgia, on the approval of charter of Legal Entity of Public Law Revenue Service.
- Decree #993 of the Finance Minister of Georgia, dated 31 December 2010.
- Resolution #96, dated 30 March 2010, of the Government of Georgia, on the establishment of service fees and rates, rendered by Legal Entity of Public Law Revenue Service.
- Support of Ministry of Finance's Revenue Service in Customs Sphere (EU project), 2010.
- Development of job analysis and job descriptions in the Revenue Service. USAID, Economic Prosperity Initiative, 2011.
- Training needs assessment in the Revenue Service. USAID, Economic Prosperity Initiative, 2011.
- Customs Reform Strategy. USAID Economic Prosperity Initiative, 2011.
- Implementation of the European Neighbourhood Policy Action Plan (ENP AP) in trade and some related areas.
- European Neighbourhood Policy EU-Georgia Action Plan.
- Implementation Plan of the European Neighbourhood Policy EU-Georgia Action Plan 2011.

During the preparation of this report, meetings, interviews and written communications were conducted with the following persons and agencies:

- **Davit Narmania,** Executive Director of Caucasian Institute for Economic and Social Research.
- **Zaza Broladze,** Managing Partner of Policy and Management Consulting Group (PMCG).
- The Office of the Business Ombudsman.
- **Gigi Liluashvili,** Project Coordinator, American Chamber of Commerce in Georgia.
- **Davit Lelashvili,** researcher for the Research and Consultation Group of the Free University.
- The Revenue Service of Georgia.
- Economic Prosperity Initiative, USAID technical assistance project.

III Intellectual Property Rights

3.1 Introduction and brief overview

One of the priority areas identified in the European Neighbourhood Policy Action Plan (ENP AP) is *Intellectual and industrial property rights* (Par. 4.5.5). The following activities are foreseen under this priority:

- Ensure full conformity of IPR legislation with PCA obligations and TRIPS requirements and its efficient enforcement.

- Ensure proper functioning of the judicial system to guarantee access to justice for rightholders and availability and effective implementation of sanctions.

- Consolidate the relevant institutional structures, as well as of the offices for industrial property rights, copyright protection and collecting societies. Extend cooperation with third country authorities and industry associations.

- Establish system of effective protection of geographical indication.

- Take measures to increase public awareness in the field of intellectual and industrial property protection. Establish an efficient system of use of patent information for enterprises.

- Increase resources dedicated to enforcement, including for the judicial system.

- Improve enforcement of the relevant conventions provided for by PCA Article 42(2).

- Conduct a study on piracy and counterfeiting in Georgia and ensure effective dialogue with rights holders.

The 2011 Action Plan of the European Neighborhood Policy (ENP AP) requires that Georgia undertakes the following actions:

- Renew existing agreements and conclude new treaties on intellectual property protection with EU Member States and other countries.

- Take measures to increase public awareness in the field of intellectual and industrial property protection. Establish an efficient system of use of patent information for enterprises, in particular: translate into Georgian and publish the work of influential thinkers working in the field of intellectual property; publish and disseminate information and educational booklets and other materials; prepare and publish comments on the legislative acts and international agreements which are applicable in Georgia; arrange seminars and trainings for diverse segments of society with the goal of raising awareness in the field of intellectual property.

Moreover, the EU considered establishment of intellectual property rights protection system as one of the key preconditions for launching negotiations on the Deep and Comprehensive Free Trade Area (DCFTA) with Georgia.

Georgian legislation governing intellectual property rights is harmonized with its European equivalent. However, in practice serious problems can be observed in the enforcement of this legislation, notably in the fight against counterfeiting and piracy. Given this reality, this paper focuses on those fields. Moreover, it provides a short overview of the current Georgian legislation on the protection of intellectual property as well as an analysis of the progress which has been made in this area and the obstacles which continue to impede the fulfillment of EU requirements.

Progress and obstacles

- In 2011, the National Intellectual Property Center Sakpatenti carried out intensive activities to raise public awareness regarding the field of intellectual and industrial property rights. However, results show that further activity in this direction is necessary.

- In 2011, two legislative amendments were adopted and two other draft amendments were taken under consideration. Of the legislative changes adopted in 2011, one amendment -- made to the Law of Georgia on Appellations of Origin and the Geographical Indications of Goods-- entered into force on 11 October. Amendments aimed at improving the trademark registration at customs were also made to the Law of Georgia on Border Measures Related to Intellectual Property. The development of draft amendments to the Law of Georgia on Copyright and Neighboring Rights is in progress. This draft law envisages the establishment of a more effective and efficient model of exercising and protecting copyright (for detailed analysis see Subchapter 2.1).

- As in 2010, the year 2011 showed that the Georgian legislation concerning intellectual property rights is not an impediment to the fulfillment of obligations assumed under ENP Action Plan; the main problem seems to lie in the enforcement of the legislation rather than in the way it has been articulated. Some analysts have pointed out certain minor flaws in the legislation, but they believe that the improvement of these flaws is not a matter of concern until the existing legislation has been properly enforced.

- Court statistics provide an interesting window into the enforcement of this legislation: number of legal cases in which intellectual property rights violations were named almost doubled in 2011. However, more than half of these cases (44 out of 85) were not officially considered[33]. This statistic can be partially explained by a high indicator of out-of-court dispute settlements, but on the other hand, it may also indicate incompetence on the part of the complainants, which once again highlights the need for raising the general level of

[33] Letter of the Supreme Court of Georgia to the Economic Policy Research Center, #900-11, dated 10 December 2011.

awareness about intellectual property law (particularly among the corpus of lawyers and judges).

- The study revealed several reasons for the low indicator of court appeals (for a detailed analysis see the Court System subchapter). Significant among these reasons is the low level of competence among judges in this area. Other factors which create problems in Georgia include the absence of case law in the country as well as lack of precedents themselves which could be referred to in court cases. Nor does a simplified practice of expertise (for example, IT expertise) exist (as, for instance, it exists in the USA), which would accelerate the court process.

- The country does not yet have an institution of mediation. However, in December 2011, a relevant law was adopted to save time and cost for parties involved in disputes on intellectual property issues.

- Available crime statistics[34] do not yet allow the tracking of the dynamics of intellectual-property-related crimes because they do not provide itemized data on such types of offenses. This may indicate neglect on the part of law enforcement bodies towards that category of crime. Regarding computer crime (which may also include crimes against intellectual property), only two relevant cases were registered during six months in 2011, according to Interior Ministry data. Those cases, however, involve an illegal penetration into computer networks with the aim of damaging those networks, and not an infringement upon intellectual property (for example, the theft of software). Accordingly, it can be concluded that controlling bodies in Georgia lack an actual will to fight this type of intellectual property crime.

- To address the problems of the enforcement of legislation, the Inter-Agency Coordination Council for Copyright Protection was established in 2010. However, as of 31 December 2011, this Coordination Council had held only one meeting. Under the aegis of the Coordination Council, a copyright protection strategy for the years 2011-2013 was drawn up. This strategic document provides an accurate analysis of existing problems but does not place any special emphasis on the role of the police in this process. Furthermore, the action plan outlined in the document is primarily focused on the implementation of awareness-raising measures. It does not actually discuss activities such as the launching of police raids to combat trade in pirated products and the like. The absence of concrete, effective enforcement measures and the general nature of the indicators make us think that the strategy and plan are of a more declarative than of a practical nature.

- The available statistics indicate that video piracy and the use of unlicensed software is still a serious problem in Georgia. According to data collected from 115 countries in 2010 by U.S. software producing organizations, the Business Software Alliance and IDC Global Software, Georgia, with an indicator of 93%, is the largest user of pirated software.

[34] www.police.ge/index.php?m=199&newsid=161

- A feature clearly observed among non-state actors was the passivity of business circles. That passivity may be attributed, inter alia, to both a low degree of confidence in the court system as well as an awareness of a lack of will on the part of the state. Another factor is the lack of information among business actors regarding the non-state measures of intellectual property protection; about those self-governing activities which the business sector can itself undertake to protect intellectual property rights, such as following the example set by certain business circles of European countries (for detailed discussion see subchapter 3.1). Significant progress has been observed in the activities of the Copyright Association. In particular, as of 17 November 2011, the Georgian Copyright Association counted more than 500 authors and copyright holders as members. As of 11 May 2011, the Association had some 350 members and this data was not systematized. During the first 12 years of its existence, that is, from 1999 to 17 November 2011, the Association issued 650 licenses of which 221 – nearly one third –were issued during the approximate seven-month period from 11 May 2011 to 17 November 2011.

Recommendations

- Considering the existing reality, the key recommendation of the Economic Policy Research Centre (EPRC) concerns the improvement of enforcement mechanisms.

- It is necessary for the state to broaden the scope of awareness-raising activities as well as to encourage and stimulate the business and non-governmental sectors to undertake regulatory measures in this area. The awareness-raising campaign should employ methods that have been well-tested and shown to be effective in the West: trainings, seminars, media campaigns, and other actions.

- We also recommend that the government openly demonstrate the will to protect intellectual property. This can be done by the country's top officials (for example, the Prime Minister who heads the Inter-Agency Coordination Council for Copyright Protection) by promoting this issue on a declarative level; on the other hand, the will must also be demonstrated by a stepping-up of the activity of law-enforcement agencies, for example, by conducting police raids; setting the precedent of punishing a culprit, and so forth.

- At the same time, along with punitive measures, various stimulating measures for the protection of intellectual property rights must be implemented or encouraged.

- In general, it is necessary to increase the authority of, as well as trust towards, the court system.

- It is important also to simplify court procedures for ordering the conduct of IT audits and to receive other types of information during disputes which concern intellectual property rights.

- Special programs designed to upgrade the qualification of lawyers and judges must be implemented.

- The development of expert services must be supported in order to avoid a protraction of court processes and their accompanying cost increases.

- The Copyright Association must be further developed (for detailed discussion see subchapter 4.1).

3.2 Legislation and state policy

The following laws regulate intellectual property issues in Georgia:

1. The Patent Law of Georgia; 2. The Trademark Law of Georgia; 3. The Law of Georgia on Appellations of Origin and the Geographical Indications of Goods; 4. The Law on Topographies of Integrated Circuits; 5. The Law on Copyright and Neighboring Rights; 6. The Law for the Protection of New Varieties of Plants; 7. The Law on Border Measures Related to Intellectual Property; and 8. The Law of Georgia on Design. Moreover, based on these laws, the Criminal Code of Georgia and the Code on Administrative Offences of Georgia provide a framework for enforcing sanctions in case of violations.

The current legislation, in particular article 189 of the Criminal Code of Georgia, considers the following actions to be offences: the misappropriation of authorship or forcing on authorship of the work; the illegal reproduction of copyrighted objects and neighboring rights; the purchase, importation, storing, selling, or renting of counterfeit copies or any other violation of the rights of the copyright holder and neighboring rights with the purpose of gaining significant income.

The Criminal Code provides for the liability of the infringement of industrial property rights as well. In particular, according to Article 189-1, the misappropriation or forcing on authorship of the invention, utility model, industrial design, or topography of integrated circuit are considered to be offences. Also, the knowing, illegal use of another's invention, utility model, industrial design, or topography of integrated circuit with the purpose of gaining significant income is also considered a punishable action. According to Article 196 of the Code, the production in large quantities or the introduction into civil circulation of goods bearing an outside trademark, appellation of origin or geographical indication, which causes significant damages, as well as a false indication of warning notice together with the use of an unregistered trademark, appellation of origin or geographical indication of goods shall be considered punishable actions.

For the commitment of any of the above offences, the Criminal Code of Georgia provides for sanctions in the form of financial penalties, restriction of freedom or imprisonment for up to three years.

Moreover, the Criminal Code stipulates the condition of “significant damage” which shall be applied in determining the appropriate sanction for an offender.

However, the Code also contains a potential loophole: the rule for determining the condition of "especially significant income" could be arguable in any country, including Georgia. This rule, in fact, allows a trader in pirated products to go potentially unpunished.

For example, offences considered in Article 189 of the Criminal Code of Georgia are considered to have been committed for gaining significant income if the illegally generated proceeds exceed GEL 5,000 and are considered to have been committed for gaining "especially significant income" if the illegal proceeds exceed Gel 10,000.

Such wording enables, for example, petty vendors who are engaged in the trade of pirated and/or counterfeit goods to continue with their illegal trade unpunished. This, in turn, encourages the growth and development of this illegal business. Given such situation, some experts believe that the theft of intellectual property must, in fact, be put on the same legal footing as all property theft in general, and the penalties must not be conditioned by the above quoted amounts of income.

If the government of Georgia truly had the will to fight intellectual property-related crimes, it should not find it difficult to promote the above-mentioned approach, particularly because the foundation of the anti-crime strategy declared after the Rose Revolution was the so-called "zero tolerance" policy. If the government has the will, these sanctions could be easily toughened. Such a move would produce an effect which would, in general, comply with the essence of "zero tolerance" and the facts and practice of legal prosecution would facilitate the establishment of a legal culture dedicated to the protection of intellectual property.

It should be noted that today, Georgia has officially declared a policy dedicated to the liberalization of criminal legislation so that it meets the standards of human rights protection and, consequently, it seems unlikely that the Georgian government will take into account the above-mentioned recommendation.

However, this lack of will is revealed not only in the refusal to toughen sanctions but also in the very low rate at which this legislation is enforced (for detailed analysis see chapter 3).

Another chapter of the Criminal Code of Georgia which touches on the issue of intellectual property theft – namely the issue of piracy –is Chapter 35 – Computer Crime. According to Article 284 of the Code, any illegal access to a computer system that has resulted in a loss, modification or duplication of information is considered to be an offence punishable by fine, or by corrective labor, or imprisonment of up to two years.

Any similar action that results in grave consequences is punishable by fine or by detention for a period of two to five years. These amendments were made to the Criminal Code in the autumn of 2010 and this Chapter is entirely dedicated to computer crime.

By introducing the above legislative amendments, the government seemingly demonstrated a will to combat cyber crime and, by extension, Internet crime in general. Actual crime statistics however indicate that there have been problems in the enforcement of this law (see Chapter 3).

The Georgian legislation, naturally, allows the damaged party to apply directly to court. The Code of Administrative Offences of Georgia provides liability for the infringement of the rights of copyright and neighboring rights holders, as well as for the infringement of trademark holders' rights. The penalty for an infringement of such rights is leveled in the form of a sanction; for repeat offenders – those who, over the course of a year, commit the same offense more than once and have already been convicted and sentenced to an administrative penalty – the Code indicates, together with an increased amount of penalty, the confiscation of the materials, devices and technical facilities which were involved in the carrying out of the violation. In addition, Georgian legislation indicates that copyright infringement and the infringement of neighboring rights is a civil liability. Under Article 59 of the Law of Georgia on Copyright and Neighboring Rights, the holder of the violated copyright and/or neighboring rights and the creator of the illegally duplicated database may demand that the violator reimburse all damages and that their intellectual property be publicly recognized.

A discussion of how these above-cited Articles should work in reality, as well as of the potential problems associated with their enforcement will be discussed below.

Among the legislative amendments adopted in 2011, the amendment to the Law on Appellations of Origin and the Geographical Indication of Goods, which entered into force on 11 October of the same year is worth mentioning. This amendment was prompted by the necessity to undertake measures for the registration and protection of appellations of origin and the geographical indications of Georgia. Under this amendment, the National Intellectual Property Center of Georgia ("Sakpatenti") was vested with the power to undertake measures for the protection of appellations of origin and geographical indications of Georgia in foreign countries in cases in which the applicant for the registration of appellations of origin and geographical indications at Sakpatenti is a government agency or a legal person of public law. Thus, the main focus of this amendment is the protection of intellectual property outside Georgia.

One more legislative change introduced in the area of intellectual property is the amendment to the Law on Border Measures Related to Intellectual Property.

Georgia has followed the example of Bulgaria, Malta and Macedonia. In particular, according to the Georgian legislation, border measures related to intellectual property are regulated by a special law on Border Measures Related to Intellectual Property and not by the Customs Code (as in the cases of France, Germany, Romania, Norway, Turkey, Russia, Ukraine, Armenia and Belarus). Under the new draft law, Sakpatenti will be in charge of registering all applications of holders of intellectual property rights for undertaking border measures (previously this function had been performed by the customs service).

The draft amendment is aimed at simplifying the application registration procedure of intellectual property rights holders to undertake border measures. According to the amendments, an application made by an intellectual property rights holder, or his/her representative, to undertake border measures against goods or counterfeit goods produced in violation of copyright or neighboring rights, or rights on appellations of origin and geographical indications, should be submitted to the Sakpatenti. The Sakpatenti should then decide within

five working days whether the application should be approved or rejected and then immediately send this information to the revenue service. An application to have border measures implemented can be submitted to the Sakpatenti simultaneously with an intellectual property registration application.

Regarding allegedly counterfeit or other goods which have been officially removed from circulation, the draft law will also determine who should be responsible for the cost of storing these goods during the litigation period. If the ruling is in favor of the applicant, financial liability will be borne by the importer (or exporter), whereas if the claim is ruled to be groundless, the financial liability will be borne by the applicant.

It is noteworthy that the draft law was published on the official Parliamentary discussion forum but, according to an explanatory note, no comments on the draft law have been made, nor has it become a subject of consultations.

Along with the above-discussed draft laws, two other related amendments were being drawn up in 2011. One is a draft law on the amendments to the Law on Copyright and Neighboring Rights. This draft law envisages the establishment of a more effective and efficient model of copyright establishment and protection. At the same time, the Georgian Copyright Association is working on the creation of a legislative proposal to regulate the Internet; after it is completed, this legislative initiative will be submitted to relevant state bodies[35]. However, in 2011, only the amendment to the Law on Appellations of Origin and Geographical Indications of Goods was approved.

One more noteworthy development with regard to legislation was a draft law on the Introduction of Amendments to Some Legislative Acts of Georgia which was approved by the Parliament of Georgia in December 2011[36]. These amendments are designed to establish a mediation mechanism as an alternative means for dispute settlement, something which will facilitate the settlement of disputes between parties and raise public awareness about the law.

The mediation mechanism can be applied very efficiently in cases of intellectual-property-related disputes.

It is noteworthy that, according to this law, the use of mediation services, in contrast to other countries, will not be obligatory in Georgia. We believe that this is the right approach because making this procedure "obligatory" may undermine public confidence in it right from its introduction.

[35] A letter to the EPRC from Giorgi Kobaladze, Chairman of the Georgian Copyright Association, 17 December 2011.

[36] http://www.parliament.ge/index.php?sec_id=1209&lang_id=GEO

3.3 Implementation of obligations assumed under ENP AP / preconditions for the launch of negotiations on DCFTA

Awareness-raising measures undertaken within the framework of ENP PA 2011 by the government and, in particular, the Sakpatenti can be evaluated as positive (see the list of undertaken measures in the report of the Government of Georgia on the implementation of ENP PA 2011).

Regarding the conclusion of international agreements, some difficulties were observed. In 2011, only one international agreement was signed: the Agreement between the European Union and Georgia on protection of geographical indications of agricultural products and foodstuff[37].

Some of the agreements which, according to a Georgian government report on the implementation of ENP PA 2010 were "in the process of completion" in 2010, had not yet been signed by 31 December 2011. Especially problematic are bilateral agreements with non-EU member countries.

The main recommendation made by the EU in the area of intellectual property protection envisages a **significant improvement in the enforcement** of existing legislation. It was precisely for the aim of addressing this problem that the Inter-Agency Coordination Council for Copyright Protection was established in 2010. However, as of 31 December 2011, the Council had held only one meeting. According to the Sakpatenti, "The Council has set goals to develop a strategy and action plan, consider and draft normative acts, defend authors' rights and conduct public awareness and information campaigns."[38]

An important document for assessing the situation in the area of intellectual property rights is Georgia's copyright protection strategy for the years 2011-2013.

It should be noted that this strategic document provides a partially correct analysis of existing problems. In particular, it says that it is necessary:

- To further intensify the role of state agencies (especially the Sakpatenti) and enhance the direct involvement thereof into the development and implementation of copyright policy;
- To draw up an overall and transparent policy on fees and tariffs;
- To strengthen copyright enforcement, including the use of state enforcement mechanisms;
- To introduce a mechanism for settling copyright-related legal disputes in a simplified manner and within shorter timeframes;

[37] A letter from Sakpatenti acting chairman, Revaz Tabukashvili, to the EPRC. Letter #0105/1344, dated 17 December 2011.
[38] Sakpatenti 2011 Performance Report.

- To raise the awareness of authors, legal specialists, the private business sector and society in general about the copyright law;

- To improve Georgia's international image in the area of copyright protection and in the fight against "pirated" material.

The strategy does not, however, place any special emphasis on the role of the police in this process. Besides, the action plan for the implementation of the strategy is primarily focused on the implementation of awareness-raising measures, such as implementing surveys, the drafting of normative acts, conducting trainings, as well as organizing study tours and a variety of informational activities. There is no doubt that all these activities are necessary and should certainly be implemented, but the action plan does not discuss such activities as, for example, the launching of police raids against the sale of pirated products in the marketplace.

Consequently, the fulfillment of the goals identified in Georgia's copyright protection strategy and action plan for the years 2011-2013 becomes questionable. The following indicators are benchmarks against which Georgia's success in this area can be measured:

- Georgia will move up in international ratings by the end 2013;

- Copyright-related disputes will be simplified;

- The 2012 public opinion survey will show more positive attitudes when compared to the findings of the 2011 survey;

- An increase in revenues mobilized to the budget in favor of authors in the form of tariffs/fees.

As one can see, all these indicators are general in nature and they do not set any specific improvement goals (for example, a percentage increase in the number of registered disputes, or the percentage of increased budget revenues).

The absence of effective, concrete enforcement measures and the general nature of the indicators suggest that the strategy and the plan are of a more declarative than practical nature.

3.3.1 Court system

During the past three years, the number of intellectual property right-related disputes in which decisions (to satisfy, refuse or terminate the cases) were delivered, did not actually change and, as the chart below indicates, showed only an insignificant increase:[39]

[39] An electronic letter of the Georgian Supreme Court's Public Relations Manager,, Nana Vasadze, to EPRC; 17 December 2011.

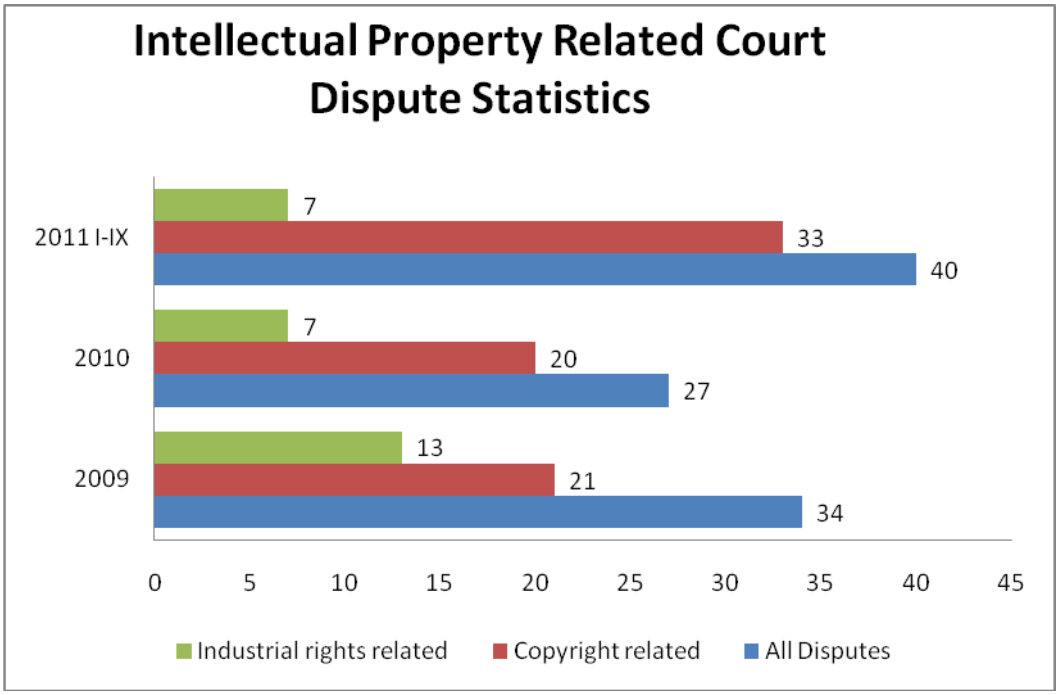

Chart 1. Most recent data on disputes in lower court (Source: Supreme Court)

Moreover, the total number of cases against breaches of intellectual property rights (both considered and unconsidered) that were filed with the courts show that 49 complaints were submitted to the lower courts in 2009 and 34 complaints were filed in 2010, while 85 were filed in 2011, indicating that the number of cases doubled in 2011 as compared to the preceding two years. However, official court rulings (on satisfying, refusing or terminating cases) were delivered on only a relatively small segment of these cases. Out of 85 cases filed with the court in 2011, 44 were left unconsidered (at the initial stage of consideration, meaning that these cases had not yet been heard in court; one was at the preliminary hearing stage).

This can be explained by a high indicator of dispute settlements (an issue to be discussed in more detail later) but, on the other hand, this could also be the result of legal incompetence on the part of the complainants.

Moreover, the low indicator of court disputes may also depend on a number of factors, including:

- Lack of information
- Lack of trust toward the courts
- High court costs
- Length of court process

When discussing court costs, it should be taken into account that even though the court fee for filing a complaint with the lower courts is GEL 100 (approximately USD 60) – not a very large amount – this cost is raised during the course of the court process by a number of factors. For example, the cost of paying for expertise which, as a rule, accompanies such court cases. A segment of intellectual property rights holders are prohibited from bringing cases to court because of the high cost of retaining an attorney. It should be noted here that the Constitution of Georgia guarantees every person the right to a legal defense (including the right to defend

property) but at the moment, public defenders are provided only to people living below the poverty line, and even then only in criminal cases.

It should also be noted here that at the moment, there is no mediation institution operating in Georgia which, in case of such disputes, might be a cheaper and faster solution.

Several specific issues should be underlined with regard to the existing low degree of trust toward the courts in disputes related to intellectual property rights (these issues are not related to the general level of trust toward the courts). For example, according to the official Microsoft representation in Georgia, only a handful of state agencies (including the Ministry of Justice, the Ministry of Education and Science and a few others) actually use licensed computer software. Ironically, the list does not include the courts. It can be seen as being quite difficult for the courts to rule impartially on a complaint against a breach of intellectual property rights (for example, against the use of unlicensed software) when the court itself uses unlicensed software.

Moreover, actors interested in issues affecting intellectual property rights point to a poor knowledge of the legislation concerning intellectual property rights among judges; interested actors also point out that given the specific nature of this issue, judges in, for example, the United States, increasingly practice case law in relation to intellectual property disputes. Problems also emerge due to the fact that case law is not practiced in Georgia and besides, there are no actual precedents which could be referred to in relevant court cases.

The business community has complained that court rulings on this issue are often unpredictable because of a lack of relevant practice and experience; this is also one of the factors which discourage potential complainants from bringing their grievances to court.

Nor does a simplified practice exist as it does in, for example, the United States, that would allow judges to order court-appointed expert investigations, for example an IT audit, upon the request of complainant. This makes it more difficult for a complainant to prove an instance of intellectual property infringement, a situation which does not contribute to the intensification of court practice.

Given all these factors, the need to organize trainings not only for judges and experts but also for the corpus of attorneys who practice intellectual property law, becomes apparent.

3.3.2 Controlling bodies

The indicator of the enforcement of the Criminal Code of Georgia in the area of intellectual property and piracy/counterfeiting shows less progress than that of courts.

First, it must be said that the existing crime statistics[40] do not allow the evaluation of the real dynamics in crime against intellectual property because the statistics do not reflect the breach

[40] www.police.ge/index.php?m=199&newsid=161

of legal provisions of intellectual property rights. It can thus be assumed that this reflects an actual neglect of this sort of crime by law enforcement bodies.

As regards computer crime (which may also include crime against intellectual property), according to Interior Ministry data, a total of two crimes were committed during six months in 2011[41].

Such statistics do not reflect the real situation as it exists in the area of Internet piracy in Georgia.

The most recent surveys conducted in the area of Internet piracy in Georgia are based on data from 2010. This information shows that Internet piracy and the use of unlicensed software remain the biggest intellectual property problem in Georgia. According to 2010 data compiled by two U.S. software-producing organizations – Business Software Alliance and IDC Global Software – among 115 countries, Georgia is the largest user of pirated software with an indicator of 93 percent. This is higher than the indicators of Moldova (90 percent), Armenia (88 percent) and Ukraine (86 percent)[42].

Even though more recent data is not available, the analysis of the situation in this area in 2011 did not reveal any radical improvements.

According to 2010 data: "Software piracy in Georgia is pervasive both in the public and private sectors. Roughly 70 percent of the 30,000 personal computers used in major government ministries and agencies, as well as by municipal governments, operate with pirated or unlicensed software."[43]

This has a significant economic effect. According to the head of the Georgian representation of Microsoft, the multinational company loses USD 150 million annually in Georgia. Furthermore, this rampant piracy deprives the Georgian budget of GEL 50-60 million annually in taxes. These findings are the result of research conducted by the Georgian representation of Microsoft, and published in 2010. The goal of the research was to identify the scale of use of pirated computer software in Georgia.[44]

The above information suggests that the official crime statistics as well as the indicator of complaints made to the courts are incompatible with the reality of the situation. No statistics on special police raids actually exist, even though this is one of the important tools in the fight against piracy in every developed country, as well as an important indicator of the will of the state to combat piracy.

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[41] As noted above, these facts do not reflect crimes committed against intellectual property. However, this article can be applied to such a crime which is related to illegal acquisition of computer software which is an object of intellectual property.

[42] http://portal.bsa.org/globalpiracy2010/

[43] Irakli Gvenetadze, Head of the Ministry of Justice special commission on combating pirated software and computer crime. http://www.eurasianet.org/departments/insightb/articles/eav012810a.shtml

[44] http://www.voanews.com/georgian/news/microsoft-georgia-104094173.html

A certain societal factor must also be underlined: there are experts in Georgia who are against the application of strict methods for the enforcement of anti-piracy legislation at this stage. As they assert, an enforcement crackdown could seriously hinder Georgia's ability to apply intellectual innovations, which could significantly impede the development of the Georgian public. These experts believe that the official prices for the most popular software are prohibitive. At the time of writing, the listed prices of the following licensed software are as follows: 1. The Windows 7 operating system: from USD 200 to USD 320; 2. Microsoft Office 2007: from USD 150 to USD 680; 3. The audio editor Audition 3: USD 350; 5. The video editor Vegas Pro 9: USD 600; 9. Nero 9 recording software: from USD 70 to USD 200; 7. The Babylon 8.0 multilingual dictionary: from USD 40 to USD 120; and 8. Norton Antivirus 360 Version 4.0: USD 80, etcetera.

The average monthly per capita income in Georgia stands at GEL 178,6.[45] Bearing in mind this level of income, the obligation to use licensed programs may sharply decrease the number of computer users, including Internet users, in Georgia, which, in 2009, comprised 1.3 million people (about one third of Georgia's population).[46] This will, in turn, limit access to educational resources as well as to information which, in the case of Georgia, will not only impede economic progress but also pose political, human rights and social risks. Consequently, both the government and independent experts have pointed out the sensitivity of this topic.

The sensitivity of this issue will almost certainly increase in 2012 and 2013, as these are election years and the government may therefore refrain from taking such unpopular steps.

We believe, however, that this is not an insurmountable problem and we will outline our own recommendation on this issue below.

3.3.3 Non-governmental and international actors

Non-governmental and international actors can play a crucial role in advancing intellectual property rights, especially when the will of the relevant state bodies is not clear cut.

A certain amount of progress has, in our view, been observed through changes implemented by the Georgian Copyright Association. These changes are reflected in the information collected by this organization which we provide below.

According to data supplied by the Georgian Copyright Association, as of 17 November 2011, the Association had more than 500 authors and copyright holders as members. As of 11 May 2011, the Association counted some 350 members, although this data was not systematized.

During the 12 years – from 1999 to 17 November 2011 – the Association issued 650 licenses of which 429 were issued between 1999 to 11 May 2011, which amounts to 36 licenses per year and three licenses per month, on average. From 11 May to 17 November 2011 however, 221 licenses were issued, or 37 licenses per year, on average, which means that the number of

[45] http://www.geostat.ge/?action=page&p_id=175&lang=geo
[46] http://www.internetworldstats.com/asia/ge.htm

licenses issued within those six months in 2011 exceeds the number of licenses issued before 2011 by as much as 12 times.

A significant increase is also observed in the payment of fees envisaged by issued licenses. In particular, out of 429 licenses issued before 11 May 2011, only 106 license holders (24%) paid fees, whereas out of the 650 license holders registered as of today, 436 (67%) pay that fee. This represents a collection increase of 280%. To improve the collection indicator and the issuance of licenses, a group has been set up to monitor and regulate this market.

The number of agreements signed with copyright watchdog organizations based in foreign countries has also been identified: 107 agreements with 150 countries and territories. An intensive cooperation is in progress with international donor organizations: The EU delegation in Georgia and USAID Commercial Law Development Program (CLDP)[47].

It is also important that the majority of court disputes today are decided in favor of the Copyright Association.

As of 11 May 2011, the Association had been involved in 60 court cases. As a result of negotiations with the defendants, agreements were reached in 36 cases and they were consequently resolved out of court. Of the remaining 24 cases, 14 ended in favor of the Association and 10 are still pending[48].

A significant innovation, which became known in 2011, relates to the trademark registration at customs. According to the changes, all trademarks registered at customs must be immediately added to a Sakpatenti electronic database. Consequently, the customs and Sakpatenti databases must be linked. To this end, receives assistance from USAID within the framework of the EPI project. However, at the time of this report, the project was still just getting started: the terms of reference have been drawn up and a call for an expression of interest has been announced.[49] This means that the Sakpatenti electronic database will neither be up and running nor linked electronically with the customs database until at least the end of 2012. Moreover, the assessment prepared by the USAID EPI program in 2010[50] notes that, in general, the customs officers' level of knowledge regarding the identification of trademarks is very low. However, as of December 2011, no trainings dealing with these issues had been conducted for customs officers by any import company.

Microsoft's experience in Georgia is interesting as well. According to Irakli Gvilia, a lawyer for the Georgian office of Microsoft, the company is not involved in any court cases at this stage. The company's activities against unlicensed software have been limited to putting up several banners (produced with the help of the U.S. Embassy in Georgia) and sending warning letters to

[47] A letter by the Chairman of the Georgian Copyright Association, Giorgi Kobaladze, to EPRC, 17 December 2011.
[48] A letter by the Chairman of the Georgian Copyright Association, Giorgi Kobaladze, to EPRC, 17 December 2011.
[49] Interview with Irakli Demetrashvili, Commercial Law Manager of the USAID EPI program, 28 December 2011.
[50] Assessment of Georgia's Intellectual Property Rights Environment (IPR Environment), USAID/Georgia Office of Economic Growth, Deloitte Consulting LLP, March 4, 2011.

local providers of computer equipment.[51] The company started planning its activities in this direction in 2010.

Passivity in the business sector is one more factor that impedes the enforcement of legislation. This passivity may be caused, on the one hand, by a lack of information, but on the other hand, it may be the result of the awareness of a lack of government will in this area which causes companies to refrain from undertaking any active legal steps.

In this regard, an interesting point is that international companies are more active in registering trademarks than local ones.

According to Sakpatenti, by December 2011, a total of 45,380 trademarks had been registered; of which 2,960 were registered by Georgian applicants. As regards patents and designs, 2,038 patents are currently in force of which 1,021 patent holders are foreigners and 1,017 patent holders are locals. 251 certificates have been issued for designs at present[52].

The above data shows that the level of awareness and activity of local businesses or, in general, local applicants in this area is very low. Moreover, the majority of trademarks, as a rule, have been registered by large companies, notably companies engaged in the pharmaceutical business.

As the data shows, the highest number of registered trademarks (240) belong to the company Aversi-Pharma, operating in the pharmaceutical sector. In the sector of wine and alcoholic beverages, the company Chateau Mukhrani is in the lead. In the banking sector, Liberty Bank holds the largest number of registered trademarks. In food production, the company that submitted the highest number of trademark registration applications to the Sakpatenti in 2011 was Barambo. The chart below shows the data on trademark registration by year:

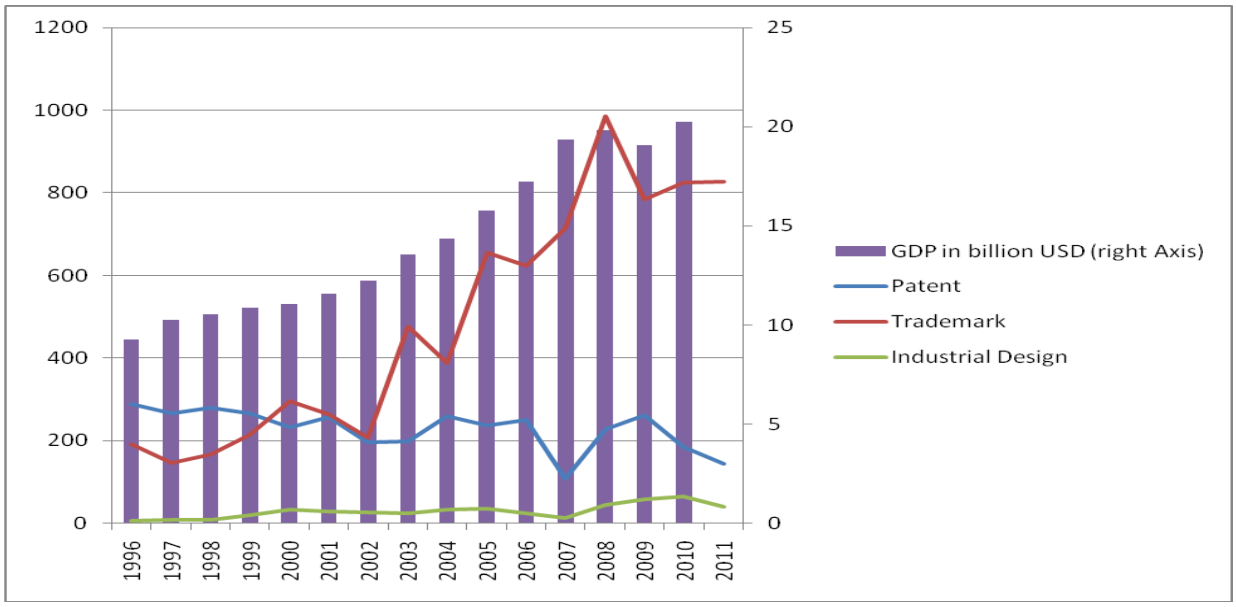

Chart 2. Registration of intellectual property and GDP growth by year (www.wipo.int, www.sakpatenti.ge)[53]

[51] Interview with Irakli Gvilia, a lawyer of Microsoft's Georgian office, 10 January 2012.
[52] Performance report of Sakpatenti for the year 2011.
[53] http://www.wipo.int/ipstats/en/statistics/country_profile/countries/ge.html

The data in the chart above shows that the registration of trademarks reached its peak in Georgia in 2008 (when 986 trademarks were registered). This seems rather strange given the economic situation at that time because 2008 was a year of economic decline in Georgia and of the Georgia-Russia War.

In past years, the registration indicator has remained stable and exceeds the indicator from the year 2003 by almost four times. However, compared to the indicators found in many European countries, Georgian lags far behind.

For example, Georgia has 825 registered trademarks while Armenia has 1,568. From there the numbers keep going up: Moldova – 1,901; Ukraine – 21,299; Estonia – 5,657; Bulgaria – 18,219; Belarus – 5,447; Latvia – 5,787; Lithuania – 5,287; Romania – 20,593. (2010 statistics for Turkey and Azerbaijan are not reflected in the database. The database also does not contain information on Albania, Kazakhstan and some other countries for the years 2009, 2010 and 2011)[54].

Naturally, given the size of Georgian economy, a direct comparison would be incorrect, but these figures do give a certain impression about the role and position of Georgia in this sphere. This data makes it clear that over the past 10 years Georgia has shown significant growth. However, a comparison with statistics such as Armenia's, reveals the need for an intensification of efforts.

As regards the role of international actors, one should underline the activity carried out by the German association for international cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit, or GIZ) in 2011. GIZ supervised the development of the Business Plan for the Georgian Technology Transfer Center (GTTC).

The Business Plan analyzes, among other issues, the strengths and weaknesses of the Georgian technology transfer system. According to this analysis, "even though Georgia's overall competitiveness is a bit better than that of Armenia and significantly worse than competitiveness of Azerbaijan, a thorough analysis of criteria related to rating of Georgia's innovations in the world economic forum – Global Competitiveness Report 2010, reveals a set of serious deficiencies. There is almost no cooperation between universities and entrepreneurs, companies do not have any desire to spend on research and development and lack innovative possibilities."[55] The Business Plan was developed precisely for addressing these problems. According to Sakpatenti, the Technology Transfer Center will start operating in 2012 and will work on the commercialization of inventions. However, the Center's primary funding sources have not been identified yet, which questions the Center's prospects.

The smooth operation of a technology transfer system is important for the enforcement of legislation on intellectual property as well as for raising public awareness about this issue. The Georgian Technology Transfer Center will assist scientists in patenting their inventions and achievements (which is an important aspect of the protection of intellectual property rights) and will also represent them in court (in cases of rights infringement).

[54] http://www.wipo.int/ipstats/en/statistics/country_profile/countries/ge.html

[55] Business plan – establishment of the Georgian Technology Transfer Center, GIZ, October 18, 2011

3.4 Conclusions and recommendations

The study has revealed that the government formally fulfilled the main requirements of ENP AP 2011, taking steps toward the improvement of the legislation of intellectual property rights, the development of a copyright association, and raising public awareness (see the Sakpatenti's performance report for the year 2011). Still, the level of intellectual property protection in Georgia remains low.

- The legislative structure concerning intellectual property rights largely conforms to the European framework. However, actual precedents of applying that legislation in practice are scarce and the number of civil disputes concerning intellectual property rights which are settled in court is low.

We recommend that the level of public awareness be further raised and the development of the Copyright Association be continued. Provision of training opportunities to practicing lawyers and continuous training for judges on copyright and intellectual property issues should also be continued. Furthermore, we recommend supporting capacity building of existing expertise bureaus to avoid protracted court processes and the accompanying high costs.

Moreover, it is important to simplify the necessary procedures enabling a court to order the conduct of an IT audit or receive other types of information during a court proceeding. In this respect, the experience of the liberal court system of the United States would be helpful. This would enable disputing parties to prove instances of misappropriation of intellectual property which, in turn, would encourage application to the courts (in Georgia, the burden of proof regarding the use by a defendant of unlicensed software lies upon the plaintiff, whereas in the U.S. system, once a complaint is substantiated, the judge instructs the defendant to carry out an IT audit and/or present data of applied software, which spares the plaintiff from incurring additional expense).

To this end, it is important, at the initial stage, to conduct special trainings for judges and relevant legal specialists, in which they will learn about Western practices.

It is important for the state to demonstrate its will (for example, through statements by top officials, meetings with businessmen, and so forth) and thus encourage medium and large business representatives to protect their intellectual property more actively by means of applying to the courts.

At the same time, a general recommendation would be to increase the level of authority of, and trust in the court system.

- Analysis of the large scale of piracy along with crime statistics make it clear that the law enforcement bodies of Georgia, and accordingly, the Georgian government, do not actually demonstrate a will to fight against intellectual property and computer crimes. This lack of will is reflected in way that legislation is drawn up rather than enforced.

We recommend that the government demonstrate its actual will through the enforcement of the Criminal Code of Georgia, first and foremost, by enacting sanctions against illegal traders in pirated products. That would be a meaningful signal on the part of the state which would fulfill an informative-educational function far better than any type of training. We do not consider social arguments appropriate here because, for example, in the case of the illegal trade in tobacco products in Georgia, the penalties were much higher but the country succeeded in combating tobacco smuggling because there was will and determination to do it.

Setting precedents through punishment and police raids and then, intensifying police raids would be an illustration of progress. We deem these steps to be the best preventive measures.

Besides, we deem it important that all those state agencies which are directly or indirectly involved in the enforcement of intellectual property legislation (for example, the Ministry of Internal Affairs, the courts, and so forth) use licensed software or other intellectual products. Such a move would increase trust toward these agencies as well as improve their motivation.

- It must be said that the economic or social effects of the use of repressive measures are not clear cut. Problems which some experts consider as main obstacles on the path to the enforcement of anti-piracy legislation are common for post-socialist and post-Soviet countries. Given the relatively low income levels in Georgia, a dilemma emerges between computer and Internet use and the consequent availability of educational and modern technologies, on the one hand, and on the other hand, the protection of intellectual property rights.

Taking this problem into account, we deem it necessary that along with punitive measures, various positive measures for the protection of intellectual property must be implemented and/or encouraged.

In this regard, the experience of Russia, which has great experience with combating piracy, may be helpful.

In Russia, Microsoft refused to chase after illegal users of its software. The company modified its license policy in Russia and now those agencies which use fewer than 50 computers or which are non-governmental organizations receive software licenses automatically without any charge. At the same time, requirements and control regarding larger companies are toughened. As a result, large companies and government entities will get used to using legal software and paying for it. Smaller companies will also use licensed software but free of charge. In general, a culture in which the use of legal software is the norm will emerge in the country, which will in turn increase respect toward intellectual property rights.

Along with the fight against unlicensed software, it is also important to fight against counterfeiting in general. Therefore, it is helpful to intensify cooperation with holders of intellectual property rights in order to make them more active. For example, import companies must be shown that educating customs officers about their products' trademarks is a well-tested and widely practiced method in Western countries, and one which will increase the popularity of trademarks.

- Even though the government has set up the Inter-Agency Council for coordinating issues related to intellectual property, the slow pace of activity of this Council is unsatisfactory.

We recommend that the Council hold meetings more intensively. A strategy has been developed but the Council must place special emphasis on the control of the enforcement of existing legislation. We believe that the strategy's action plan must be more concrete in its nature and indicators for success must be more precise. Moreover, in addition to goals concerning awareness-raising, the improvement of legislative acts and the conducting of public opinion surveys, the strategic plan should envisage the enhancement of the role of controlling bodies and their use of levers of enforcement.

References:

- Letter of the Supreme Court of Georgia to the Economic Policy Research Center, #900-11, dated 10 December 2011.
- www.police.ge/index.php?m=199&newsid=161
- Letter of the Chairman of the Georgian Copyright Association, Giorgi Kobaladze, to EPRC; 17 December 2011.
- http://www.parliament.ge/index.php?sec_id=1209&lang_id=GEO
- Letter of the acting chairman of the Sakpatenti, Revaz Tabukashvili, to EPRC. Letter #0105/1344, dated 17 December 2011.
- Sakpatenti's annual report 2011.
- An electronic letter of Public Relations Manager of the Supreme Court of Georgia, Nana Vasadze, to EPRC, 17 December 2011.
- http://portal.bsa.org/globalpiracy2010/
- Molly Corso, Georgia: Tbilisi's Reliance on Pirated Software Leaves Government Vulnerable to Cyber-Attack, Eurasianet, 27.01. 2010.
- *http://www.eurasianet.org/departments/insightb/articles/eav012810a.shtml)*
- http://www.voanews.com/georgian/news/microsoft-georgia-104094173.html
- http://www.geostat.ge/?action=page&p_id=175&lang=geo
- http://www.internetworldstats.com/asia/ge.htm
- Assessment of Georgia's Intellectual Property Rights Environment (IPR Environment), USAID/Georgia Office of Economic Growth, Deloitte Consulting LLP, 4.3.11
- http://www.wipo.int/ipstats/en/statistics/country_profile/countries/ge.html
- Business plan – establishment of Georgian Technology Transfer Center, GIZ, October 18, 2011.

During the preparation of this report, meetings, interviews and written communications were conducted with representatives of various agencies:

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- **Giorgi Kobaladze**, Chairman of the Georgian Copyright Association;
- **Eka Shanidze,** Head of PR Department of Sakpatenti;
- **Giorgi Nioradze,** Head of PR Department of Georgian Copyright Association;
- **Irakli Demetrashvili,** Program Commercial Law Manager of USAID EPI project;
- **Irakli Gvilia**, a lawyer of the Georgian representation of Microsoft;
- **Giorgi Asatiani,** Executive Director of Georgian Business Association;

- **Guguli Maghradze**, a professor of the Tbilisi State University, founder of mediation clinic;
- **Irina Kvakhadze,** Deputy Executive Director of Georgian Business Association;
- **Nika Nanuashvili,** lawyer of Georgian Business Association;
- **Archil Karaulashvili**, Head of the European Integration Department, Office of the State Minister on European and Euro Atlantic Integration of Georgia;
- **Elene Kemashvili**, Head of the Legal and Copyright Law Department of Sakpatenti;
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- **Ana Gobechia,** Head of the International Affairs and Project Management Division of Sakpatenti.