

Comments to the Law of Georgia On Free Trade and Competition

GEPLAC has been requested to provide the Agency on Free Trade and Competition (hereinafter, the “Agency”) with comments to the Law of Georgia on Free Trade and Competition (hereinafter, the “law”).

The first obvious remark concerns the nature of the law: it is unambiguously a programmatic law that lacks sufficiently detailed provision for its immediate application. Certainly, the Agency for Free Trade and Competition is bestowed with delegated legislative powers (see art. 8(3), 9(2), 11(3) and 12(4)), but substantive rules for specific State aid schemes lack completely. Furthermore, Georgia has neither adopted clear industrial or economic policies, nor specific statutory parameters for any type of subsidies that could serve at least as guidance for its officials at the Agency and in line Ministries. The application of this law is thus surrounded by a hazardous legal vacuum that should be supplemented by the incumbent authorities.

The second obvious remark concerns its title: while the title includes the word “competition” the articles relate mostly to two sub-areas of competition law in a wider sense (State aids and, to a certain extent, concessions).

The third remark results from the latter: the worst provision in this law is certainly its article 16 which derogates a number of laws, decrees and orders in the field of competition law that were painstakingly adopted over more than 10 years with the financial support of international donor organizations and with the intellectual input of many prestigious foreign experts. Certainly, such a contest between the different provisions in a law to be commented is a highly unusual phenomenon, but we could not refrain from stating the obvious. Dumping good laws should always be dismissed, unless they are replaced by excellent laws. Regrettably, the Georgian authorities have rejected such an approach in the present instance.

Fourthly, by derogating most of its competition laws, Georgia breaches its international obligations, not only under the Partnership and Cooperation Agreement, but those accepted in its commitments when it became a member of the WTO. While there is no immediate legal remedy in international law for such a breach of Georgia’s treaty obligations, neither in the Vienna Convention on the Law of Treaties signed on 23 May 1969, nor in customary law, we would nonetheless point towards the diplomatic unease that could result from an unsubstantiated political reaction.

We also miss adequate rules for protecting consumers’ rights in the law. While consumers are mentioned in the definitions given by article 2, their interests are not further regulated. This creates some confusion to say the least insofar as competition law and policy is concerned. For instance, the question whether consumers are entitled to introduce complaints to the Agency is inadequately touched upon. All legal systems in the field of economic competition clearly protect the consumers’ rights and the Georgian system should not be an exception to the rule.

The ambiguity of the law leads to significant confusion for the public and the private sectors alike. Too many open questions remain after the adoption of the present law. Most

importantly, the creation of a competition-law-free country, as has been suggested, cannot be seriously considered in a globalized world, notably when referred to a transition economy where many non-market economy structures still subsist (and have been or are being privatised).

Furthermore, the Agency's functions should be portrayed as consultative. The sole output of the Agency is recommendations that the addressee may choose to implement or reject. For its enforcement, the Agency must take legal action against the addressee, but there is no legal basis (i.e. clear parameters applicable to State aid schemes or target governmental programs) for defending the Agency's findings in judicial proceedings. In this context, we should stress that the Agency's functions do not include being a sort of "guardian of free trade and competition" in Georgia. To the contrary, its functions listed under article 13 only mention "recommendations" as its outputs, without granting it any enforcement powers. This astounding innovation in comparative law constitutes a groundless experiment, whose results are only conducive to more or less public disputes among different bodies of the Georgian Public Administration.

We conclude that there is not only room for improvement, but a need to review profoundly the provisions of the law, while developing those areas that are just superficially regulated at present, i.e.:

- the internal rules, or by-laws applicable to the Agency and to be approved by the Agency;
- procedural rules for State aids and target governmental programs, if this distinction is to be maintained, to be approved by the Agency;
- guidelines applicable to the review of rejections by special property holders to economic agents' applications for admission to the networks, to be approved by the Agency;
- substantive rules for State aid schemes and target governmental programs, to be approved by Parliament, or the government in the form of economic or industrial policies;
- a law on "restrictive economic practices by economic agents", as mentioned in article 3(a) of the law, to be approved by Parliament with provisions delegating legislative powers to the Agency for adopting secondary legislation in this field; and a concessions law to be adopted by Parliament).

In our understanding, it should be possible to build on the present law, despite its obvious weakness. It is advisable to streamline the ambiguities that exist in the present law. For this reason, we would suggest that a new law is enacted in line with the derogated legal instruments.

This being said, we will comment each article of the present law having in mind that our analysis coincides with our comments to two draft procedural regulations received from the Agency.

Chapter 1

General Provisions

Article 1

The law of Georgia on Free Trade and Competition consists of the Georgian Constitution, international treaties and agreements, Georgian Laws, this Law and other sub-legislative statutory acts.

Article 2

Terms used in this Agreement have the following meanings:

- a) **Economic agent** – a legal entity or natural person that, irrespective of its residence, organization, ownership and legal form runs an enterprise. The term also refers to non-profit organizations, foundations as well as other associations acting like market players or in line with the interests of entrepreneurs, charity organizations and professional associations;
- b) **Economic competition** – contention between economic agents endeavouring to run their enterprise more successfully than others proposing better conditions of price, quality, packaging, service standards and other economic features to consumers;
- c) **Substitutable goods** – goods or a group of goods, which may replace other goods or a group of goods in view of their functionality, use, quality, or technical specifications;
- d) **State aid** – any kind of a single support from the State for a given term, in particular – tax exemptions or deferrals, writing-off debts, restructuring, purchasing real estate under special conditions, preferential conditions for purchases from public provider and profit guarantee as well as granting any other exclusive rights restraining or intending to restrain competition by giving preferences to a given economic agent or to the production of certain goods;
- e) **Target governmental program** – set of social and economic measures financed with budgetary appropriations, which are implemented by government, according to a time-frame and to the benefit of consumers, in line with a feasibility study performed by government, the objective being to actively influence economic processes;
- f) **Noncompetitive environment** – commodity markets where competition may be introduced but is restrained and/or restricted by governmental or local authorities;
- g) **Monopolistic position** – market structure where only one trader exists and no substitutable goods are available;
- h) **Controlled economic areas** – economic activities, which based on needs related to the protection of consumers' economic interests are subject to tariff regulations and/or state enterprises existing in the infrastructural fields;
- i) **Infrastructural field** – field where goods subject to restricted circulation are being manufactured, traded and served;
- j) **Special property** – one or more facilities for the transportation of goods subject to restricted circulation;

- k) ***Special property holder*** – economic agent, which is an owner (owners) or a tenant (tenants) of one or more facilities for the transportation of goods subject to restricted circulation;
- l) ***Goods subject to restricted circulation*** – goods which are manufactured, imported, traded and used under limited conditions;
- m) ***Tariff regulation*** – price (tariff) set by an administrative authority for goods and services in a restricted competition environment;
- n) ***Administrative barrier*** – abuse of authority by a governmental or local authorities when powers are delegated to it under the applicable law (request for additional documents, unreasonable delay of the documents required for start-up of economic activities etc.);
- o) ***Discriminatory barrier*** – making unreasonable, uncommon and unfair demands or granting preferences to any economic agent by a governmental or local authority as a result of the type of ownership, residence or any other criteria.

Comments

It is useless to include definitions of terms that are not used in substantive provision of the law (for example, substitutable goods, tariff regulation – used only in another definition). This comment may be however related to some inaccuracies in the translation.

Modern legislative techniques recommend avoiding the use of brackets in any law. This remark could be repeated in many articles, but we choose to avoid repetitions.

We assume that public enterprises are included in the term “economic agent”. We would recommend clarifying this, unless the Georgian text is sufficiently clear on this question.

The definition of the term “monopolistic position” calls for a reference to “oligopolistic positions”, rather to “monopolistic markets” and “oligopolistic markets”. We would recommend including provisions in the law that have the effect of submitting economic agents enjoying such positions to the same rules. Such a provision is mostly useful in a transition economy after the privatisation process of State monopolies and of immense publicly owned enterprises.

We recommend using the term “product market” instead of “commodity market”, since this is the internationally accepted legal term.

Article 3

The objective of the Law is to lift any barrier to free trade and competition for natural persons and legal entities notwithstanding their organization, ownership and legal form, in particular:

- a) Restrictive competitive practices by economic agents;
- b) Barring any administrative barrier for market entry and facilitating free access of any economic agents to a given market;

- c) Barring any discriminatory barriers on the part of governmental or local authorities, and barring the creation of these barriers;
- d) Protecting vital and economic public interests within economic areas controlled in a restricted competition environment;
- e) Prohibiting the implementation of international obligations by governmental or local authorities which may prevent free trade both in the country and abroad.

Comments

Point (a) concerns “restrictive competitive practices by economic agents” which undoubtedly covers the areas of restrictive agreements, agreements between associations of undertakings, concerted practices, the abuse of a dominant position and mergers. The problem resides in the dimension given in the law to its main scope (at least, as disclosed in the title), i.e. competition law, as rules for such “restrictive competitive practices” are not further developed in any provision of the law. This is certainly not only a shortcoming but a deplorable deficiency in the Georgian legal system, because in the end such restrictive competitive practices are not forbidden. Hence, not being forbidden, they are allowed. Moreover, restrictive competitive practices are not monitored and controlled by any public authority; the Agency does not have any authority over such infringement to generally accepted principles of competition law.

Points (b) and (c) equally lack further development in the law. Probably, what the legislators intended was to introduce a “cut red tape” policy in the country. The fact is that reducing the size of the public administration by lifting administrative and discriminatory barriers cannot solve the problems created by monopolistic market structures and abusive conducts of a dominant position by economic agents. At the end, legislators have mixed two topics which are in theory and in practice unrelated. We certainly support the policy of reducing burdens for investment, but this should be a part of economic policies (or general administrative law) and not a part of competition law.

The wording of point (d) is striking in a competition law. A “restrictive competitive environment” and a “noncompetitive environment” (as mentioned elsewhere in the law) are competition-free product markets – and nothing else. Protecting the “vital and public economic interests” in such product markets is certainly not a matter to be included in a competition law, but rather in exceptions to the free market economy, that may be warranted in the transition to a free market economy. Consequently, such artificial bubbles in a free market environment should only be admitted for a short period of time and measures to restructure such areas of the economy are necessary. State aids may be instrumental for restructuring such markets, but they are not the only political tools available.

Point (e) conflicts with not only with international law but also with the Georgian Constitution (the supremacy clause applicable to international treaties).

Article 4

The Law applies to:

- a) Legal relations affecting competition and free trade on the national commodity and service markets for legal entities and/or natural persons and/or governmental or local authorities;

- b) Legal acts and decisions of governmental or local authorities which influence (or threaten to influence) somehow competition or free trade.

Comments

Modern legislative techniques recommend avoiding the use of the term “and/or”.

Due to the fact that Georgia still maintains competition-free product markets, the wording of point (a) is simply incorrect, as it omits referring to such “bubbles”.

Secondly, the term “national” as used in point (a) limits the scope of the law in a globalized world. There are numerous examples of international cartels (for example, the wood-pulp case, the cement case, etc.) and any doubt as to their subjection to competition law should be avoided. Moreover, the use of the term “national” certainly conflicts with the provisions in article 3(e), when it refers to the prohibition of legal instruments that have the effect of preventing trade “both in the country and abroad”.

The term “legal relations” includes agreements, and by definition restrictive agreements. This confirms our comments to article 3(a).

“Legal entities and/or natural persons” correspond, in our understanding, to the term “economic agents”, as defined in article 2. There is no apparent reason for not using here the term as included in the definitions.

The scope of point (b) is huge; we assume that the original Georgian text is drafted with more precise terms than the English translation. Anyway, there would certainly be means to better specify the exact intent of the legislator.

Article 5

This Law does not apply to any legal relation associated with copyrights and related rights, trademarks and industrial models.

Comment

We simply cannot understand the rationale for artificially creating a competition-free area in the field of most intellectual property rights. Such scheme is in breach of TRIPS and the PCA.

This being said, we note that the intellectual property rights referred to in the law do not include patents. Furthermore, this article does not expressly exclude know-how from its scope. We cannot endorse such an inaccurate wording, or, in the alternative, such an unfounded regulation.

Article 6

Compliance with the provisions of this Law shall be controlled by the Agency for Free Trade and Competition (hereinafter referred to as the “Agency”) – entity within the jurisdiction of the Ministry for Economic Development.

Comments

There is a conflict between this provision and article 15(c). If the Agency is to become an independent body, it cannot remain an “entity within the jurisdiction of the Ministry for Economic Development”.

We would certainly recommend ensuring that the Agency is and remains as independent as possible from government. Many examples from well established market economies would support our recommendation.

We would recommend reassessing the adequate dimension for an efficiently working Agency. The present Agency with a staff of 12 officials is not in a position to cope with its functions as described in the law. To reach this conclusion no further analyses are necessary (but we would support to analyze objectively the size and structure needed for the Agency to be in a position to cope efficiently with its functions).

We note that the total number of staff at the Agency exceeded the figure of 120 officials before the adoption of the law.

The law remains silent as to the Agency’s authority to control “restrictive competitive practices by economic agents” (see article 3(a)) and the prohibition of implementing “international obligations by governmental or local authorities which may prevent free trade both in the country and abroad”. For the time being, since no law stipulates that the Agency is responsible in these areas, we should conclude that there is no administrative unit charge of the areas described above. This ambiguity requires urgent action.

Chapter II

Prohibition of Restraints to Competition

Article 7

Every governmental or local authority shall be prohibited to:

- a) Set taxes or other exemptions for any economic agent, who with respect to other competitors (potential competitors) may acquire advantageous conditions having the effect of distorting competition;
- b) Prohibit, prevent or restrict otherwise business activities as well as the independence of any economic agent unless exemptions are provided for by the Georgian legislation;
- c) Establish governmental or local agencies for the monopolization of goods’ production or for their completion, or delegate the already established agencies with authorities which may restrict competition;
- d) Make decisions leading an economic agent to a monopolistic position, thus significantly restraining competition as well as free pricing, unless exemptions are provided for by the Georgian legislation.

Comments

Interestingly, undertakings entrusted with the operation of services of general economic interest are omitted in the law, unless they are the ones operating in “controlled economic areas”.

The title of Chapter II does not fully coincide with the legal provisions in article 7. For instance, “restrictive competitive practices by economic agents” regulated under article 3(a) seem not to be prohibited in Georgia under the provisions of Chapter II of the law.

If one analyzes point (b), the formula “unless exemptions are provided for by the Georgian legislation” either invalidates the essence of the prohibition, or is useless. It is not clear whether the legislator wanted to include here a standstill clause (or similar), or a reference to article 8(2). Anyhow, any legislation in the world is characterised by its temporal validity, so that the formula used simply confirms the most basic principles applicable to a sovereign State and its legislators, who enjoy the right to legislate and to amend legislation according to its political program (disclosed and voted for in democracies) and in compliance with international obligations accepted by the State (not to be mixed up with the legislators and government). We would therefore recommend amending this formula as follows: “except with respect to exemptions under article 8(2) of this Law”.

It is clear that public authorities may prohibit, prevent or restrict business activities, but it is not so clear that they can somehow prohibit, prevent or restrict “the independence of [an] economic agent”.

The broad prohibition to prohibit under point (b) should be reviewed, since it encompasses so many scenarios in its present form, that one may argue, for instance, that local authorities are not in charge any more of city planning (and the regulation of industrial areas, green zones, etc.).

Chapter III

State aid and Target governmental programs

Article 8

1. Any kind of State aid which restrains or prevents competition with the exception of the exemptions provided for in Paragraph 2 of this Article, shall be prohibited.
2. State aid may be accepted in the following cases:
 - a) Force majeure as defined by the Georgian legislation;
 - b) State aid granted with the aim to promote certain economic activities or the development of economic zones and/or the maintenance of culture and cultural heritage;
3. The Agency shall design and approve under its by-laws procedural rules applicable to the processing of recommendations in the field of State aids.
4. Under the rules provided for in Article 8, par. 3 governmental and local authorities shall elaborate a State aid scheme which shall define its necessity, forms of its materialization and beneficiaries.
5. State aid schemes shall be submitted to the Agency for approval under the by-laws approved by the Agency.
6. The Agency shall be notified on the plan, modifications and/or State aids already granted.

Comments

Paragraph 4 is unclear. In principle, we understand that the delegated legislative powers granted to the Agency are limited to the adoption of implementing regulations, notably internal rules (or by-laws) and procedural regulations. The wording of paragraph 4 suggests

that other rules will impinge on the work of governmental and local authorities. To complicate further this issue, we should note that article 9 does not include a similar provision when regulating target governmental programs.

We recommend that paragraph 4 is either clarified, or deleted. In case the first option is chosen, an equivalent provision ought to be added to article 9.

Article 9

1. Target governmental programs which restrict or prevent competition in any way whatsoever shall be prohibited.
2. The Agency shall design and approve under its by-laws procedural rules applicable to the processing of recommendations in the field of target governmental programs of economic nature.
3. Target governmental programs of economic nature, as defined by the Georgian legislation shall be submitted to the Agency for approval under the by-laws approved by the Agency.
4. The Agency shall be notified on the target plan, programs and/or modification of the latter.

Article 10

1. The Agency shall conclusively assess any State aid scheme and/or target governmental program submitted to it within a 30-day period, otherwise the State aid scheme or the target governmental program shall be deemed valid.
2. In case of any inconsistency between the activities of governmental or local authorities and the provisions in this Law, or in case any risk exists of incorrect application of the provisions therein, the Agency may request explanations from that governmental or local authority.
3. Based on the submitted information, the Agency shall determine the conformity of the target governmental program with the provisions in this law and shall within a 30-day period make a recommendation on conformity of the aforesaid program with the Law.
4. The State authority to which the recommendation was notified in compliance with Article 10, par. 3 shall within a 10-day period decide upon abandoning, revoking, amending and/or leaving unaltered the target governmental program.
5. The governmental authority shall inform the Agency about the decision made upon the notified recommendation.

Comments

We consider the 30-day time period stipulated in paragraphs (1) and (3) (without any possibility of an extension!) as illusive. Our conclusion is based on the staffing and material means available at the Agency. Secondly, we take also into consideration the level of expertise of the officials linked to the lack of clear parameters set by government in an economic or industrial policy.

It is unconvincing that the law does not stipulate any means for enforcing at least the request of explanations sent by the Agency to governmental or local authorities (paragraph 2). The law does not specify that the Agency is authorised to use any type of injunction or similar to force the allegedly infringing authority to provide it with information. The only

remedy available to the Agency is regulated under article 12(3)(b) that, we must assume, is not the most expeditious means to obtain information from another public authority.

We conclude that the Agency should have more powers to enforce its internal decisions.

In line with this conclusion, we also consider that the Agency should have the power to investigate the beneficiary of a State aid scheme, or a target governmental program. While the beneficiary should not participate in the procedure, as designed in the law, we suggest that it can be investigated by the Agency's officials.

The 10-day period regulated under paragraph (4) refers at first sight only to the hypothesis of a notification under article 10(3), i.e. in the case of an investigation initiated by the Agency (as opposed to the procedure initiated on the basis of a voluntary submission by the governmental or local authority). We obviously consider that the same 10-day period should be granted to the governmental and local authorities that voluntarily submit an application for the elaboration of a recommendation. This way, we would balance the rights of the governmental and local authorities in the two types of procedures to be managed by the Agency. Similarly, the term "state authority" is only used in paragraph 4 of article 10, without disclosing the definition of the new notion. We propose to specify that the provision refers equally to governmental and to local authorities.

Paragraphs (2), (3) and (4) concern only target governmental programs, excluding apparently State aid schemes. It is most likely that this slip relates to the translation of the Georgian text. For this reason, we will not develop it further.

Chapter IV

Controlled economic areas

Article 11

1. Special property holders shall, for the purposes of acquiring and/or selling any service, admit other economic agents to their network or infrastructure under non-discriminatory conditions.
2. Special property holders may reject the admission of other economic agents to its network provided that the rejection is based on the following objective reasons:
 - a) Certain technical requirements and standards are not met with the effect of endangering the network integrity or security;
 - b) The economic agent requesting admission to the network lacks sufficient financial resources in order to ensure the accomplishment of the works that are necessary to meet the required technical requirements as well as the standards.
3. The conformity or rejection of other economic agents to the network by the special property holder with the provisions in this Law is regulated by the Agency.
4. Requirements stipulated in Article 10, par. 1, 2 and 3 do not apply to the facilities for the transportation of goods subject to restricted circulation made through private investments in any infrastructural fields.
5. In order to meet the objectives defined in this Law, the Agency shall analyze the activities performed by economic agents within the controlled economic areas and develop and publish the corresponding recommendations.
6. In case an infringement to this Law by an economic agent acting in a controlled economic area is established, the Agency shall notify the offender a

- recommendation with a view to bringing the agreement (decision) into line with the present law.
7. The economic agent acting within a controlled economic area shall within a 10-day period from receiving the abovementioned recommendation decide upon bringing the agreement (decision) into line with the law or leaving it unaltered.
 8. The economic agent acting within the controlled economic area shall notify the Agency on its decision made upon the recommendation.
 9. Article 10, par. 1, 2 and 3 shall not apply to the admission of any special property holder to the third party's network provided that the conditions for admission are defined in a separate law and provided the legal relations are regulated by the relevant independent regulatory body.

Comments

We are not aware of any other legal instrument dealing horizontally with “controlled economic areas” in the Georgian legal system. If this can be confirmed, we would strongly recommend regulating as a matter of urgency the “bubbles” in the sense that this term was used earlier (see comments under article 3), i.e. the product markets with a “noncompetitive environment” or in “controlled economic areas”. This recommendation includes regulations on concession agreements and public procurement, but does not concern the Agency.

Anyhow, article 11 can be described as a first attempt to deregulate the controlled economic areas, compelling special property holders to incorporate economic agents into some of their operations. The scope of the deregulation is quite reduced: in fact, this article preserves all controlled economic areas in a manner that is probably by far too conservative (from the perspective of a non-market economy); it only calls for a limited “opening” of networks owned by special property holders to other economic agents. In this context, we can only remind the Georgian authorities that deregulating certain sectors in the European Union meant adopting audacious regulations after the authorities had analysed in great detail the sector and listened to the opinions of the main stakeholders in so-called “hearings”. A similar process ought to be designed notably for Georgia as being an economy in transition.

It appertains to the Agency to regulate the first approach to liberalising controlled economic areas pursuant to paragraph (3) of this article.

We recommend creating a road-map for the adoption of such rules.

The deregulation of controlled economic areas requires in any case a political support for the Agency. We could not imagine undertaking such an endeavour in a former non-market economy without the unconditional backing of policy makers and civil society (i.e. consumer associations, the press, etc.).

It is essential to organise adequate hearings, so that the stakeholders can voice publicly their concerns. Inappropriate approaches to such discussions can be avoided if the stakeholders are ONLY invited to public discussions/hearings.

The Agency could even consider the publication of a document similar to a Green Paper, as used by the European Commission requesting written comments within a given time period. Such comments will then be made available to all stakeholders in a web site. It

appertains then to the Agency to process the inputs received and to reach conclusions with the help of technicians specialized in the area under consideration.

This simple procedure would certainly increase the quality of the secondary legislation¹ to be adopted by the Agency.

This article does not solve the question as to the transitional measures that the Agency should apply until tailor-made regulations are adopted in Georgia. We are not aware of any similar legal scheme adopted in other transition economies of the region. For this reason, we can only suggest the integration of internationally accepted standards into the Georgian legal system, and more precisely, the standards in force within the European Union, with respect to which Georgia is required to approximate its national laws.

This said, the last words in this article are a matter of concern. The “independent regulatory bodies” enjoy an authority that certainly conflicts with those of the Agency. It is unclear to us, whether these independent regulatory bodies are expected to cooperate with the Agency, or whether they will simply behave as observers to the regulations or recommendations issued by the Agency. We would in any case recommend inviting such independent regulatory bodies to the process of deregulation, since they may have the technical expertise that is most likely lacking at the Agency.

In spite of the difficulties that may arise while interacting with such independent regulatory bodies, settling any dispute becomes an easy task, if one considers that the law only recognizes a role to the Agency. Hence, the decision making is only in the hands of the Agency; it will seek advice from the independent regulatory bodies. These considerations are objectively supported, even if the Agency plays an eminently consultative role.

Chapter V

Agency for Free Trade and Competition

Article 12

1. The Head of the Agency for Free Trade and Competition, upon nomination by the Minister for Economic Development of Georgia, shall be appointed and dismissed by the Prime Minister of Georgia.
2. The Agency, with respect to governmental or local authorities, shall have the authority to:
 - a) Issue recommendations to any offender of this Law whether governmental or local authorities with respect to any illegal conduct;
 - b) Request from governmental or local authorities any documents related to acts infringing the provisions in this law;
 - c) Denounce the governmental or local authority before the higher organ or official if no adequate response for the recommendation is given on the part of the governmental or local authority;

¹ It is not clear which format the Agency’s output will have. According to paragraph (3) the Agency is supposed to “regulate”, while according to paragraph (5) the output will be again a “recommendation”. If the term “recommendation” is correctly translated from the Georgian text, we assume that this recommendation will have a different nature and scope than the recommendation issued with respect to a given State aid scheme or target governmental program. The need for a recommendation with binding effects and not only applicable to an individual case, is supported by the legal certainty that all economic agents need when applying for entrance to a close network.

- d) Denounce the governmental or local body with a view to imposing disciplinary, administrative and/or criminal sanctions against the official having infringed free trade and competition rules.
3. With respect to economic agents acting in controlled economic areas the Agency shall be authorized to:
 - a) Request from the economic agent any documents related to the action infringing the provisions in this law;
 - b) Solicit the Courts of Justice for assistance to obtain from the economic agent the requested documents for conducting analysis, in case the agent fails to do so;
 - c) Request from the economic agent to abide by the provisions in this law;
 - d) Apply to the Courts of Justice for cancelling the decision or action made by an economic agent in breach of the provisions in this law.
4. The Agency may approve rules for assessing State aid procedures and/or target governmental programs, where formalities, terms and other issues related to the procedure will be defined.

Comments

We consider that these rules are clear enough for the programmatic law that we are considering. However, it is necessary to develop these rules in a procedural regulation, as described above.

The absence of a procedural regulation merely complicates the work of the Agency's officials. It sets hurdles, because nobody can presume seriously what is in the mind of his superior. We consider that the legislative delegation in the law is broad enough for the Agency to act as a matter of urgency, bearing in mind that non-compliance with the "right to self-regulate procedural issues" will certainly not deserve the public approval of Parliament and of the highest spheres of the Georgian public administration.

We consider that time is of the essence for the Agency to validate itself.

We also consider that the Agency should produce high quality procedural rules, in line with international standards. It is up to the Agency to conduct itself within the limits established in the law. Such limits refer to the adoption of procedural rules.

We understand the present law in such a way that the procedural regulations must be adopted (or approved) by the Head of the Agency. There is no reference to the adoption by another (higher) official. While we would not recommend that procedural rules are finally approved without some exchange of points of views with the higher officials in the Ministry of Economy, these consultations ought to preserve the "independence" of the Agency. We have to agree that this independence is more theoretical than real, according to the information that has been disclosed to us. But the Agency has to defend its own case before higher ranking officials.

Article 13

The main obligations of the Agency are:

- a) Lifting administrative barriers that prevent the development of free trade and competition;

- b) Investigating and preventing discriminatory acts, illegal State aids (direct and indirect) and preferences granted by governmental or local authorities;
- c) Assessing the infringements to the Georgian legislation on free trade and competition and elaborating recommendations;
- d) In case any governmental or local authority or economic agent acting within the controlled economic area fails to comply with the terms of the recommendation, the Agency may:
 - d.a) take legal action before the Courts of Justice and participate in the judicial investigation;
 - d.b) denounce publicly the governmental, or local authority, or the economic agent listed in Paragraph (d) of this article;
- e) Complying with State as well as commercial confidentiality and non-disclosure rules;
- f) Indemnifying any damages resulting from the disclosure of confidential information under the rules and in the amount provided for by the Georgian legislation;
- g) Submitting annual reports on activities performed as well as recommendations to the government of Georgia:
 - g.a) On the compliance of this Law by governmental or local authorities;
 - g.b) On the compliance of this Law within the controlled economic areas.

Comments

The publication of annual reports requires the Agency to collect during the year sufficient data on the matters under its jurisdiction.

Such a report is certainly a means to publicize the difficulties encountered in the exercise of its functions.

Article 14

Any offender of this Law shall be imposed disciplinary, administrative or criminal sanctions.

Comments

Disciplinary, administrative and criminal sanctions will be imposed by the Courts of Justice. As stated above, we cannot subscribe to an authority charged with monitoring compliance with competition law (even if in reality its authority is reduced to cases related to State aid and target governmental programs) and deprived of any authority to sanction.

We would strongly recommend granting the Agency with the adequate authority to sanction infringers, while judicial review of the Agency's decision ought to be maintained. Our recommendation is exclusive of criminal sanctions² that should always be imposed by a Court of Justice.

Chapter VI Transitional Provisions

Article 15

² Criminal sanctions in competition cases are rarely in force. France is an exception to this rule.

- a) The Government of Georgia shall accomplish the liquidation process of the State Antimonopoly Service of Georgia and State Inspection of Prices – the entities in charge of the Ministry of Economic Development of Georgia within a month period upon putting this Law into effect.
- b) The Ministry of Finance of Georgia shall ensure the transfer of appropriations to the State Antimonopoly Service and State Price Inspection – the entities in charge of the Ministry of Economic Development of Georgia - provided for by the State budget under the Law of Georgia on State Budget of the Year 2005 as well as any property retained after liquidation of these organizations to the Agency.
- c) Within a 9-month period upon this Law coming into effect, the government of Georgia shall submit to the Parliament of Georgia legal amendments with a view to establishing as an independent entity the Agency for Free Trade and Competition – a state entity in charge of the Ministry of Economic Development of Georgia.

Comments

This article concerns actions to be undertaken by the Government of Georgia and its Ministers. We consider this article beyond the scope of our mission.

Chapter V Final Provisions

Article 16

Upon putting this Law into effect, the following documents shall be deemed null and void:

- a) Law of Georgia on Antimonopoly Activities and Competition (Bulletin of Parliament #22-23, October 17, 1996, pg. 19);
- b) Law of Georgia on Fundamentals to Prices and Price Formation (Bulletin of Parliament #9, 1993, Art. 189);
- c) Decree #596 of President of Georgia (of September 13, 1996) on normative acts required for putting into effect the Law of Georgia on Consumer Rights Protection;
- d) Decree #95 of President of Georgia (of February 22, 1998) on Mechanisms of State Regulation of Natural Monopolies;
- e) Decree # 262 of President of Georgia (of April 23, 1998) on approving the Statute of Antimonopoly Council at the State Antimonopoly Service of Georgia;
- f) Decree #314 of President of Georgia (of May 11, 1998) on Establishing Interdepartmental Council for Coordination of consumer rights protection at the State Antimonopoly Service of Georgia and Approving its Statute;
- g) Decree #426 of President of Georgia (of September 30, 2000) on Approving the Provisions for the State Registry of economic agents possessing monopolistic status on the Georgian commodity market;

- h) Decree #8 of President of Georgia (of January 10, 2002) on Approving the Instruction for Inspection to be carried out by the State Antimonopoly Service of Georgia;
- i) Decree # 145 of President of Georgia (of March 31, 2002) on Amendments to the Decree #314 of President of Georgia (of May 11, 1998) on Establishing Interdepartmental Council for Coordination of Consumer Rights Protection at the State Antimonopoly Service of Georgia and Approving its Statute;
- j) Order #8/42, December 12, 2000 of Head of State Antimonopoly Service of Georgia at the Ministry of Economy, Industry and Trade of Georgia on Defining the Monopolistic Status of Economic Agent (entrepreneur) on the respective (concrete) commodity market.

2. This Law shall enter into force on the 15th day after its publication.

President of Georgia

Mikheil Saakashvili

Tbilisi
June 3, 2005
#1550-Is

**Comments to the
Draft Regulations on
General procedure for elaborating recommendations on State aids
and
General procedure for elaborating recommendations on target governmental
programmes of economic nature**

Both draft regulations were handed over by the Agency for Free Trade and Competition (hereinafter, the “Agency”) to GEPLAC during the meeting held on 21 February 2006 with the request to comment the delivered texts.

Since the draft regulations were handed over in Georgian, the GEPLAC project translated them into English. We attach the English translations to the present Comments as Annex 1 and 2.

Our comments analyze the most relevant strengths and weaknesses identified in these drafts. To facilitate the reading, we have numbered our comments and we conclude each item with clear recommendations addressed to the Agency.

1. It is worth noting at the outset of our comments that both drafts refer to the following legal basis:
 - article 8(3) of the Law of Georgia on Free Trade and Competition (hereinafter, the “Law on State aids”) in the case of the draft intended to regulate the procedures in State aid cases; and
 - article 9(3)³ of the Law on State aids in the case of the draft intended to regulate the procedures in cases involving Target Governmental Programmes of an Economic Nature.

The English translation of the cited articles equally state that the design and approval of the procedural rules will be undertaken under the Agency’s by-laws. Yet, we have been informed, that such by-laws or internal rules do not exist at present.

It is also worth noting that the drafts omit to refer to article 12(4) of the Law on State Aids. The latter equally opens the door to secondary legislation adopted by the Agency, but is not mentioned in the drafts.

More surprisingly, the law also calls for the adoption recommendations – which may take the form of some type of regulation – for the opening of networks owned by special property holders to other economic agents. We note that neither article 11(3) nor article 11(5) of the law is mentioned in the drafts.

Nonetheless, neither article 8(3), nor 9(2), nor 12(4), nor 11(3)/11(5) compel the Agency to adopt any act of secondary legislation within a given time period. Of course, legal certainty would be enhanced if such implementing rules were adopted

³ Obviously, reference should be made to article 9(2) of the Law on State Aids, and not to article 9(3). This minor typographical error should be corrected.

as a matter of urgency, but given the sequencing that is implicit in the Law on State aids, we would certainly recommend adopting first the by-laws or internal rules and only then turning to procedural rules.

This being said, a first question arises as to whether the Agency has the jurisdiction to adopt its internal rules. Given that the Agency is to become an independent body, it should have the jurisdiction to regulate its internal functioning. Furthermore, Heads of Agencies enjoy in most democratic systems known to us, the right to regulate the internal mechanisms where a general law does not cover the details that are specific to the Agency under consideration.

In addition to this, article 8(4) should be read and interpreted in conjunction with article 8(3) of the Law on State aids, to which it refers. One can only understand these two legal provisions as a type of “legislative delegation”⁴.

We could not find a provision similar to article 8(4) of the Law on State aids to be applied to target governmental programmes, i.e. under article 9 of the Law. However, we consider that the legislative delegation spelt out in article 9(2) is adequate for the Agency to adopt the procedural regulation.

With respect to the opening of networks owned by special property holders to other economic agents, and more precisely to the scope of the legislative delegation incorporated into article 11(3) and 11(5) of the law, we understand that the Agency received from Parliament the right to regulate this area. Since inaccuracies in the translation may contaminate the original wording, we simply state that in all our recommendations where we harmonise our advice for the two categories (i.e. subsidies, on the one hand and the opening of networks owned by special property holders to other economic agents, on the other hand), the recommendations on subsidies will subsist, even in the hypothesis that article 11(3)/11(5) should not entail any legislative delegation for the Agency.

Finally, the provisions contained in article 8(3) and in article 9(2) are identical, the only difference being the scope of the provision (i.e. State aids in the case of article 8(3) and target governmental programs in the case of article 9(2)). Obviously, this could be simplified by means of an amendment to the law. As for the implementing regulations to those articles, the Agency should do the outmost to simplify the applicable rules in the interest of the public at large and in the interest of its own officials who will use the regulations on a daily basis. Consequently, a single regulation should implement the provisions contained in article 8(3) and 9(2).

In summary, we conclude that:

- the Agency is entitled to adopt its own by-laws or internal rules, i.e. the internal regulations that cover both structural (the organigram, division of activities, etc.) and operational issues;
- the Agency is entitled to adopt its own regulations applicable to the procedure with a view to rendering recommendations on State aid schemes

⁴ We understand the term “legislative delegation” as the intentional shift of legislative powers from Parliament to a specific administrative unit of the Public Administration. This unit is charged by Parliament with defining and regulating the more technical aspects of the topic it has legislated upon within the boundaries set in law.

and governmental support programmes, and for the for the opening of networks owned by special property holders to other economic agents. These are the procedural regulations that the Agency will apply directly in all cases under its consideration.

Recommendation:

First, adopt the by-laws or internal rules covering structural and operational issues to be applied at the Agency.

Subsequently, develop a single procedural regulation for State aid schemes, for governmental support programmes, and for the opening of networks owned by special property holders to other economic agents.

2. The content of the drafts mainly restates many provisions of the law. Even working with translations the similarities are striking.

To illustrate our remark, we have created the following table of concordances:

State aid Law	Procedural Regulation for State aids	Procedural Regulation for Governmental Target Programmes
Art. 7(b)	Art. 1(3)	Art. 1(3)
Art. 2(d)	Art. 2(1)	
Art. 8(4)	Art. 3(2) and (3)	Art. 2(1) and (2)
Art. 8(5)	Art. 3(4)	Art. 2(4)
Art. 10(1)	Art. 4(1)	Art. 3(2)
Art. 10(2)	Art. 4(2)	Art. 3(3)
Art. 10(3)	Art. 4(3)	Art. 3(4)
Art. 10(4)	Art. 5	Art. 6
Art. 10(5)	Art. 6	Art. 5
Art. 12(2) and (3)	Art. 7	Art. 7

Modern legislative techniques would certainly discourage a verbatim repetition of the terms which are already legally binding, in the secondary legislation adopted on the basis of such legally binding instruments, unless such repetition is required because further new rules are added up to the original norms. We cannot find any justification for such repetition in the drafts received because there is simply no new rule in those drafts with reference to law.

Therefore, we would recommend deleting the provisions mentioned in the middle and right columns of the previous table.

3. If the provisions mentioned in the middle and right columns of the previous table were deleted, the remainder would certainly become redundant. Indeed, it is a fact that a large part of the drafts simply restate the provisions of the Law on State aids without any added new regulation, as mentioned before.

In order to clarify our remarks we can state without any hesitation that the drafts neither guide governmental or local authorities in the formalities to be accomplished when submitting a State aid scheme or a governmental support

programme to the Agency, nor does it regulate the steps to be accomplished by the Agency staff in the process of assessing these subsidies⁵.

This being the case, it is useful to examine whether the adoption of the drafts somehow contributes to streamlining the rules applicable to procedures in the area of files related to subsidies and managed by the Agency.

We sincerely doubt that this goal has been achieved.

For this reason, we recommend redrafting from scrap the procedural regulations.

4. To further support our conclusions, we draw the attention to the fact that the *acquis communautaire* contains procedural rules in the field of State aids covering, among others:
 - at which stage in the setting up of a subsidies scheme the notification must be done;
 - the calculation of time-periods, notably in the hypothesis that a notification is incomplete;
 - the request for additional information; time-periods to be applied; the legal effect of not receiving the requested additional information;
 - the investigation procedure; the request of comments from other Member States (within the European Union) and from other interested parties (i.e. from competitors and other businessmen in the private sector);
 - the possibility to attach conditions to a positive decision;
 - the withdrawal of a notification;
 - the revocation of a positive decision;
 - procedure to be followed in the case of an unlawful subsidy; the injunction to suspend or recover aid; non-compliance with the injunction;
 - recovery of unlawful subsidies; its control and monitoring; the limitation period;
 - interest rates for the recovery of unlawful subsidies;
 - rights of interested parties (i.e. the competitors and other businessmen in the private sector);
 - annual reports; their content; dates of publication (electronic publication and hard copies);
 - on-site monitoring and controlling, when reasonable doubts exist as to the implementation of decisions;
 - publication of decisions;
 - professional secrecy for officials and independent experts appointed for specific cases;
 - creation of an Advisory Committee on subsidies;

⁵ We use the term “subsidy” as inclusive of all State aids schemes and governmental support programmes. Whatever legal distinction may exist in Georgia, such distinction is completely irrelevant in the international arena. While we approach now a topic that is clearly outside the scope of our mission, we would strongly recommend the Georgian authorities to review the need to divide subsidies into two artificial categories. This division is useless for the WTO, for the European Union, and, most importantly, for the Georgian citizen, official and businessmen.

- forms for the notification of all different types of subsidies; simplified procedure (with a simplified form for the notification).

Not surprisingly, EU procedural regulations in subsidies are contained in more than 150 printed pages. This includes all forms to be completed by the authorities in Member States.

We recommend leaning on the EU model for adopting procedural regulations in the field of subsidies, as is also required in the Partnership and Cooperation Agreement.

5. Of course, in EU law numerous parameters⁶ have been adopted by law for assessing the compatibility or conformity of subsidies schemes with the Internal Market. In the case of Georgia, there is no law that determines compatibility or conformity criteria for any subsidy.

Lacking adequate guidance from the legislator, the conformity assessment of any subsidy set up by a line Ministry can become quite speculative at best. Indeed, any preference granted generously from a public source will have an impact on a competitive market. It would be ludicrous to challenge this. Then, looking for justifications for subsidies becomes a political exercise that should not be assigned by politicians to public officials. It appertains to politicians to evaluate the need and suitability for certain subsidies in a given instance. It appertains to public officials to implement on a non partisan basis the rules adopted by politicians.

We would like to underline that the absence of clear parameters will certainly lead to awkward situations. Firstly, the absolute absence of verifiable parameters provides decision-makers theoretically with a golden opportunity for engaging in corrupt behaviour, or in close-to-corrupt behaviour when exercising their discretionary powers. Secondly, worried (or disadvantaged) foreign interests can assess their damages in competitive markets and draw on article VI GATT(1947) and on the provisions in the Partnership and Cooperation Agreement that allow the imposition of countervailing duties, when subsidies have an impact on the commercial opportunities available to competitors in their domestic markets (i.e. not in the Georgian market) as stipulated in the cited legal provisions.

The conclusion should then be to determine by law approved in Parliament clear parameters for all types of subsidies that are exempted from the general prohibition, in accordance with internationally accepted standards.

Regrettably, this conclusion cannot be directly implemented by the Agency.

With respect to the opening of networks owned by special property holders to other economic agents (art. 11 of the Law), no legal provision regulates this complex topic. The same remarks as those presented above for subsidies are applicable to this task attributed by the law to the Agency.

We recommend that the procedural rules clearly distinguish between procedures based on parameters enacted in a legal provision approved by

⁶ They include, but are not limited to intensity of subsidies, their duration, and the repetition of subsidies.

the Georgian Parliament, from those procedures lacking any national legal framework. In the latter case, the discretionary powers of the Agency should be informally pegged to foreign parameters. We strongly recommend integrating the *acquis communautaire* by reference⁷ as a subsidiary source of law (or as an internationally accepted doctrine) applicable when assessing the conformity of subsidies with the Georgian law, in the absence of national rules. This recommendation also applies to a regulation on the opening of networks owned by special property holders to other economic agents (see article 11(3) and 11(5) of the law). The integration by reference should be announced in the form of a notice (and not in the form of a regulation), as the Agency lacks the authority to formally regulate the matters under consideration.

6. Article 2(d) to (j) of the Draft Regulation in the field of State aids lists exemptions that are not included in the Law. There is however no delegation of legislative powers in favour of the Agency on this quite crucial topic.

We would strongly recommend not including new types of exemptions in the procedural regulation for obvious reasons.

7. Our recommendations under item 5 steers our comments to article 44 of the Partnership and Cooperation Agreement.

Technical Assistance should be made available to make our recommendation viable whether through GEPLAC or through the framework contract. It would be preposterous to pretend that the *acquis communautaire* in the fields of State aids and of the dismantling of national monopolies should be translated integrally into the Georgian language. However, Georgian public officials should be trained to research in the European Commission web-site with some rudimentary knowledge of English with a view to squeezing out the relevant criteria. To achieve this goal, Georgian public officials should understand the legal system applicable to State aids and to the dismantling of national monopolies within the European Union. In addition to this, the procedural rules (and the pegging regulations) should be designed in such a way that they allow the subsidiary application of EU substantive rules in the field of Georgian subsidies and in the field of the opening of networks owned by special property holders to other economic agents.

We recommend that the Agency requests further Technical Assistance for implementing our recommendation under item 5 that consists of actions geared at legislative reform and training.

⁷ Before joining the European Union, Austria applied EU provisions on State aids for supporting the establishment of the Chrysler factory in the country. The case caught the public attention at its time.

Glossary for the translator:

“The opening of networks owned by special property holders to other economic agents” used as a term – see article 11 of the law.

State aids is the term used in the EU for subsidies. These are synonyms, but “subsidy” is used in our comments as a category embracing “State aids” and “governmental target programs”.

Governmental target program.

Governmental or local authority.

Recommendation – this term is used as the main output of the Agency, and to refer to our advice to the Agency.

Submission – the file transmitted by a governmental or local authority to the Agency.

Notification – the term in administrative law to give notice, notify a decision (in our case, a “recommendation”) to another person (in our case to a governmental or local authority).

PLEASE USE THE ORIGINAL LAW AND DRAFT REGULATIONS IN GEORGIAN AND READ THEM BEFORE STARTING WITH THE TRANSLATION. GOOD LUCK AND THANK YOU.