
GEPLAC ACTIVITIES

Analysis of the Draft Customs Code

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I. Introduction

Customs legislation of Georgia consists of the Customs Code of Georgia, Law on Customs Tariff, laws on taxation, some other laws, as well as Government resolutions and orders of Minister of Finance. The current Customs Code of Georgia has been adopted by Parliament of Georgia in 1997. This Code in terms of its structure, main definitions, scope, system of Customs procedures (regimes), etc. is similar to the Customs Code of Russian Federation and Customs Codes of other CIS countries. Presently this Code still forms a basis of Georgian Customs legislation; however, the detailed analysis of it hasn't been carried out due to the fact that the draft of new Customs Code of Georgia is already prepared. Government of Georgia has approved this draft Code in October 2005 and submitted it for consideration to Parliament. It was planned that the new Code would be adopted by Parliament in November or December 2005 and would enter into force since 1 January 2006 (it was expected that this date will be postponed till 1 April 2006). However, according to the latest information, even in the beginning of last decade of December 2005 the new Code still wasn't adopted.

The version of draft Customs Code of Georgia, which was used for this analysis, was the version, which was approved by the Government and submitted to Parliament. Unofficial translation of this document into English was prepared by AmCham (American Chamber of Commerce in Georgia).

II. Analysis of the Draft Customs Code

The draft of new Customs Code of Georgia was prepared using as a basis the Community Customs Code (Council Regulation No 2913/92 with later amendments). The Customs Code of Estonia, which was in force before Estonia's accession to the EU, was also used in the process of drafting of the new Code. The drafting of the new Customs Code of Georgia was carried out with technical assistance of Customs legislation experts from the EU Member States provided in the framework of TACIS programme.

The analysis of the draft new Customs Code of Georgia has shown that in terms of its structure and scope this draft Code is quite similar to the Community Customs Code. However, there are differences and provisions, which are worth to be revised.

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Structure and Basic Definitions

A significant part of the draft Code is formed by the provisions establishing functions, structure and powers of the Customs authorities, as well as sanctions applied in cases of violations of Customs legislation. Regardless the fact that the Community Customs Code doesn't contain corresponding provisions, their introduction into the draft Customs Code of Georgia can be treated as fully justifiable if this is in line with the principles of formation of Georgian legal system.

According to the definition provided in Article 7 of the draft Code "Customs declaration" means only a document. In the Community Customs legislation the term "Customs declaration" is defined in a different way: it means a statement, which can be made in a different form (in writing, orally, electronically or in a form of any other acts such as selection of green or red channel in dual-channel system). Broadening of the term "Customs declaration" would allow to avoid the use of rather vague term "Customs declaring", which is provided in the same Article and which, in fact, is overlapping with the term of "Customs declaration". Highlighting of the "paper" form of the Customs declaration can create certain legal problems for the future use of electronic Customs declarations.

Definitions "Customs supervision" and "Customs control" provided in Article 7 of the draft Code are to certain extent overlapping. This could be avoided by a replacement of the term "Customs control" with the term "Customs examination", which could be defined using a part of provisions from the definition "Customs formalities" covering *inter alia* Customs examination.

Article 7 contains two rather similar terms "Customs debt" and "Customs obligation", which are used in the draft Code quite confusingly. On the contrary, the Community Customs Code contains only the definition "Customs debt" and that makes its provisions related to payment of duties and taxes more clear and accurate. Moreover, it is confusing that the definition "Customs duties" also covers other import and export taxes because in some places of the draft Code only actual Customs duties should be referred to.

The draft Code doesn't contain a definition of the "Holder of the Customs procedure". Due to the lack of this definition the provisions defining responsibilities of persons who are transporting or using the goods subject to the Customs control are less clear and accurate. Introduction of the term "Holder of the Customs procedure" would allow defining clearly that this person is always responsible against the Customs authorities for the fulfillment of all obligations related to corresponding Customs procedure.

The draft Code doesn't contain provisions on issue of binding information. Moreover, it is stated in Article 15(3) that an explanation about the application of the Customs legislation issued by the Customs authorities is only a recommendation, which doesn't have a binding character. Taking into account that binding information is a very useful possibility for

traders to safeguard their interests, it is strongly recommended to reintroduce into the draft Code the provisions on issue of binding information, which were included in earlier version of that document.

Goods' Declaration Procedure

The draft Code contains rather detailed provisions governing the activities of Customs brokers. Those provisions contain a quite doubtful requirement to provide a guarantee of a Customs broker, the amount of which is 30 000 EUR, because it isn't established in what cases this guarantee can be used. It would be much better to apply general rules on the use of guarantees also in cases when goods are declared by Customs brokers.

It is also questionable whether it is necessary to have the provisions of Article 17(2) stating that "a list of documents required for Customs control shall be defined by the decree of the Minister of Finance" because it will be very difficult to make an exhaustive list of documents necessary for Customs control, which are probably mentioned in various legal acts.

Customs Valuation and Origin

The provisions of Article 21 defining the order how the official exchange rate of national currency (GEL) has to be applied are different from the corresponding provisions of the Community Customs legislation.

The provisions of Article 34(5) and Article 77(2) providing that the rules and criteria of determination of origin of goods are defined by the decree of the Minister of Finance seem quite doubtful because preferential rules of origin very often are defined by international agreements. The same remark can be made concerning Article 37(3) of the draft Code.

Entry of Goods into the Customs Territory

The formulation of provisions of Article 51(2) isn't correct: the foreign goods should remain under Customs control until the change of their Customs status or until their re-exportation; as regards Georgian goods, they should remain under Customs control until the determination of their Customs status.

The provisions of Article 51(6) seem quite doubtful: export declaration issued in other country normally is a very unreliable source of information about the goods, which are brought into the Customs territory. Similar remark can also be made concerning Article 192(4) of the draft Code.

In Article 65 of the draft Code instead of the goods to be placed under a transit procedure the goods, which have already been placed under this procedure should be mentioned (e.g. the goods transported under cover of TIR Carnets).

Customs-approved Treatment or Use

The provisions of Article 73(5) of the draft Code seem quite doubtful: results of Customs examination can be registered without making a special act of examination.

It isn't clear what is the intention to make a person represented by the declarant but not the declarant himself responsible for the correctness of data provided in the Customs declaration in cases specified in Article 79(5) of the draft Code.

Provisions governing the order of amendment and invalidation of Customs declarations after the release of the goods aren't clear enough (Articles 80 and 81 of the draft Code). The provisions of Article 82 of the draft Code in fact are duplicating the provisions of Article 78(4).

It would be reasonable to establish in Article 87 of the draft Code that authorised Customs officials (mobile teams) are entitled to stop means of transport at every place of the Customs territory of the Republic of Georgia.

The provisions of Article 87(4) actually are related to temporary admission of means of transport but not to their examination. Therefore, it would be reasonable to transfer those provisions to the other place of the draft Code or to delete them.

The provisions of Article 89(3) of the draft Code should probably be applicable in all cases of Customs examination but not only in cases of examination of travellers. It would be reasonable to establish in Article 92(2) of the draft Code that other authorities having powers to examine the goods aren't entitled to remove Customs seals or other means of identification affixed by the Customs authorities without their prior consent.

Clear provisions on application of simplified procedures are missing in the draft Code. Only simplified Customs declarations are mentioned in Article 97.

The provisions of Articles 99 and 100 (declaration of traveller and declaration of postal consignment) should be transferred to the implementing provisions of the draft Code (see Article 77(1) of the draft Code).

The provisions of Article 107(1) seem very doubtful because those provisions in fact prevent the application of transit procedure for the transportation of foreign goods within the Customs territory of the Republic of Georgia. In Article 108 of the draft Code responsibilities of the principal or the holder of transit procedure (it is recommended to introduce and to use such a term) are mixed with responsibilities of the declarant. Responsibilities mentioned in Article 109 of the draft Code should be assigned to the principal or the holder of transit procedure but not to the carrier. It isn't clear what is the reason that the guarantee waiver provided for in Article 110 of the draft Code doesn't cover the transportation of goods by rail. It also isn't clear what are the reasons to apply restrictions for the release into free circulation of unprocessed goods and compensating products after the application of inward processing procedure (Article 133 of the draft Code).

It would be reasonable to transfer to secondary legislation mentioned in Article 145(2) very detailed provisions describing cases when temporary admission procedure can be applied (Article 148 of the draft Code). The provisions of Article 189(4) of the draft Code should be revised and transferred to other place of the draft Code because after release of the goods into free circulation they can only be exported but not re-exported.

Articles 224 and 228 of the draft Code in fact do not contain provisions on deferred payment of Customs duties and taxes; therefore, almost in all cases provisions foreseeing the payment of duties and taxes during the implementation of Customs formalities would be applied. This situation can be treated as an obstacle for the creation of effective system of financial guarantees.

Appeals

The provisions of the draft Code establishing the order how appeals against decisions taken by the Customs authorities are to be lodged and considered (Articles from 239 to 253) should be reviewed substantially, taking into account that persons must have a right to appeal not only against violations committed by the Customs authorities but against every decision taken by those authorities, which concern them directly and individually, and that appeals shall not be lodged before the Customs authorities who have taken an appropriate decision (proceeding this way would only delay the process). Moreover, it should be noted that some provisions of the draft Code on appeals are too detailed, therefore, it would be reasonable to transfer them to the implementing provisions of the Customs Code.

Transitional Measures

Transitional measures do not contain provisions establishing how Customs procedures started before the entry into force of the new Customs Code and not discharged before that date would be applied in the new legal environment and what rules of assessment of duties and taxes would be applied in above-mentioned circumstances.

III. Implementing Provisions (Secondary Legislation)

Many provisions of the draft Customs Code of Georgia contain references to implementing provisions (secondary legislation), which should establish detailed rules of application of appropriate provisions of the Code (in total more than 30 acts of secondary legislation are mentioned). It is very important for the successful implementation of the new Customs Code that those implementing provisions (secondary legislation) would be adopted before the entry into force of the new Code and would enter into force simultaneously with the Code. However, it isn't very likely taking into account that time left until the provisional date of entry into force of the new Customs Code is very short and human resources of the Customs Department of Georgia, which can be used for the drafting of above-mentioned secondary legislation, are very limited. The fact that some drafts of secondary legal acts have already been prepared using own resources and technical

assistance provided by experts of the EU Member States in the framework of TACIS programme actually doesn't make the situation easier. Therefore, it is strongly recommended to seek the postponement of the date of entry into force of the new Customs Code at least till 1 July 2006 (better till 1 January 2007) in order to have enough time for the preparation of secondary legislation necessary for its implementation as well as for training of Customs officials, Customs brokers and other economic operators. However, if it wouldn't be possible to achieve a significant postponement of the entry into force of the new Customs Code then it is recommended to prepare a special legal act (Government Resolution or Order of Minister of Finance) on temporary application of the new Code during the transitional period when a part of secondary legal acts referred to in the provisions of the Code aren't yet adopted. This special legal act would allow to explain how the Customs authorities have to apply those provisions of Customs legislation, which wouldn't be aligned with the Customs Code before its entry into force.

IV. Spheres of Special Interest

Provision of Information and Binding Decisions

The provisions of the draft new Customs Code on rights of persons to request an information from the Customs authorities (Article 15) as well as the provisions on obligation of the Customs authorities to ensure the confidentiality of information provided to those authorities by other persons (Article 18) are in line with the Community Customs legislation. However, the situation with binding decisions is absolutely different because corresponding provisions have been deleted in the latest version of the draft Code. Moreover, it is stated in Article 15(3) that an explanation about the application of the Customs legislation issued by the Customs authorities is only a recommendation, which doesn't have a binding character. Taking into account that binding information is a very useful possibility for traders to safeguard their interests, it is strongly recommended to reintroduce into the draft Code the provisions on issue of binding information, which were included in earlier version of that document.

The detailed rules on the issue of binding tariff and origin information could be laid down in secondary legislation. Preparation of this legislation should go in parallel with recruitment and training of specialists who will prepare and issue binding information. This is extremely important for the correct application of Customs tariff because presently the situation in sphere classification of goods and control of their origin is very difficult.

Customs Valuation Rules

The rules of Customs valuation laid down in the draft Customs Code are in line with the provisions of the Community Customs Code and Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade of 1994. Presently the rules of Customs valuation are laid down in secondary Customs legislation.

It should be noted that currently Customs valuation of the goods is one of the most difficult problems for Georgian Customs administration. Declared transaction value of consumer goods produced in China, Turkey and some other countries as well as value of agricultural products imported from Azerbaijan by natural persons very often is intentionally decreased by importers. In cases of under-valuation of the goods the Customs authorities encounters very serious difficulties trying to prove in legal terms the application of other Customs valuation methods instead of transaction value method and to establish the Customs value on the basis of data available to the Customs authorities.

Simplified Customs Procedures

Clear provisions on application of simplified procedures are missing in the draft Customs Code. Only simplified Customs declarations are mentioned in Article 97. Taking into account that the application of simplified procedures is a very important trade facilitation measure, it is recommended to expand corresponding provisions of the draft Code and to prepare secondary legislation necessary for practical application of simplified procedures. Those activities should go in parallel with promotion of simplified procedures among traders.

Post-importation Control

The draft new Customs Code contains some provisions on post-importation control (e.g. see Article 7(11) and Article 101). However, those provisions aren't very clear and harmonised with corresponding provisions of the Community Customs Code. Moreover, the powers of Customs officials necessary for carrying out the post-importation control aren't clearly established. Therefore, it is strongly recommended to review and strengthen provisions of the draft Code related to the post-importation control in order to ensure that Customs authorities would have necessary legal support for the application those very important control. Broader application of post-importation control would allow to decrease the percentage of examinations carried out before the release of the goods.

Another issue, which is very important in this context, is to ensure that all economic operators are legally obliged to keep at the disposal of the Customs authorities all the documents and records related to import, export and transit operations carried out for a sufficiently long period of time.

Deferment of Customs Duty

The draft new Customs Code (Articles 224 and 228) in fact doesn't contain provisions on deferred payment of Customs duties and taxes; therefore, almost in all cases provisions foreseeing the payment of duties and taxes during the implementation of Customs formalities would be applied. This situation can be treated as an obstacle for the creation of effective system of financial guarantees and also as a disadvantage for traders. There-

fore, it is recommended to review the provisions of the draft Code in order to allow much wider application of the deferred payment of Customs duties and taxes.

Transit

Customs legislation of Georgia governing the order of application of Customs transit procedure quite significantly differs from corresponding provisions of the Community Customs legislation. Those differences are mainly related to the following aspects: 1) restricted application of the Customs transit procedure (the goods can be placed under the Customs transit procedure only by Customs carriers who submit a guarantee to the Customs authorities before the issue of license of the Customs carrier); 2) conditions of discharge of the Customs transit procedure; 3) system of guarantees; 4) simplifications; and 5) application of computerised transit system. In cases of transportation of so-called sensitive goods (excise goods and some other goods) the Customs escort is applied. However, escorting isn't required when the goods are transported under cover of TIR Carnet.

It should be noted that currently Customs fees are to be paid for the Customs transit formalities and the collection of those fees increases significantly the time needed for the crossing of border. However, it is planned that in the near future the decision on abolition of those fees should be taken.

Customs Declarations

The form of Customs cargo declaration, which is used in Georgia, is the same as the form of Customs cargo declaration used in other CIS countries and, consequently, very similar to Single Administrative Document (SAD) used by Member States of the EU and by some other countries. However, the rules of filling-in of the Customs cargo declaration, which are applied in Georgia, differ from the rules of filling-in of SAD applied in the EU. It should be noted in this context that the Community rules of filling-in of SAD have been amended recently in the framework of so-called SAD reform (Commission Regulation No 2286/2003).

Fight Against Corruption

The draft new Customs Code does not contain special provisions on the fight against corruption. However, there are provisions (see Article 30) establishing restrictions applicable in cases of the conflict of interests. Article 24 is also important in this context because it contains references to other legal acts, which presumably can contain provisions applicable in cases of corruption. It should be noted that corruption is a very serious problem for Georgian Customs administration but the fight against this phenomenon is normally organised in a form of massive firing of "corrupt" officials and recruitment of new ones. This forthright approach gives rise to the loss of so-called "institutional memory" because after such "purging" actions the working experience of most officials employed in local offices is often less than one year.

V. Conclusions

The draft Customs Code of Georgia in general is line with the provisions of the Community Customs Code and with the provisions of revised Kyoto Convention. However, there are some differences and gaps listed in Chapters II and IV of this analysis reducing the quality of this document, which is very important for the future modernisation of Georgian Customs legislation and Customs system as a whole.

It should be noted that preparation and introduction of the new Customs Code of Georgia based on the provisions of the Community Customs Code as well as adoption of implementing provisions of the new Code harmonised with corresponding provisions of the Community Customs legislation would make Georgia a leader among CIS countries in sphere of modernisation of Customs legislation. However, too rapid introduction of substantially new Customs legislation without allocation of sufficient time for the preparation of secondary legislation as well as for training of Customs officials and economic operators can diminish significantly the positive effect of introduction of the modern Customs legislation, give rise to a multiplicity of mistakes made by Customs officials and economic operators, provoke complaints of traders and influence negatively the collection of revenues collected by the Customs authorities to the State budget.

Taking into account the clear intention of Georgian Customs administration to modernise the Customs legislation of Georgia using as a basis the provisions of the Community Customs legislation, it is very important to provide an intensive technical assistance supporting this process. This assistance is vital because it is obvious that specialists of Customs legislation employed by the Georgian Customs administration are lacking knowledge in sphere of the Community Customs legislation and in sphere of the EU legislation in general, however, most of relevant materials can hardly be used because of the lack of their translations into Georgian or Russian. Therefore, it is a risk that it would be very difficult for the Georgian Customs administration on it's own to achieve the high quality of the new legislation and to ensure the correct application of this legislation by economic operators. In this context the translation into Georgian or Russian of some selected acts of Customs legislation of Lithuania or other new EU Member State, which have been in force before the enlargement of the EU, would be very helpful as those legal acts were aligned with the Community Customs legislation.