

JEL Classification: K33, K34

LEGAL ANALYSIS ON UKRAINE'S LEGISLATION COMPLIANCE WITH THE REVISED KYOTO CONVENTION

Olga Triakina

Academy of Customs Service of Ukraine, Ukraine

Abstract

The article describes the provisions of the Customs Code of Ukraine with regard to their compliance with regulatory rules of the Kyoto Convention. The author researches the issues of improving the legislation of Ukraine concerning customs procedures in order to implement the standards of the international convention on a larger scale.

Keywords: rules, standards, the Kyoto Convention, the Customs Code of Ukraine, compliance, laws.

Introduction

Ukraine, striving to enter the global market on a larger scale, acceded to the Revised International Convention on the Simplification and Harmonization of Customs Procedures (the Kyoto Convention) and all its Annexes according to the Law of Ukraine "On Ukraine's accession to the Protocol on the amending the International Convention on the Simplification and Harmonization of Customs Procedures " dated from 05.10.2006, № 227-V (the Law of Ukraine 2006). Under Article 13 of the Kyoto Convention (Revised Kyoto Convention 1999), each Contracting Party takes obligation to implement the Standards of the General Annex, Specific Annexes or Chapters that it has accepted not later than 36 months after such Annexes or Chapters have entered into force for that Contracting Party. On the one hand, this means that Ukraine having acceded the Kyoto Convention undertook to implement Standards of the Convention it has accepted into the activity of Customs administration within 3 years from the date of accession. On the other hand, it shows that the country follows the progressive way of development and economic reform by stimulating foreign trade through simplifying and expediting procedures of customs clearance and customs control and harmonizing customs control technologies with appropriate technologies of European countries.

As a result, Ukraine's accession to the Kyoto Convention put the Customs Service of Ukraine before a set of new challenges, especially the adaptation of national customs legislation, including the Customs Code of Ukraine with a view to facilitate trade and simultaneously to ensure the compliance, so as this simplification won't cause harm to the interests of the state and society by decrease of revenues as well as weak protection of the domestic market (Berezhnyuk 2010). Having taken all these factors into consideration, the

Supreme Rada accepted the Customs Code of Ukraine from 13.03.2012 № 4495-VI (Customs Code 2012), a lot of rules of which reflect the provisions of the Kyoto Convention. One of the major achievements of the new Customs Code is laws adopted to govern electronic declaration of goods, the ability to change or correct already submitted declarations, to withdraw a declaration and to request the use of other customs regime as well as compliance with certain definitions used in the Kyoto Convention.

So the one of the main measures Ukraine has taken to ensure that it is compliant with the provisions of the Kyoto Convention is newly adopted Customs laws, which are more close to the Standards of the Kyoto Convention. Obviously, the new rules largely adapt the standards and provisions of the Kyoto Convention, but according to our analysis in this article, there are a number of discrepancies that need further consideration and elimination at the legislative level.

1. Analysis of compliance of the Ukrainian laws to Chapter 3 of the General Annex concerning the declarant (from Standard 3.6 to Standard 3.10), the Goods declaration (from Standard 3.11 to Standard 3.31)

First of all, the title of Chapter 3 of the General Annex is “Clearance and other Customs formalities”, which rules are adopted into Section VII “Clearance” (Articles 246-269) of the Customs Code of Ukraine 2012. So it includes two definitions that were revised in the adopted Customs Code 2012. “Clearance” is defined as the accomplishment of the Customs formalities necessary to release goods and vehicles for commercial use (the Customs Code of Ukraine, Article 4), which is closer to the definition given in Chapter 2 of the General Annex of the Kyoto Convention than in the previous laws, but doesn’t cover it fully by not specifically dividing release into release for home use, for export or placement under another Customs procedure. Another definition specifies that “Customs formalities mean all the operations which must be carried out by the persons concerned and by the Customs in order to comply with the Customs law of Ukraine concerning Customs matters” (the Customs Code of Ukraine 2012, Article 4), which is in full compliance with the definition given in the Kyoto Convention.

What is more, in the Customs Code 2012 “declarant” is defined as “any person who makes a Goods declaration or in whose name such a declaration is made” (the Customs Code of Ukraine, Article 4), which is also consistent with Chapter 2 of the General Convention of the Kyoto Convention. According to Standard 3.6 of the General Annex that “national legislation shall specify the conditions under which a person is entitled to act as declarant”, the Ukrainian Customs Code 2012 specifies that only residents older than 16 years old, who or on behalf of whom the foreign trade contract is signed and in other cases - a person who under the laws of Ukraine has the right to accomplish legally significant actions on his own behalf to goods, vehicles for commercial use, is entitled to act as a declarant (Article 265, Paragraph 1.1 and Paragraph 1.2 of the Ukrainian Customs Code 2012). It also determines which categories of citizens, persons having privileges, representative offices of foreign firms, foreign carriers, enterprises have the right to act as declarants, and other cases where under the legislation of Ukraine non-resident has the right to dispose of the goods in the customs territory of Ukraine (Article 265, Paragraph 2 of the Ukrainian Customs Code 2012). Paragraphs 5 and 6 of Article 265 are also in

correspondence with the definition of “declarant” given in the Kyoto Convention, because they specify that “declarant can make the declaration of goods, vehicles for commercial purpose by themselves or authorize other persons to carry out the declaration on his behalf” (Paragraph 5) and “declaring of goods belonging to citizens may be made by the citizens themselves or other citizens authorized by the owners of the goods certified by a notary” (Paragraph 6). These laws are also consistent with Standard 3.7, because they list rights giving a person authority to dispose of goods (under contract, authorized by the owner, notary certification etc.) and under these conditions to act as a declarant (Article 256 of the Ukrainian Customs Code 2012).

Article 266 of the Customs Code is consistent with Standard 3.8 of the General Annex, because it lays on the declarant the responsibility to accurately declare and pay duties and other charges. But there is also additional responsibility to submit goods and transport vehicles for commercial use for Customs clearance and Customs control, by request of Customs administration (Article 266, Paragraph 1, Paragraph 3, Paragraph 4). At the same time, the provision of Standard 3.9 is fully implemented into Article 266, Paragraph 2, which reads that “before lodging the Goods declaration the declarant is allowed, under such conditions as may be laid down by the Customs, to inspect the goods in order to verify their compliance with description (information) specified in the accompanying documents; and to draw samples”.

Article 257 of the Customs Code adopts the provisions of Standard 3.11 as to the paper format of the Goods declaration and the format of the electronically lodged Goods declaration, which have the similar legal force, and specifically notes in Paragraph 5, that “the format of customs declarations submitted as electronic documents is based on international standards for electronic data interchange”. Following these international standards Paragraph 4 of Article 257 entitles the Customs administration to create an accredited Keys Certification Center, which provides free services to the customs authorities in the field of digital signature. The same Article in Paragraph 7 states that the list of particulars to be entered into the customs declarations shall be limited to those data necessary for the purposes of levying customs duties, the compilation of customs statistics, and to ensure compliance with the Customs Code and other legislative acts, which is in compliance with Standard 3.12. So, in our opinion, the particulars such as declared customs procedure, type of declaration, information about the peculiarities of movement, information about declarant, information about the name of the departure and destination, information on commercial vehicles, which are used for international transport of goods and / or transportation across Ukraine's customs territory under customs control, and containers, information on goods, their names, trade description that allows to identify and classify goods, trademark and producer of goods, product code according to the Ukrainian Goods Classification, the name of the country of origin, a description of package (number, type), gross weight and net weight, invoice value of the goods, the customs value of the goods and the method of its determination, information on authorized banks of the declarant, the statistical value of the goods, information about customs charges and other fees, as well as measures providing guarantee of payment, the rate of customs duties, application of exemptions of customs duties, the amount of customs duties, currency exchange, method and features of calculation and payment of customs duties, the method

of guarantee of payment of customs duties, information on foreign economic contract concluded and its basic conditions, information demonstrating compliance with established prohibitions and restrictions on the movement of goods across the customs border of Ukraine as well as information on the documents presented to customs together with the goods declaration don't include excess information, which may be above the frameworks of Standard 3.12. What is more, Customs authorities are forbidden to demand inclusion in the customs declaration information other than those mentioned in this article (Article 257, Paragraph 9 of the Customs Code 2012).

Furthermore, in accordance with Standard 3.13 the Ukrainian Customs Code 2012 allows a provisional or incomplete Goods declaration to be lodged, if for reasons deemed valid by the Customs, the declarant does not have all the information required to make the Goods declaration (Article 260, Paragraph 1). It also specifies in compliant with the second part of Standard 3.13 the conditions under which such a declaration may be submitted by the Customs. They include requirements to give data sufficient for placing the goods under declared customs procedure, and the obligation to submit an additional declaration to be completed within 45 days from the date of issuance of provisional or incomplete customs declaration. Article 261 describes in detail the particulars of the additional declaration.

Standard 3.14 is implemented into Article 260, Paragraph 3, stating that for the release of goods declared in the provisional or incomplete customs declaration, the application of exchange rates, measures of tariff and non-tariff regulation of foreign economic activity is made in accordance with the legislation in force, current at the date of acceptance of such a customs declaration. As the same legislation is applied to the complete declaration, we can conclude that there is no difference in tariff treatment accorded to both complete and incomplete declarations.

Next, Article 335, Paragraph 3 limits the quantity of supporting documents to invoice or other document which defines the value of the goods and, in the cases prescribed by the Customs Code 2012, the declaration of customs value, which is compliant with Standard 3.16. Information as to proof of authority of the person submitting the customs declaration, contract, travel (transportation) documents, commercial documents, proof of compliance with non-tariff regulation of foreign economic activity and others is specified in the goods (customs) declaration by the declarant (Article 335, Paragraph 3, 1-11). In addition, Article 264, Paragraph 7 allows some specific period for the production of the supporting documents, which couldn't have been lodged before, which is compliant with Standard 3.17.

The next set of Standards of the General Annex concerning lodgement, registration and checking of the goods declaration is almost enforced into the Customs Code of Ukraine 2012 as well. In particular, the place of declaring of goods transported by different means of transport is specified in Article 262 (compliant with Standard 3.20); Article 257, Paragraph 1 and Paragraph 3 allows electronic submission of goods declaration and gives it legal force (compliant with Standard 3.21); Article 263 defines the terms of submission the declaration (compliant with Standard 3.22) and this period within 10 working days from the date of arrival of these goods to the designated Customs office is developed in order to meet the provision of Standard 3.23 to have sufficient time to enable the declarant to complete the Goods declaration and to obtain the supporting documents required;

Article 263 in Paragraph 4 also defines the certain conditions under which the limits prescribed for lodging goods declaration can be extended (consistent with Standard 3.24); Article 263, Paragraph 8 and Article 259 allow lodging and registering or checking of the Goods declaration and supporting documents prior to the arrival of the goods (consistent with Standard 3.25); Article 264, Paragraph 10 requires the Customs to state the reasons of refusal to register the goods declaration to the declarant (compliant with Standard 3.26). What is more, Article 269 specifies that information specified in the customs declaration may be amended or declaration may be withdrawn. Though amendments to the goods declaration submitted by the Customs authority is allowed until the completion of customs clearance of goods and vehicles for commercial use and within three years from the date of completion of customs clearance. Amendments shall relate only to goods, vehicles for commercial purpose specified in the goods declaration (Article 269, Paragraph 2). Additionally, if after the release for free circulation of goods, customs clearance of which had been carried without customs examination, the declarant found goods having moved across the customs border of Ukraine and not specified in the goods declaration, by the written request of the declarant and with the permission of the customs authority it is allowed to enter changes connected with the discovery of undeclared goods (Article 269, Paragraph 3). Withdrawal of goods declaration is allowed, provided that the request to do so is made to the Customs before the goods have been released (Article 269, Paragraph 5). The abovementioned laws are compliant with the Standard 3.27, the Transitional Standard 3.28 and the Transitional Standard 3.29.

In practice, the Law of Ukraine "On electronic documents and electronic circulation of documents" from 31 May 2005 № 2599 and consequently the Decree of the Customs Service from 17.03.2011 № 216 set out the basic organizational and legal foundations of electronic documents and their using. Together with the provisions of the Customs Code 2012 the previous laws contributed to the application of the electronic goods declarations. Nowadays, under statistical data, some Customs account for 32% of goods declarations out of the total issued in electronic form, others declare that this figure is up to 90% out of the total (the State Customs Service of Ukraine).

2. Analysis of compliance of the Ukrainian laws to Chapter 3 of the General Annex concerning special procedures for authorized persons (Standard 3.32)

Chapter 2, Articles 12-18 of the Customs Code 2012 include certain provisions for authorized economic operators (AEO). In particular, Article 14 specifies the terms under which the certificate of the authorized economic operator can be obtained, including having an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records (compliant with Standard 3.32). Article 15 lists special facilitations provided to the authorized economic operator by the Customs including release of the goods on the provision of the decreased number of information necessary to identify the goods and permit to remove Customs seals; clearance of the goods at the declarant's premises or another place authorized by the Customs as well as release of goods from the premises, outdoor and indoor playgrounds of the authorized economic operator without submitting them to the Customs (Article 15, Paragraph 1). Other special provisions for the authorized economic operators are contained in Article 15,

Paragraph 2, which permits them to allow a single Goods declaration for all imports or exports in a given period where goods are imported or exported frequently by the same person, to undergo customs control on a priority basis, to place goods in the private warehouse for temporary storage without permission of the Customs authority, to be exempted from providing guarantees in time of internal customs transit of goods (excluding excise goods), to have goods cleared at the declarant's premises. Thus, it can be seen that some laws of Article 15 are consistent with the provisions of Standard 3.32, but not in full scale.

In practice, according to two decrees of the Customs Service of Ukraine from 18.09.2009 and the Customs Code rules the regional customs were given authority to determine conscientious enterprises and to apply the simplified customs procedures to commodities and vehicles of such enterprises. The three-leveled mechanism of introduction of «degree of trust» to the enterprises was developed based on the analysis of risks and audit of previous activities of an enterprise. Depending on the «degree of trust» a customs administration establishes certain kinds and numbers of customs procedures applying to the commodities and vehicles of an enterprise. The degree of trust divides enterprises into two lists – so called «White list» and «Green list». Economic operators from these lists get certain preferences (Videnov 2011). For all other enterprises which did not join the mentioned lists, the level of trust is not established. Thus they will carry out their foreign economic operations in the ordinary mode (Revised Kyoto Convention, Lectures 2009). According to experts, the AEO status is generally being given to multinational companies operating in Ukraine, as well as domestic enterprises with significant part of export-import operations. Their number nowadays includes only a few hundred companies (finance.ua).

3. Analysis of compliance of the Ukrainian laws to Chapter 3 of the General Annex concerning examination of the goods (from Standard 3.33 to Standard 3.38)

In accordance with Article 338 and 339 of the Customs Code 2012 the examination of goods, vehicles for commercial purposes, subject to customs clearance, shall take place as soon as possible after the decision to hold the examination has been made, which is partly consistent with Standard 3.33.

Priority is given to the examination of the goods needed to overcome the consequences of natural disasters, accidents, disasters, epidemics and live animals, organs and other anatomical materials for human needs, for goods that are restricted as to time and conditions of storage, goods of military purpose, radioactive materials, photos, audio and video materials for international technical and humanitarian aid, goods transported under the Agreement of industrial cooperation, goods transported under the TIR procedure, mentioned in Article 360. This law has been developed to adapt the provisions of Standard 3.34. Article 338 in Paragraph 6 obliges the declarant to be present at the examination of the goods, which gives the declarant more obligations than it is defined in Standard 3.36.

Sampling of goods carried out by officials of the customs authority within the customs control procedures and customs clearance is made in order to establish the characteristics that are essential for classification of goods, checking the declared customs

value of the goods, establishing the country of origin, establishing their relation to narcotic drugs, psychotropic substances, their analogues and precursors of potent or poisonous substances, establishing their relation to the articles of artistic, historic or archaeological value as well as establishing the relation of the goods to those manufactured using intellectual property rights, which are protected by law (Article 356 of the Customs Code 2012). Besides, this Article in Paragraphs 13 and 14 specifies samples drawn shall be as small as possible. The abovementioned laws are in compliance with Standard 3.38.

Summary and concluding remarks

In general the laws of the Customs Code of Ukraine are compliant with the Standards of the Kyoto Convention. But, in our opinion, some amendments should be made to make it more consistent. Some improvements shall also be made in practical implementation of these laws. Therefore, we recommend:

1. to change some definitions in order to make them more clear and detailed. For example, the definition of "clearance", which is contained in Article 4 of the Customs Code of Ukraine, should be made as much as possible closer to the definition given in Chapter 2 of the General Annex;

2. to amend some laws not to burden the declarant with additional responsibilities and obligations. For example, to review the provisions of Article 52 of the Customs Code of Ukraine on the rules for determining the Customs value;

3. to introduce wider use of electronic submission of declarations;

4. in order to promote further facilitation of trade to include into Article 264 of the Customs Code 2012 laws concerning the time when checking the goods declaration shall be effected and certain limits under which the actions of the Customs concerning checking shall be restricted, in accordance with Standard 3.30;

5. to grant the authorized economic operators with wider range of privileges to "use of the authorized persons' commercial records to self-assess their duty and tax liability and, where appropriate, to ensure compliance with other Customs requirement" and "to allow the lodgement of the Goods declaration by means of an entry in the records of the authorized person to be supported subsequently by a supplementary Goods declaration", which is stated in the second part of Standard 3.32;

6. it is also necessary, in our opinion, to revise some inconsistencies in the laws concerning the authorized economic operators. In particular, Paragraph 1, Article 14 of the Customs Code of Ukraine 2012 contains a list of conditions to be met by the company for obtaining a certificate of authorized economic operator, among which there is the absence of monetary obligations not paying off, defined after the documentary checks. This condition is quite controversial especially if it is interpreted against the provisions of Article 16, Paragraph 1.7 of the Customs Code of Ukraine 2012, according to which the presence of not paying off monetary liabilities, defined after the documentary check, is considered to be grounds for suspension of the certificate of authorized economic operator. This controversy, in particular, lies in the fact, that it is not legally defined which authority should accrue liabilities and whether an entrepreneurs can appeal the charges of these liabilities in court without negative consequences in the form of suspension of the AEO

certificate. In this concern, the lawyer from the Attorney Association “Law firm” Sokolowski and Associates” Filatov Vladislav noted that such an ambiguity can lead to the situation, when even the Taxation Service of Ukraine will charge a company with a liability for some reason (which probably is illegal) and the company consequently will occur in a difficult situation, deciding either to appeal this illegal decision or to sacrifice to save the AEO certificate (Attorney Association “Law firm” Sokolowski and Associates”);

7. to adopt the law concerning limited number of copies of the goods declaration to be lodged in order to simplify the customs formalities, which is consistent with Standard 3.15;

8. it is essential to attract more enterprises to obtain the status of authorized economic by accurate fulfillment of obligations taken by the Customs as to the compliant businesses. It would be also more beneficial for the Ukrainian Customs and its partners to imply all of the categories of AEO used in the EU, which are divided into three groups – according to reliability and safety, to the granting of privileges and simplifications of customs procedures and the mixed type (today Ukraine introduces only two of them). The wider choice of categories of AEO, to our mind, will also attract more companies;

9. to develop regulatory and legal framework for obtaining AEO through consultations between the Ministry of Finance and the Customs Service, especially concerning issues of companies’ information to be revealed and internal information protection. In this regard we recommend to legally explaining detailed disclosure, allowing to qualify for preferences both in Ukraine and in other European countries (finance.ua).

Consequently, a great deal of measures has been taken to ensure that Ukraine is compliant with the rules of the Kyoto Convention. Such efforts are rather beneficial for Ukraine, because they are aimed at support of domestic exporters, and contribute to balance of payments and uniformity in the foreign exchange market, which is essential for creation of favourable conditions for trade. Nevertheless, some alterations are to be undertaken to make the national legislation consistent with international obligations to the greater extent.

References

Attorney Association “Law firm” Sokolowski and Associates” 2012, *New Customs Code of Ukraine: the authorized economic operator*, viewed 18 November 2012, <http://lex.org.ua/ua/news-2012/1861>

Berezhnyuk, I 2010, “Matching the draft of the Customs Code of Ukraine with the Standards of the Kyoto Convention”, *Customs Security*, № 2, Series "Economy", viewed 18 November 2012, http://www.nbu.gov.ua/portal/Soc_Gum/Mbez/econ/2010_2/Berezhnyuk.pdf

Finance.ua 2012, *Kaletnyk breaks a customs window into Europe*, viewed 18 November 2012, <http://news.finance.ua/ua/~2/0/all/2012/09/25/288166>

International Convention on the simplification and harmonization of Customs procedures (as amended) (Revised Kyoto Convention) 1999, viewed 18 November 2012, http://www.wcoomd.org/Kyoto_New/Content/content.html

Revised Kyoto Convention, *Lectures* 2009, viewed 26 March 2011, www.center.km.ua/old_version/.../1_3_4.htm

The Customs Code of Ukraine from 13.03.2012 № 4495-VI, viewed 18 November 2012, <http://zakon1.rada.gov.ua/laws/show/4495a-17/paran4#n4>

The Law of Ukraine "On Ukraine's accession to the Protocol on the amending the International Convention on the Simplification and Harmonization of Customs Procedures " dated from 05.10.2006, № 227-V, viewed 18 November 2012, <http://zakon2.rada.gov.ua/laws/show/3018-17>

The State Customs Service of Ukraine 2012, *The results of the activity of the Customs administrations*, viewed 18 November 2012,

http://www.customs.gov.ua/dmsu/control/uk/publish/category?cat_id=337881

Videnov, A 2011, *Concepts of "white and green lists" and AEO – further steps of trade facilitation and improving control over supply chain*, Report at the fourth international conference of young scientists "Customs policy and problems of the economic safety of supply chain", Dnipropetrovsk, Ukraine