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PRAWNE ASPEKTY ZARZĄDZANIA RYZYKIEM CELNYM NA UKRAINIE

LEGAL ASPECTS OF CUSTOMS RISK MANAGEMENT IN UKRAINE

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Streszczenie

Ramy prawne są podstawowym elementem każdej działalności publicznej, a sprawy celne każdego państwa nie stanowią wyjątku. Głównym źródłem prawnych regulacji celnych na Ukrainie jest Kodeks Celny przyjęty w 2012 r., który zgodnie z art 320, stanowi zakres i cel przestrzegania przepisów celnych i międzynarodowych traktatów Ukrainy w czasie odprawy celnej. Natomiast urzędy celne (stacje celne) wybierane są na podstawie systemu zarządzania ryzykiem. Dlatego prawidłowe funkcjonowanie systemu zarządzania ryzykiem jest kluczowe dla selektywnej kontroli celnej. Celem niniejszego artykułu jest opisanie podstawy prawnej dla zastosowania systemu zarządzania ryzykiem celnym oraz sprawdzenie, czy istnieją jakiegokolwiek luki w przepisach celnych, które uniemożliwiają pełne funkcjonowanie i wykorzystanie systemu celnego na Ukrainie. Autorzy wskazują, że oprócz prawodawstwa w zakresie zarządzania ryzykiem celnym, niektóre ogólne przepisy w tym zakresie należy poddać dalszej analizie.

Słowa kluczowe: regulacje celne na Ukrainie, kontrola celna, system zarządzania ryzykiem celnym, analiza ryzyka, ocena ryzyka, profil ryzyka, wskaźniki ryzyka.

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Abstract

Legal framework is a core element of every public activity. Customs affairs are not an exception. Main source of customs regulation in Ukraine is a Customs Code adopted in 2012. According to article 320 of Ukrainian Customs Code forms and scope of control, sufficient to ensure that the customs legislation and international treaties of Ukraine are observed at the time of customs clearance, shall be selected by the customs offices (customs stations) on the basis of the risk management system. Thus, proper functioning of risk management system is a crucial thing for selective customs control. Aim of this article is to describe legal basis for customs risk management system application and to find out if there are any gaps in customs legislation, which prevent from its full-fledged functioning and use. So apart of customs risk management legislation, some general provisions are to be analyzed further.

Keywords: customs regulations in Ukraine, customs control, risk management system, risks analysis, risks assessment, risk profile, risk indicators

Introduction


In today's dynamic world global economy becomes not just a combination of national economies but a single market with regional and national industrial specialization. Thus national legislation should be transformed accordingly. Customs legislation, which regulates major part of international trade, should be harmonized with international standards as well. Concerning international standards in the area of customs control we should mention the following documents: International Convention on the Simplification and Harmonization of Customs procedures (Revised Kyoto Convention) (13); Agreement on Trade Facilitation (1); EU-Ukraine Association Agreement (9); SAFE Framework of Standards to Secure and Facilitate International Trade (16); Customs Risk Management Compendium (4); EU Customs blueprints (7). All of these documents contain provisions or recommendations for selective customs control, which is based on risks analysis and assessment. Such targeted control aims to achieve an appropriate balance between trade facilitation and regulatory control.

Presentation of the main research material with explanation of the obtained research results

Standard 6.1 in chapter 6 of General annex to the Revised Kyoto Convention states that all goods, including means of transport, which enter or leave the Customs territory, regardless of whether they are liable to duties and taxes, shall be sub-

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ject to customs control. According to standard 6.2 customs control shall be limited to that necessary to ensure compliance with the Customs law. Standard 6.3 stipulates that in the application of customs control, the Customs shall use risk management. According to standard 6.4 The Customs shall use risk analysis to determine which persons and which goods, including means of transport, should be examined and the extent of the examination (13). Provisions on risk management are set in the part 4 article 7 of Agreement on Trade Facilitation. According to it, each Member shall:


- adopt or maintain a risk management system for customs control, to the extent possible;
- design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade;
- concentrate customs control and, to the extent possible other relevant border controls, on high-risk consignments and expedite the release of low-risk consignments. A Member also may select, on a random basis, consignments for such controls as part of its risk management;
- base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, inter alia, the Harmonized System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.

International Convention on the Simplification and Harmonization of Customs procedures is a part of national legislation of Ukraine since 2006. In 2015 Ukraine also ratified Agreement on Trade Facilitation.

EU-Ukraine Association Agreement, signed in 2014, in article 76 defines that, the Parties agree that their respective trade and customs legislation, as a matter of principle, shall be stable and comprehensive, and that provisions and procedures shall be proportionate, transparent, predictable, non-discriminatory, impartial and applied uniformly and effectively and shall inter alia apply modern customs techniques, including risk assessment, post clearance controls and company audit methods in order to simplify and facilitate the entry and release of goods (9).

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SAFE Framework of Standards to Secure and Facilitate International Trade and Customs Risk Management Compendium contain more precise recommendations on customs risk management, as well as EU Customs blueprints, which join together best EU practices.

The first document, which determined selective customs control in Ukraine was the Concept for Establishment, Implementation and Development of Risk Analysis and Management System, approved by the order of the State Customs Service of Ukraine No. 435 dated 27.05.2005. Regulation on the System of Analysis and Selection of Risk Factors during Determining Certain Forms of Customs Control was approved by the same order in 2005 (2). In this document it was proposed to develop and implement system for risks analysis and management. The expected outcomes were acceleration of customs formalities, simplification of customs procedures and enhancement of customs control efficiency. The document set main principles for risk management system building and formed a background for its further development, including implementation of Automated Risk Management System (ARMS).


From the legal point of view the most important step in risk management system development was adoption of the new Customs Code of Ukraine in 2012. It was the first time when selective customs control, based on risks analysis and assessment, was determined in a law. Thus, according to article 320 forms and scope of control, sufficient to ensure that the customs legislation and international treaties of Ukraine are observed at the time of customs clearance, shall be selected by the customs offices (customs stations) on the basis of the risk management system (3).

Main provisions on risk management system application are laid down in Chapter 52 of the Customs Code, which is titled "Risk Management System". In part 1 of article 361 of the Customs Code it is said that risk management means activities performed by the revenue and duties authorities to analyze, identify and assess risks, develop and take actions aimed at mitigating risks, assess their efficiency and follow up their application. At the same time risk is referred to as the probability of failure to comply with the customs legislation of Ukraine.

Part 2 of article 363 of the Customs Code states that regulation on risks analysis and assessment, development and implementation of risk management measures

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shall be determined by the Ministry of Finance of Ukraine. Currently such regulation is approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015. This Regulation is a basic document, which contains details on risk management system application during customs control. Main definitions given in the Regulation are presented in the Table 1 below.

Table 1. Main definitions given in Regulation on risks analysis and assessment, development and implementation of risk management measures for selection of forms and scope of customs control, approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015

Term	Definition
Alert	is information about persons and/or means of transport, which can be involved in violation of Ukrainian customs law, and information about goods, which can be objects of offence, that is created by authorities of the State Fiscal Service of Ukraine (SFS) (its divisions) as a result of analytical work or received by authorities SFS (its divisions).
Automated Risk Managements System (ARMS)	is a combination of software and IT systems, which ensures functioning of risk management system during customs control and clearance of goods and means of transport.
ARMS module	is one of ARMS' sub-systems, which is a part of a module of Automated System for Customs Clearance (ASCC) or another software system of SFS and ensures work of ARMS during customs control and clearance of goods and means of transport.
Exposed risk	is a risk regarding which authorities of SFS have information on violation of Ukrainian customs law.
Fiscal risks	are risks, exposure of which aims to prevent illegal actions aimed at the evasion of customs duties during international trade transactions.
Random check	is a method of selection subjects to customs control for carrying out certain forms of customs control or some set of forms of customs control, when each item of sampling frame has equal probability to be selected.
Risk area	is grouped objects of risks analysis concerning which there is a need to apply certain forms of customs control or some set of forms of customs control.
Risk assessment	is evaluation of risk occurrence probability and possible outcomes of violation of Ukrainian customs law in case of its occurrence.
Risk indicators	are criteria with set in advance parameters, which serve as a tool to select subjects to control that pose a risk.

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Risk profile	is a description of any set of risks, including a predetermined combination of risk indicators, based on information which has been gathered, analyzed and systematized.
Negative history of risk profile	is a parameter, which characterizes, in a quantitative manner, occurrence during certain period of time violations of Ukrainian customs law or detection of irregularities, which are described in risk profile and are taken into account when calculating risk rank of risk profile (increasing it), if such parameter is included into risk profile.
Non-fiscal risks (safety and security risks)	are risks, exposure of which aims to ensure protection of national security, life and health of humans, animals, plants, environment, consumers' interests according to the competence of SFS.
Positive history of risk profile	is a parameter, which characterizes, in a quantitative manner, cases of customs clearance during certain period of time when, after carrying out recommendations, formed by risk profile, there were no violations of Ukrainian customs law or any irregularities detected, which are taken into account when calculating risk rank of risk profile (decreasing it), if such parameter is included into risk profile.
Potential risk	is a risk, which was not exposed, but conditions of its exposure exist.
Selectivity of risk profile	is a parameter of risk profile, which characterizes, in a quantitative manner, its selective capability (numeric value, which shows percentage of customs clearance cases, which risk profile allow to select from the total number of customs clearance cases).
Targeting	is an approach to risks analysis and assessment, when foreign trade transaction, which was pre-analyzed, including analysis performed by ARMS, is subject to additional assessment in order to find out whether there are any risks, which is carried out by authorities of SFS (its divisions) with the use of available sources of information.


Source: Own work based on Regulation on risks analysis and assessment, development and implementation of risk management measures for selection of forms and scope of customs control, approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015 (14)

According to the Regulation customs risk management is performed on strategic, tactical and operational levels. On the strategic level, based on the results of risks analysis, identification and assessment, priorities of risk management measures are set. Such priorities are systemized in Risks register, which is approved by SFS. Risks register includes, inter alia:

- priority areas for development and implementation of risk management measures;

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- information on authorities of SFS (its divisions), responsible for implementation on each area.

On the tactical level authorities of SFS (its divisions) according to their competence based on the results of risks analysis, identification and assessment and consistent with Risk register develop risk management measures. For this can be used the following tools:

- 1) risk profiles;
- 2) alerts;
- 3) risk indicators;
- 4) guidelines on the work of customs officials on risks analysis, identification and assessment;
- 5) random check.


On the operational level customs offices (customs stations) of SFS apply mentioned tools of risk management on case-by-case basis during carrying goods and means of transport across customs border of Ukraine in order to select appropriate forms and scope of customs control (14).

It should be mentioned that control based on risk management system application is not narrowed only to automated risks analysis and assessment made by ARMS, but also provide possibility for application of non-automated (applied when risks assessment in specific case of carrying goods and means of transport across customs border of Ukraine can't be exercised automatically) and/or mixed (which means combination of automated and non-automated approaches) risks analysis and assessment. From this point of view targeting belongs to mixed control based on risk management system application. In case of risk management measures development priority is granted to automated and mixed control based on risk management system application.

As for the targeting it is considered to be the most modern and precise risks analysis and assessment tool, which ensures more targeted selection of risky foreign trade transactions. It is widely applied in many countries, including EU member-states, USA, Canada etc.

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Targeting approach means that results of primary selection performed by automated systems are further manually justified by analysts. On the one hand it helps to speed up and unify risks profiling, on the other hand it allows to make more targeted selection based on the analysis of other parameters, which are better to be analyzed manually due to specific features of such information (e.g. access to the information exclude possibility of its automated analysis; analysis of text information, which in case of fuzzy comparison may return too many results).

Nevertheless according to international standards risks analysis and assessment should be performed mainly by automated systems. Such system in Ukraine is called ARMS and its main component is electronic risk profile.

Risk profiles are developed on central level by division of SFS, responsible for coordination of risk management system application. At the moment such division in organizational chart of SFS is Customs Risk Management and Targeting Department. Different types of electronic risk profiles are shown on Picture 1.

Apart of risk profiles SFS has developed and approved other documents, which aim to support practical aspects of customs risk management system application. Thus, according to Chapter III Regulation, approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015, SFS has issued the following documents:

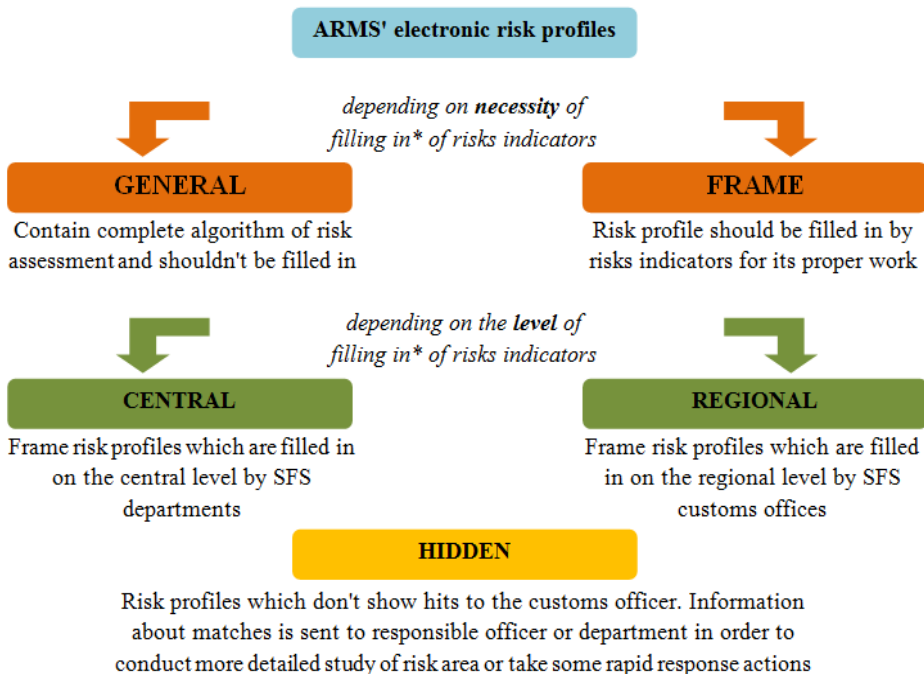
Instruction on entering information about possible violations of customs legislation into the module Alerts of ASCC (approved by the order of SFS No. 282 dated 20.04.2017) (15, p. 31).

Lists of risk indicators, which can be used for selection of forms and scope of customs control, are reviewed on annual basis and brought to the notice of customs officials regularly.

Instruction on use of ASCC's module Risk profiles' constructor (software for regional risks profiling) is approved by the order of SFS No. 231 dated 21.03.2016 (15, p. 31). Regional risks profiling was established within further development of customs risk management system, which is used by customs offices (customs stations) for selection of forms and scope of customs control, automation of risks analy-

sis and assessment considering risk areas, specific for different regions, facilitation and simplification of risk profiles implementation process.

Picture 1. Different types of ARMS' risk profiles



* - filling in means determination of specific risk indicators and other parameters of risk profiles, which are described in risk profile

Source: Own work based on Regulation on risks analysis and assessment, development and implementation of risk management measures for selection of forms and scope of customs control, approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015 (14)

In order to establish one-size-fits-all approach during risks analysis and assessment based on pre-arrival customs declarations an instruction was approved by the order of SFS No. 339 dated 05.05.2017 (15, p. 31).

Considering Agreement between SFS and World Customs Organization (WCO) on the use of Cargo Targeting System (CTS) SFS has developed document on its use. Instruction on carrying out targeting on goods, transported in containers, with a use of WCO CTS, is approved by the order of SFS No. 704 dated 20.10.2017 (15, p. 31). WCO CTS is a cargo manifest risk assessment solution developed by the WCO to enable its Members to carry out international best practice cargo risk assessment to manage risk and facilitate trade and thus implement key parts of the WCO's SAFE Framework of Standards and Kyoto Convention (17).


In order to implement best worldwide practices and European standards of risk analysis and assessment in Ukraine, to make more precise selection of international transactions which pose risks and to simplify customs control for reliable business entities, SFS has developed Strategy of customs risk management system development until 2022 and action plan on its realization. These documents were approved by decree of Cabinet of Ministers of Ukraine No. 978-r dated 27.12.2017 (15, p. 30-31).

Based on EU Customs Blueprints: pathways to better Customs (7) and EU Strategy and Action Plan for customs risk management: Tackling risks, strengthening supply chain security and facilitating trade (Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, COM/2014/0527 final) (8) Strategy includes four areas of development: institutional changes; improvement of customs risk management approach; carrying out pre-arrival risks analysis and assessment (before arrival goods, vehicles to the border crossing point); IT development; interagency cooperation; human resources development (6).

So, in Ukraine at the moment there is a comprehensive legal basis for customs risk management system application. At the same time, some general provisions of customs legislation are bottlenecks for full-fledged use of risk analysis and assessment approach during customs control. For instance, whereas article 320 of Ukraini-

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an Customs Code states that forms and scope of customs control are selected based on the results of risk management system application, there is no possibility to clear goods without documentary check of transaction even if there are no risk indicators. According to the Instruction on customs formalities fulfillment during customs clearance of goods with a use of customs declaration in the form of single administrative document, approved by the order of the Ministry of Finance of Ukraine No. 631 dated 30.05.2012 (11), documentary check of tariff classification, country of origin, customs value etc. should be fulfilled by custom officer in 100 % cases of customs clearance of goods regardless results of risks analysis and assessment. Also, there are some inconsistencies of national legislation and international standards in the area of information submission by carriers to customs authorities before arrival of goods, vehicles to the border in order to make possible early risks analysis and assessment. One more issue to be mentioned is a need of clear and precise instructions of customs control (including risk management system application) in different types of border crossing points. At the moment there are only typical process schemes, approved by decree of the Cabinet of Ministers of Ukraine No. 451 dated 27.12.2017 “Issues of passage through the state border of persons, auto, water, rail and air means of transport of carriers and goods, which are transported by them” (5) and instruction for water border crossing points (12).

Conclusions

Risk management system application is a core tool to ensure selective customs control. There is why it is very important to ensure that legal basis for its application is in line with international standards and recommendations. Ukrainian legislation in the area of customs risk management system is comprehensive and corresponds to the similar provisions of EU legislation. It consists of Customs Code of Ukraine, Regulation on risks analysis and assessment, development and implementation of risk management measures, approved by the order of the Ministry of Finance of Ukraine No. 684 dated 31.05.2015, and some inner documents, approved by SFS. At the same time there are some gaps in general provisions of Ukrainian customs legislation. To ensure full-fledged risk management system application instruction on

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customs formalities fulfillment during customs clearance of goods with a use of customs declaration in the form of single administrative document should be amended, new instructions for application in border crossing points should be developed and pre-arrival information submission should be introduced. Some of mentioned issues are to be solved within implementation of Strategy of customs risk management system development until 2022 and action plan on its realization. These documents were approved by decree of Cabinet of Ministers of Ukraine No. 978-r dated 27.12.2011.

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