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Dear readers!

Here is the new issue of the Information Bulletin "Trade Facilitation in Ukraine Monitoring," a product of the Institute for Economic Research and Policy Consulting, published with the support of the European Union, International Renaissance Foundation, and ATLAS Network within the project "Support to the Civil Society Initiative "For Fair and Transparent Customs." We strive to provide you with the latest and most up-to-date information on the state of customs reform implementation and the implementation of measures to facilitate international trade in Ukraine. Therefore, send your opinion, feedback, and wishes regarding communication links and methods of providing information to: customs@ier.kyiv.ua

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Certain norms of the Customs Code of Ukraine were recognized as unconstitutional

The decision of the Second Senate of the Constitutional Court of Ukraine on the case on the constitutional claim of Barseghyan Gevork Senekerymovych and Lynenko Nataliya Mykolaivna regarding compliance with the Constitution of Ukraine (constitutionality) of Article 485 of the Customs Code of Ukraine (regarding the individualization of legal liability)

Legal persons to a constitutional complaint - H.S. Barsegyan, N.M. Linenko - appealed to the Constitutional Court of Ukraine regarding the verification of compliance with the Constitution of Ukraine (constitutionality) of Article 485 of the Customs Code of Ukraine (hereinafter - the Code), according to which:

"Article 485. Actions aimed at illegal exempting from customs duties, or reducing their amount as well as other illegal actions aimed at customs duties evasion

1. Statement of false information in the customs declaration for illegal exemption from customs duties or reduction of the amount of such duties, submission of false information about essential terms of the foreign trade agreement (contract), weight (considering permissible losses during normal storage or transportation), amount, country of origin, sender and/or recipient, false information, which is required to determine the product code in accordance with Ukrainian Classifier of Products of Foreign Trade Activities and its customs value, and/or submitting by the foreigner to the income, duties and fees agencies of Ukraine the documents containing the same information with the same purpose, non-payment of customs duties within the period prescribed by law, or commission of other illegal actions aimed at customs evasion as well as the use of goods, concerning which customs exemptions were provided, for purposes other than those for which the exemptions were provided, - entails imposition of a penalty amounting to three hundred percent of the unpaid amount of customs payments.

Barseghyan H.S. and Linenko N.M. considered that Article 485 of the Code does not correspond to the first part of Article 41, Article 48, and the second part of Article 61 of the Constitution of Ukraine.

Evaluating the disputed prescription of the Customs Code, the Constitutional Court assumed that the sanction for violation of the norm should correspond to the degree of public danger of the act (action or inaction). The non-alternative sanction of the disputed article does not ensure compliance with the principle of individualization of legal liability. Although the actions provided for in Article 485 have the main unifying feature: the goal of "evasion of the payment of customs payments," they simultaneously carry several different components of an administrative offense and can manifest themselves in different ways and, accordingly, represent the different social dangers. Despite the diversity of the objective side of this administrative offense body, the sanction of Code's Article 485 has the characteristics of being defined and without alternatives, and one that establishes only one type of penalty - a fine, which is also determined in a fixed amount of interest. It eliminates the ability of differentiating liability depending on a specific act and choosing a proportionate sanction. Therefore, the absence of other penalty types in the prescription disputed and the inability to change the amount of interest, which determines the fine, make it impossible to individualize legal liability taking into account the committed illegal act's nature, the form of guilt, the characteristics of the person guilty of committing the offense, the possibility to compensate the damage caused, and the circumstances, mitigating or aggravating liability.

The need to individualize the amount of the fine is urgent in cases where this amount is significant and its application may be an excessive interference with many constitutional rights of the guilty person. In the opinion of the Constitutional Court of Ukraine, depriving the ability to individualize an administrative penalty by the order disputed, taking into account the entire set of case's circumstances, makes implementing the individualization of legal liability principle impossible when bringing a person to administrative liability based on an article of the Code and does not create an adequate legislative basis for applying presumptive measures to a violator of customs rules.

It is worth noting that there is another side to this aspect. The ability to apply different degrees of liability for an offense committed at the judge's discretion creates corruption risks, which often appear in the discrepancy between the severity of the committed crime and the type of sanction applied.

The Constitutional Court of Ukraine concluded that the second paragraph of Article 485 of the Code contradicts the second part of Article 61 of the Constitution of Ukraine. The Constitutional Court of Ukraine also took into account that recognizing the second paragraph of Article 485 of the Code as unconstitutional will make it impossible to prosecute persons for actions and (or) inaction aimed at illegal exempting from customs duties or reducing their amount, as well as other illegal actions aimed at customs duties evasion.

To prevent violation of customs interests and customs security of Ukraine, the Constitutional Court postponed the loss of validity of the second paragraph of Article 485 of the Code for six months from the date of adoption of this decision. The Verkhovna Rada of Ukraine, no later than six months from the date of adoption of this Decision, must bring the legal regulation established by the second paragraph of Article 485 of the Code, which is recognized as unconstitutional, into compliance with the Constitution of Ukraine and this Decision.

Source: https://bit.ly/3ofaE7q



The government expanded the list of checkpoints through which vehicles purchased by Ukraine's citizens are moved

Decree of the Cabinet of Ministers of Ukraine dated June 14, 2022, No. 479 "The issue of moving certain vehicles across the customs border of Ukraine"

The government increased the number of checkpoints through which, temporarily, for the period of martial law, the movement of vehicles purchased outside the customs territory of Ukraine by Ukraine's citizens for free circulation was allowed. The list includes the following international checkpoints:

⇒ the international checkpoint across the state border for the international passenger car service "Ustyluh";
⇒ the international checkpoint for road transport "Hrushiv";
⇒ the international checkpoint for road transport "Malyy Bereznyy";
⇒ the international checkpoint across the state border for maritime transport "Black Sea Fish Port";
⇒ the checkpoint across the state border "Black Sea Port" for international sea and ferry connections;
⇒ the international checkpoint across the state border for maritime transport "Black Sea Ship Repair Plant";
⇒ the international checkpoint across the state border for sea traffic "Odesa Sea Trade Port";
⇒ the international checkpoint across the state border for sea traffic "Sea Port Pivdennyy";

- ⇒ the international checkpoint across the state border for sea traffic "Izmayil Sea Trade Port";
- ⇒ the international checkpoint across the state border for sea traffic “Reniyskyy Sea Port”;
- ⇒ the international checkpoint across the state border for sea traffic “Ust-Dunayskyy Sea Trade Port”;
- ⇒ the international checkpoint across the state border for sea traffic “Bilhorod-Dnistrovskyy Sea Trade Port”;
- ⇒ the international checkpoint across the state border for ferry, sea, and river freight and passenger traffic on the territory of the limited liability company "Orlivka Ferry Complex."

The order was in force less than a month, as it became invalid simultaneously with the entry into force of the Law of Ukraine "On Amendments to the Tax Code of Ukraine and other legislative acts of Ukraine regarding the revision of certain tax benefits," which canceled the preferential import of cars into Ukraine.

Source: https://bit.ly/3o7F0sL



Changes have been made to the list of goods whose export and import are subject to licensing and quotas for 2022

Resolution of the Cabinet of Ministers of Ukraine dated July 1, 2022 No. 759 "On Amending to Appendices 1 and 5 to the Resolution of the Cabinet of Ministers of Ukraine dated December 29, 2021 No. 1424"

The government has changed the list of goods whose export and import are subject to licensing and quotas for 2022.

For example, the export of the product "Oats" (code 1004 of the Ukrainian classification of goods of foreign economic activity - UKT FEA) is subject to licensing, but it is excluded from the list of goods subject to export quotas. It is a mitigation measure.

The export licensing of "Wheat and mixtures of wheat and rye" (code 1001 UKT FEA) was also canceled.

At the same time, a zero quota has been established for mineral or chemical nitrogen fertilizers export (code 3102 of the UKT FEA). The full list of goods whose exports are subject to licensing or quotas can be found at the following link: https://bit.ly/3yK6kSB

Source: https://bit.ly/3aNZmUL

The government further changed the list of critical import goods

Decree of the Cabinet of Ministers of Ukraine dated June 7, 2022 No. 673 On Amendments to the Decree of the Cabinet of Ministers of Ukraine dated February 24, 2022 No. 153

The government further changed the list of critical import goods and excluded flat-rolled carbon steel and bars: items 7209, 7208, 3916, 7914, and 3916 (except 3916200090), 7213 according to UKT FEA. Individual product positions have been replaced or expanded. The Government also added to the list a number of services for the repair of various equipment.

The corresponding changes have partially lost their relevance since, on July 7, 2022, the Government canceled the list of critical import goods.

Source: https://bit.ly/3RIRCnu



The government canceled the list of critical import goods and the relevant criteria for determining such goods

Resolution of the Cabinet of Ministers of Ukraine dated July 7, 2022 No. 761 "On Amending the Resolution of the Cabinet of Ministers of Ukraine No. 153 of February 24, 2022, and Recognizing Clause 1 of Resolution of the Cabinet of Ministers of Ukraine No. 289 dated March 16, 2022 as Having Lost the Validity»

Taking into account that the last changes to the list of critical import goods were made on June 7, already on July 7 of the same year, the Cabinet of Ministers adopted a decision to cancel the list of critical import goods. At the same time, the criteria for determining goods of critical import in the conditions of martial law were abolished.

At the same time, the so-called list of critical import of services (a list of services, works, intellectual property rights, and other non-property rights intended for sale (payment transfer), for the import operations of which the National Bank is recommended to ensure transfers).

Despite the critical attitude of foreign economic activity actors to the critical import goods list introduced with the beginning of the martial law, its existence was necessary for the first months of the war. At the same time, the established criteria and system of inclusion/exclusion in the relevant list of goods and services raised many questions. Individual positions were included and excluded from it several times. At the same time, the existence of the list made it possible to save the gold and currency reserves of the National Bank in the first weeks of the war.

Overall, the critical import program was positive for balancing currency flows, which helped ensure macroeconomic stability in the critical period following the Russian invasion.

The list of critical import goods has been repeatedly revised upwards. Changes to the resolution on critical imports were made based on appeals from Ukrainian companies. The latest version of the list contained about 90% of goods imported into Ukraine before the war.

Source: https://bit.ly/3RETFJm



Certain tax benefits, which were introduced with the beginning of martial law in Ukraine, have been canceled

Law of Ukraine dated June 21, 2022 No. 2325 "On amending the Tax Code of Ukraine and other legislative acts of Ukraine regarding revision of certain tax benefits"

The authorities are gradually canceling the benefits introduced at the beginning of the war for certain goods imports into Ukraine, in particular, cars.

For example, the law provides:

- Prohibition for the third group of the single tax payers (legal entities and individual entrepreneurs) who use the special taxation established by subsection 9.3 of clause 9 of subsection 8 of chapter XX "Transitional provisions" of the Code on the import of passenger cars, their bodies, trailers and semi-trailers, motorcycles, vehicles intended for the transportation of 10 people or more, and vehicles for goods transportation.

- Cancellation of exemption from VAT when importing goods into the customs territory of Ukraine by the third group of the single tax payers, who use the special taxation, established by subsection 9.3 of clause 9 of subsection 8 of chapter XX "Transitional provisions" of the Code.

- Cancellation of exemption from VAT taxation, the excise tax on transactions involving the import by individuals into the customs territory of Ukraine of passenger cars, their bodies, trailers and semi-trailers, motorcycles, vehicles intended for the transportation of 10 people or more, vehicles for the transportation of goods under the customs regime import.

- Cancellation of the exemption from VAT on transactions involving the import of goods into the customs territory of Ukraine under the customs regime of import by business entities registered as taxpayers of the first, second, and third group of single taxes.

Source: https://bit.ly/3PkCnzF



A decision was taken to invite Ukraine to the Customs Conventions on Common Transit Procedure *(NCTS)* and Facilitation of Trade in Goods

According to the work results of the final evaluation mission of the General Directorate for Taxation and the Customs Union of the European Commission (DG TAXUD), which worked in Ukraine at the end of June 2022, a decision was made regarding the possibility for Ukraine to join the Conventions.

The representative of the General Directorate for Taxation and Customs Union of the European Commission (DG TAXUD) informed the Ukrainian side that official conclusions regarding the possibility of inviting Ukraine to join the NCTS are expected at the beginning of July 2022.

On July 7, 2022, a decision was made to invite Ukraine to the Convention on the Common Transit Procedure (NCTS) and the Convention on the Simplification of Formalities in Trade in Goods.

The decision was taken at the meeting of the working group on the relevant conventions based on the results of studying the conclusions of the final Evaluation Mission of the Directorate-General for Taxation and Customs Union of the European Commission (DG TAXUD), which took place on June 23-24, 2022.

After Ukraine accedes to the Convention on the Common Transit Procedure (NCTS), Ukrainian businesses will be able to follow the benefits and simplifications:

- One transit declaration and one guarantee for the movement of goods between 36 countries (EU countries and the UK, Turkey, Serbia, Northern Macedonia, Iceland, Norway, Liechtenstein, and Switzerland);
- Authorized enterprises can send and receive goods at their company without entering the customs terminals;

Ukrainian financial guarantees will be valid in 35 more countries.

It is expected that Ukraine will be able to start the international application of NCTS by the end of 2022. It should be preceded by the adoption by the Parliament of Ukraine the draft law No. 7420 and laws on accession to the two conventions and the implementation of all relevant international procedures.

Source: https://bit.ly/3cneh8T



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The proposed Information Bulletin is a continuation of the previous one and is published within the project **"Support to the Civil Society Initiative "For Fair and Transparent Customs"** accomplished with the support of the European Union, the International Renaissance Foundation, and ATLAS Network and monitors customs reform and international trade facilitation implementation.

The publication consists of three parts:

regulatory legal acts that entered into force;

draft laws;

news.

We understand that small and medium-sized businesses do not have enough time to analyze new legislation or possible regulatory innovations. Also, a significant number of such acts are difficult for the average person to understand. "Trade Facilitation Monitoring in Ukraine" is designed to draw attention to interesting events and innovations in Ukrainian legislation related to the trade procedures simplification that may directly affect foreign economic activity actors. In these publications, we will also analyze draft regulations on this issue.

The Institute for Economic Research and Policy Consulting (IER) is an internationally recognized independent Ukrainian think tank founded in 1999.

IER analyzes economic development problems, international trade, and business climate (particularly in the SME sector) and participates in developing policy documents at the national and regional levels.

The IER regularly issues its macroeconomic forecast for Ukraine and participates in developing the consensus forecast of the Ministry of Economic Development and Trade of Ukraine.

The IER sociologists' team conducts regular surveys of enterprises and experts to assess the business climate and expectations of Ukrainian business. IER successfully combines its analytical activities with advocacy for change and participation in the public life of Ukraine. IER cooperates with central and local authorities, national and foreign think tanks, and civil society organizations.

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