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CUSTOMS FORMALITIES: THE LEGAL NATURE AND THE CONTENT OF THE CONCEPT (INTERNATIONAL LEGAL ASPECTS)

In the article the concept and the definitions' maintenance “customs formalities” in the international legal acts (customs conventions, bilateral interstate, intergovernmental treaties of Ukraine with other states in the sphere of customs affair) which is offered to be entered into legal turnover of the national customs legislation is researched.

The attention is focused on identification in some international legal acts of concepts “customs registration” and “customs formalities”. The thesis is proved that customs formalities include following procedures: customs registration, customs control, customs clearance, administrating of cusroms fees.

Key words: customs law; customs legislation; customs formalities; customs procedures; customs clearance; customs control.

Досліджується правова природа та зміст дефініції “митні формальності”, що містяться в міжнародно-правових актах (митних конвенціях, двосторонніх міждержавних, міжурядових угодах України з іншими державами в галузі митної справи) та Митному кодексі України.

Здійснено порівняльний аналіз досліджуваного поняття. Обґрунтовується теза, що митні формальності становлять сукупність дій, здійснюваних посадовими особами митної служби та іншими учасниками митних правовідносин з метою спрощення і гармонізації митних правил і процедур.

Ключові слова: митне право; митне законодавство; митні формальності; митні процедури; митне оформлення; митний контроль.

Problem formulation. Under the circumstances of forming and developing customs law as a complex area of law in the national legal system, the problem of creation of own conceptual and categorical apparatus is very urgent. The problem of defining basic concepts and their meaningful characteristics is one of the most difficult as in terms of the general theory of law, and in terms of defining the fundamental principles of regulation and functioning of individual branches of law, particularly those that are in the process of formation.

It is known, that one of the criteria of law branch's isolation is a codified act that performs an integrated role of the legal requirements set that carry legal regulation of public relationships related to the movement of goods and vehicles across the customs border. For the Customs law such a core act is the Customs Code of Ukraine (CC of Ukraine) [1]. Since its adoption in 1991

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and till its latest edition (2012), the branch codified act contains majority of norm-definitions, performing mainly oriental and informational functions in the legal regulation of customs relationships, assisting to apply those norms of the Customs law, that use the appropriate categories and concepts.

Therewith, experts in the branch of Customs law and practitioners noted repeatedly a significant number of defects of terminological nature, as in the past and in the current version of CC of Ukraine, both in terms of formal logic and legal technique [2; 3]. Furthermore, in the context of European integration, that is actively implemented in Ukraine, the issues of implementation and application in the field of customs regulation conceptual and categorical apparatus used in the international acts (conventions, agreements, contracts) are becoming more topical.

Analysis of recent researches and publications. A large number of publications on the problems of the terms and concepts' use in the Customs law and customs regulations, indicate the concern and interest of scholars and practitioners as for the forthcoming of the national customs legislation to the international standards. First of all these are works of I. G. Berezhnyuk, E. V. Dodin, A. V. Mazur, I. V. Mishchenko, P. V. Pashko, S. S. Tereshchenko, I. O. Fedotova and others. At the same time, the research of the term "customs formalities", that is used in a number of international customs conventions ratified by Ukraine, and that was set legally for the first time in abstr. 29 of Art. 4 in the new edition of the CC of Ukraine is stayed out of scientists and practitioners' sight. Considering that this concept is one of the key in legal regulation of customs relations and the fact that today there is no consensus on its content and scope, the research of its legal nature is topical.

The purpose of the article is studying the definition of "customs formalities" in the international conventions, agreements and analysing the possibilities of its application in the national customs legislation.

Main material. Currently, one of the important task of reforming the customs service is adoption of the national customs legislation to the international rules, norms, standards, and therefore, during the last years several bills such as "About amendments to the Customs Code of Ukraine and some other legislative acts of Ukraine" (№ 8130 on 18.02.2011 [4]; № 8130-1 on 04.03.2011 [5]) have been prepared. As the explanatory notes reveal their aim and objectives are the bringing the CC of Ukraine to the International Convention on the simplification and harmonization of Customs procedures and to the Convention on temporary import, and implementing the Framework security standards of the World Customs Organization into the national law.

With the adoption of the new edition of the CC of Ukraine [1] customs legislation has been harmonized with the international acts in the field of customs regulations. The "customs formalities" concept was included in the terminology of national customs legislation in the branch codified act for the first time. In fact, at the stage of publication of the bill on amendments to the CC of Ukraine debate about the interrelation of such concepts as "customs regulations", "customs procedures", "customs regimes", "customs formalities" has begun and is going on now in the administrative and legal literature. Taking into account the aim of the article, we are going to examine the legal nature and the context of "customs formalities" concept in international conventions, treaties.

The key point in the study of customs formalities is its analysis in the context of the International Convention on the simplification and harmonization of Customs procedures (Kyoto Convention in 1973) [6], that Ukraine joined in due course [7].

According to the abstr. E9F16 of the Chapter 2 "Definitions" of the General Appendix of the Convention mentioned above, customs formalities – are a set of actions to be performed by the special persons and the Customs service in order to comply with customs legislation. In this case, it is nessecary to pay attention to the abstr. E5F9 of the same section: customs clearance – is the implementation of customs formalities required for release of goods in free circulation for domestic using, export or transfer under other customs regimes and abstr. E7F3 customs controle – a set

of measures taken by the Customs service to ensure compliance of the customs legislation. The question on the relations between these concepts remains open.

On the one hand, the name of the Ch. 3 of the General Annex “Customs clearance and other customs formalities” indicates allegedly that customs clearance is a kind of customs formalities. So if they are not identical, then which elements besides customs clearance include customs formalities.

On the other hand, from the content of this section we may conclude that under customs clearance declarants, agent, customs officials commit a number of different actions aiming eventually at moving goods across the customs border. First, before filing goods declaration the declarant is allowed to inspect the goods and take samples. Second, these are filing, registration and checking the goods declaration. Third, checking the goods, that is committing the operation on the actual checking goods by the customs service in order to set matching of the nature, origin, condition, quantity and value of goods to the data cited in the goods declaration (actually committing the customs control by the Customs). Fourth, the production of goods, that means the goods pointed in the goods declaration may be released after the decision not to conduct their inspection, under the following condition: there was no offence; the license for import or export or any other required documents are presented; all authorizations concerning specific procedures are presented; all duties and taxes are paid or all the necessary measures to ensure their payment are taken.

Thus, the analysis of sec. 3 of the General appendix of Kyoto Convention leads to the conclusion that the term “customs formalities” includes a set of actions, the commission of which is directed not only to perform customs clearance, but also customs control and customs duties and taxes that is commission of customs procedures.

Also, it is necessary to pay attention to the special appendixes to this Convention, that also use the term “customs formalities”. So, in Ch. 1 “Customs formalities prior to the goods declaration” of a Specific annex A the importation of goods into the customs territory, responsibilities of carrier, representation and unloading of goods are discussed. According to the abstr. E3. / F.2, customs formalities prior to the goods declaration – all operations performed by the special person and the Customs since the importation of goods into the customs territory till the time of placement of goods under the customs regime. Analysis of this section’s statements of the Specific Annex A suggests that customs formalities must be understood as actions, operations that carried out: first, by the Customs service to take decisions regarding the importation and delivery of goods at the destination, representation of goods to the Customs; second, by the special person regarding the obligation of the carrier to deliver the goods at the place and unloading pointed by the Customs. Consequently, customs formalities – are again a set of actions, which implementation is aimed at achieving a legally meaningful result.

Besides, for example, according to the abstr. E1. / F.2 of Ch. 1. “Goods in free circulation” of the Specific Annex B release for free circulation – customs regime, that foresees that imported goods receive the status of goods in free circulation in the customs territory after paying all necessary import duties and taxes and commission of all necessary customs formalities. This statement is active also for the characteristics of other customs regimes regulated in a Specific Annex B.

The 4th Standard principle of Ch. 1 “Travellers” of the Specific Annex J has evidence in favor of the position that customs formalities – are actions, which implementation is determined with the realization of special procedures. According to this principle: subject to compliance with the appropriate Customs controls, travellers entering or leaving the country by their vehicle for private use shall be permitted to accomplish all necessary Customs formalities without having to leave the vehicle in which they are travelling.

In Ch. 2, “Postal traffic” of the Specific Annex J for the purposes of this section the following concept is used: Customs formalities in respect of postal items means all the operations to be carried out by the interested party and the Customs in respect of postal traffic, and include postal registration, customs presentation, collection of duties and taxes. That is in this Chapter Customs

formalities include actions undertaken for the purpose of customs clearance of postal traffic, customs control and taxation, duties. A similar interpretation of Customs formalities is contained in other Chapter of this annex.

Thus, developers of the Convention define Customs formalities as a set of actions undertaken by both customs officials and other participants of customs legal relationships connected with the movement of goods and vehicles across the customs border of the State.

Another cornerstone of the system of customs regulation is the Customs Convention on the International Transport of Goods under Cover TIR Carnets (TIR Convention, 1975) [8], Ukraine is a participant of which [9]. The main purpose of this Convention is promotion of better standards of international goods transport and simplification and harmonization of administrative, in particular at frontiers, formalities in the field of international transport. In some articles the term “formalities” is also used. In view of the subject of legal regulation of the Customs Convention, obviously, it is about Customs formalities.

Analysing the content of the standards of the Convention we should note that formalities in the field of international transport are related to both warranty association, the Carnet TIR holder, carrier, and customs officials. The warranty association performs the following formalities (actions): issuing the Carnet TIR forms; payment of appropriate import or export duties and taxes and any interest for delay, that may belong under the customs laws and regulations of the country in which violation has been revealed in connection with the TIR operation; responsible not only for goods listed in the TIR Carnet but also any goods that have not been mentioned in this book, and are hold in the sealed part of vehicle or in the sealed container.

As to the TIR Carnet holder, this member of customs relations shall perform the following formalities (actions): to get and fill in the TIR Carnet; complete manifest; be present during the loading and shipment.

The carrier as a subject of international transportation performs the following formalities (actions): receives the Certificate of Approval of the vehicle, container from the competent authority; takes cargo transportation; represents the TIR Carnet together with the road vehicle, the storage of vehicles or container(s) at each Customs office of departure, at each mediate Customs office and at each Customs office of destination; in the event of casual damage of customs seals and signet or death, damage of goods, the carrier shall immediately contact the Customs authorities, if any ones are near, or otherwise, to the other competent authorities of the country in which he is; delivers the goods to the customs office of destination.

The customs authorities, according to the requirements of the TIR Convention, accomplishing the customs procedures regarding the goods transported through the customs border under the rules of international transportations with the use of TIR Carnet carry out the following actions in addition to traditional formalities. Firstly, give the admission to transportisation provided TIR Convention; secondly, issue certificates of approval of the vehicle for such services; thirdly, complete customs clearance of the cargo and, in exceptional cases, use the customs inspection.

Thus, the term “formalities” in the TIR Convention includes the implementation of specific actions as by appropriate persons (warranty association TIR Carnet holder, carrier) and customs officers. The latter ones perform these actions as for the implementation of mandatory customs procedures (customs control, customs clearance), and activities related to the providing the abidance concerned with the demands of international conventions of the proper person (issue of access to transport and certificate of approval to international transportation). So, customs formalities in the TIR Convention – are the actions, that should be performed to obtain a certain legally significant result.

In the Convention on Temporary Admission of 26 June 1990 (the Istanbul Convention) [10], Ukraine joined 24.03.2004 [11] the term “customs formalities” is also used. In Art. 15 of the Convention it is noted, that “each Contracting Party minimizes customs formalities relating to the

benefits of this Convention...”. We can assume that “each Contracting Party minimizes actions concerning the benefits foreseen of this Convention...”. These customs formalities (actions) are related with obtaining the prior authorization from customs authorities, application of benefits as for the temporary importation of certain categories of goods by the proper determining the bans and restrictions arising from national laws and regulations. Despite the fact that in the Istanbul Convention it is not clearly pointed out such customs procedures as customs control and customs clearance (unlike the taxations and fees or exemption from them), researching the norms of this Convention leads to the conclusion that these actions are performed in the implementation of mentioned customs procedures. For example, in Art. 13 of the Convention it is noted: “temporary admission may be stopped with the clearance of goods for home use if circumstances justify this and if national legislation allows, under compliance with the conditions and formalities applicable in such cases”. Or in Ch. 1 of the Art. 14 of Annex A of the Convention it is remarked that “if it is expected that the temporary admission operation will exceed the period of validity of documents for temporary importation due to the inability of the owner to export the goods (including vehicles) within that period, the association that issued these documents may issue the documents that replace them. Such documents shall be submitted to customs authorities for control of the Contracting Parties which they relate to...”.

In the Framework of Standards to secure and facilitate global trade of the World Customs Organization [12] (hereinafter – WCO Framework of Standards) introduced with the Customs Service of Ukraine [13], the term “import and export formalities” is used. These customs formalities may be used with the customs administrations in order to use “Customs Data Models” of WCO to implement customs procedures.

The definition “customs formalities” is often used in bilateral international treaties of interstate and intergovernmental character between Ukraine and other states in the sphere of customs activity. For example, in the Agreement between Ukraine and the Slovak Republic on cooperation and mutual assistance in customs affairs, that was ratified in the Law of Ukraine on July 12, 1996 (Art. 2) [14], it is determined that contracting parties take all necessary measures to ease the performance of customs formalities in international traffic between two countries.

In intergovernmental agreements of Ukraine on cooperation and mutual assistance in customs affairs with such countries as Azerbaijan [15], Armenia [16], Georgia [17] and Kazakhstan [18], Moldova [19], Tajikistan [20], Uzbekistan [21] the notion “customs formalities” is also used. Let’s note that the intergovernmental treaties mentioned above are standards and in the Art. 3 it is foreseen the simplification of customs formalities. This article states that firstly Customs services: a) take the necessary measures to simplify customs clearance by mutual agreement; b) recognize custom software (seals, prints of signets, stamps) and customs documents of each other, and if it is necessary apply their own custom software on goods that move. Secondly, goods and vehicles that move in transit are exempted from rammage, except the cases, when there are reasons to believe that their import, export and transit are banned according to the legislation of the Parties or customs offense is present.

Thus, in these treaties the content of the definition of “customs formalities” contains the implementation, first of all, actions to simplify customs procedures.

In the Glossary of international customs terms, published with the World Customs Organization, the customs formalities are understood as all operations that must be carried out by persons whom it is concerned to, and with the Customs service to comply with customs legislation. In a footnote to this term it is noticed that in addition to customs formalities connected with different customs procedures they may include formalities relating to the phytosanitary, veterinary, immigration, currency norms and standards relating to licensing [22]. It is necessary to draw attention to the possibility of a wide interpretation of this term, that is the developers of this document, except actions related to customs clearance, customs control, taxation of goods transported across borders allow to include in these formalities taking actions on phytosanitary, veterinary, immigration, currency regulations and regulations regarding licensing of these formalities.

Let's note that in some countries, including in Ukraine, implementing measures compliance with some of norms, noticed above, is put on customs administrations. For example, in 2005 to facilitate and simplify the control procedures when moving goods across the state border of Ukraine the Cabinet of Ministers of Ukraine approved the procedure for preliminary documentary control of goods at checkpoints across the state border of Ukraine [23], which defines procedures implementation at checkpoints across the state border of Ukraine that defines the implementory procedure of sanitary-epidemiological, veterinary, phytosanitary, environmental monitoring and controlling the movement of cultural valuables in the form of preliminary documentary control of goods imported into the customs territory of Ukraine and according to the legislation are subject to the mentioned types of control. The implementation of such control at checkpoints across the state border is entrusted to the customs authorities of Ukraine. Later the changes regarding preliminary documentary control with the customs authorities were made with the Law of Ukraine of 03.02.2011 in the CC of Ukraine [24].

We believe that inclusion in the range of actions undertaken by Customs administrations regarding document checks on compliance with sanitary, veterinary and other regulations, to customs formalities is a reasonable action. This situation facilitates only the security and simplification of the global trade, which is a priority in the activity of customs administrations.

In the context of the research experience of customs regulation in the European Union is interesting. The basic document in this area is the Community Customs Code (Modernized Customs Code) that implements common rules and procedures applicable to the goods imported into the customs territory of the Community or exported out of it [25]. According to the par. 8 of art. 4 of this Code, customs formalities – are all actions that must be performed by the interested parties and customs authorities to comply with customs legislation. Thus, it is clearly determined in the Code that customs formalities represent in the interpretation of European legislators. An example that confirms the affirmation about customs formalities are actions is the par. 2 of the art. 106, according to which the customs office where the declaration filed or that is granted any access to it, perform all formalities to check the declaration, recover the amount of import or export fees corresponding to any customs debt and perform customs clearance.

The current national customs legislation uses the definition “customs formalities”, the interpretation of which is contained in the par. 29 of art. 4 of the CC of Ukraine: customs formalities – are set of actions to be performed by the proper persons and income and charges authorities to comply with the Ukrainian legislation's demands on the issues of state customs affair. Considering this norm in Ukrainian CC the concept “customs procedures” is formulated – conditioned with the aim to move the goods across the customs border of Ukraine set of customs formalities and procedure of their implementation (par. 21 of art. 4 of the CC of Ukraine) [1].

The analysis of these concepts indicates that the term “customs procedures” is wider in its content than the term “formalities”, because includes not only determining the necessary set of actions, but also officially established order of implementation. We believe that such normative fixing of these concepts must stop the discussion about their interrelation.

This position is confirmed by the legislator in the ch. 6 of the CC of Ukraine, where the features of moving and skipping the goods across the customs border of Ukraine is determined with customs formalities, but not the customs procedures as it was in the previous version of the CC of Ukraine. Meaning that features of moving and skipping the goods across the customs border of Ukraine are defined with a set of specific actions, not the manner of their performance features, that is common and unificated, regardless of the kind of transport. In order to implement the affirmations of par. 6 of the CC of Ukraine the “Nomenclator of customs formalities that may be determined by the results of the risk management system” and other departmental nomenclators of information on the issues of the state customs affair, that are used in the processing of customs declarations were developed and implemented [26]. This normative act defines clearly customs formalities (actions) used by the customs officials in the choosing the necessary form of customs control within customs procedures.

Conclusions and further researches directions. Thus, we can conclude that in the international acts the concept of customs formalities is unified and it means a set of actions of customs officials and other participants of customs legal relations, committing of which is aimed to perform customs procedures (customs control, customs clearance, customs duties and taxes, etc.). Customs formalities are carried out to ensure compliance with customs legislation.

We can also ascertain full compliance of national legislation with international norms and standards, the Community Customs Code and the WCO recommendations in the interpretation of such terms as “customs procedures”, “customs control”, “customs clearance” and “customs formalities”.

Filling the CC of Ukraine with the norms-definitions accelerates the completion of the formation of the customs law as an independent branch of the law of integrated nature in the national legal system.

Some problematic issues that arise in the activity of customs officials and other participants of customs legal relations are conditioned first of all with not drawbacks of legal regulation but imperfect mechanism for implementing the norms of customs legislation and with some subjective factors.

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