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AUTHORIZED ECONOMIC OPERATOR: REASONS FOR DISSATISFACTION WITH STATUS IN UKRAINE AND WAYS OF TERMS IMPROVEMENT

Mariana HOMENUIK

University of Customs and Finance, Ukraine

E-mail: homenuikmariana@gmail.com

Abstract

This paper was presented at the 10th annual WCO PICARD conference (in the frameworks of the “Youth Forum”), 8-10 September 2015 in Baku, the Republic of Azerbaijan.

With the introduction of the new Customs Code of Ukraine the concept of the authorized economic operator (AEO) was first presented, but its implementation is still under way. Therefore, the author studies an international experience in AEO implementation, specifying that AEOs’ main features are determined by the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention).

The author also underlines the actuality of the topic connected with some ambiguity in the Customs legislation and difficulties with getting AEO status.

The main conditions required to obtain the AEO certificate are mentioned in the paper. Three types of AEO certificates (the certificate of Customs procedures simplification; the certificate of reliability and safety; the certificate of Customs procedures simplification as well as reliability and safety) together with simplifications provided to AEOs depends on the type of the certificate are analyzed; the grounds for suspension and revocation of any kind of AEO certificate are identified.

The author also studies some hindrances in obtaining the AEO status in Ukraine, in particular, application and certificate forms, the whole procedure of a certificate issue, the questionnaire concerning different areas of an enterprise activity, absence of appropriate mechanisms to ensure the confidentiality of the information given, implementation of special simplifications.

To more deeply research the chosen subject the following scientific methods were used: analysis, synthesis, comparison, generalization, induction, deduction.

In conclusion the author gives recommendations concerning ways of encouraging enterprises to obtain the AEO status, as it enters new principles of safe international trade as well as marks the beginning of a fundamentally new approach to the performance methods and interaction between Customs administrations and business partners.

Key words: Authorized Economic Operator, the Customs Code of Ukraine, the AEO certificate, simplifications, Customs procedures.

Introduction

The introduction of the authorized economic operator institution as a form of public-private partnership has become an interesting innovation in the Customs legislation of Ukraine. For the first time this term began to be used in Ukraine on June 1, 2012, when the Customs Code of Ukraine from March 13, 2012 № 4495-VI entered into force. The main objectives of this innovation are to develop a proper system of relationships between Customs and business, accelerate and facilitate Customs procedures as well as bring the national legislation into conformity with the international laws.

In addition, the introduction of the authorized economic operator system is one of the priority tasks of the State Customs Service of Ukraine modernization, which is directly provided by the Concept of the Customs Service of Ukraine reforming called “Face to people” (Ukrainian variant – “Обличчям до людей”) dated from October 29, 2010.

The actuality of the topic is connected with the fact that at present time due to some reasons it is not possible to obtain the status of an economic operator. These reasons will be listed further. Therefore one of the priority directions of the Customs law improvement is the study of the AEO institution with regard to provisions, rules and principles that regulate this institution.

1. Appearance of AEO at the international level

The possibility of implementing the authorized economic operator institution is known to have been first outlined at the international level within the provisions of the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) by means of establishing special procedures for “authorized persons”. On the basis of these rules the more detailed concept of “authorized economic operators” was developed and fixed in the Framework of Standards to Secure and Facilitate Global Trade (SAFE) adopted by the World Customs Organization on June 23, 2005.

According to the determination given in the WCO SAFE Framework of Standards, the authorized economic operator is a party involved in the international movement of goods in whatever function that has been approved by or on behalf of a national customs administration as complying with the WCO or equivalent supply chain security standards. AEOs may include manufacturers, importers, exporters, brokers, carriers, consolidators, intermediaries, ports, airports, terminal operators, integrated operators, warehouses, distributors and freight forwarders.

Within the AEO program Customs authorities are to give the number of privileges to the organizations getting this status, meanwhile all work must be conducted in the close co-operation with business representatives. Standard 6 of Section IV of the WCO SAFE Framework of Standards encourages a collaboration between Customs authorities and trade participants with the purpose of providing a maximal level of safety and simplification. However, this standard gives priority to security rather than simplicity and that creates a dilemma. In this regard, the WCO has developed special guidelines on AEO implementation (outlined in Chapter 5 the WCO SAFE Framework of Standards) as well as the plan of benefits for AEOs drawn up by the private sector efforts. These benefits imply a reduced number of inspections and priority while inspecting, softer security requirements, expedited release of goods as well as pre-arrival clearance, simplified procedures, priority service in case of emergencies etc.

The “second pillar” (called “Customs-to-Business”) includes six standards? In particular:

Standard 1. – Partnership: Authorized Economic Operators involved in the international trade supply chain will engage in a self-assessment process measured against pre-determined security standards and best practices to ensure that their internal policies and procedures provide adequate safeguards against compromise of their supply chains until cargo is released from Customs control at destination.

Standard 2. – Security: Authorized Economic Operators will incorporate pre-determined security best practices into their existing business practices.

Standard 3. – Authorization: The Customs administration, together with representatives from the trade community, will design validation processes or quality accreditation procedures that offer incentives to businesses through their status as Authorized Economic Operators.

Standard 4. – Technology: All parties will maintain cargo and container integrity by facilitating the use of modern technology.

Standard 5. – Communication: The Customs administration will regularly update Customs-

Business partnership programmes to promote minimum security standards and supply chain security best practices.

Standard 6. – Facilitation: The Customs administration will work co-operatively with AEOs to maximize security and facilitation of the international trade supply chain originating in or moving through its Customs territory.

In accordance with Annex 2 of the WCO SAFE Framework of Standards containing technical specifications to the “second pillar” called “Customs-to-business”, relations between Customs administrations and business society should be based on mutual respect for each other's roles and responsibilities in this area (UNECE Trade Facilitation Implementation Guide). This annex specifies and explains the standards of the “second pillar”.

2. Implementation of AEOs in Ukraine

Authorized economic operator is a new person, a new entity in the foreign economic activity participants' institute. The main component of its status is an ability to operate in a preferential regime (Bilous-Osinj 2014). Earlier within the legislation of Ukraine, in particular, governing Customs matters, the preferential regime acted under special simplified procedures, so certain definite benefits for a number of traders already existed in one way or another.

The definition of an authorized economic operator's legal status, the conditions and order of this status granting as well as the list of special simplifications are indicated in Chapter 2 of the Customs Code of Ukraine (Innovations of the Customs Code of Ukraine). But a clear and complete definition of AEO isn't given. The Customs Code only states that any company having a certain combination of features can be an authorized economic operator. These features include :

- registration in accordance with the laws of Ukraine;
- meeting the criteria (the conditions) for receiving an appropriate certificate;
- having the authority to use special simplifications, established by the Customs Code of Ukraine for such subjects of Customs legal relations.

To obtain the certificate an applicant is to meet all AEOs conditions established by Article 14 of the Customs Code of Ukraine (the conditions must be met at the time of filing the certificate application). They include the requirements that:

1. the foreign trade activities shall be carried out for no less than 3 years;
2. all customs payments and fines must be paid;
3. here should be no debts in tax payments, fines and penalties;
4. in the past three years an applicant must not be brought to administrative proceedings for not declaring goods and means of transport for commercial purposes, for transfer and actions aimed at transfer of commercial goods and vehicles across the customs border of Ukraine with violation of customs control rules; for actions aimed at illegal exemption from customs payments or reduction of their size as well as other illegal actions aimed at evading payment of customs duties (Articles 472, 485 and 482 of the Customs Code of Ukraine);
5. goods accounting system of a company-applicant must allow comparing the information and documents provided to the customs authorities during Customs formalities and control with data on the economic activity implementation and relevant documents;
6. an applicant must not have an open monetary commitment defined by the results of a documentary check.

The document confirming the status receipt is an AEO certificate, and its presence is confirmed by the entry in the Single Register of authorized economic operators.

A company applying for the status, depending on the declared type, can obtain an AEO certificate of three types (Independent auditor 2013) :

1. the certificate of Customs procedures simplification;

2. the certificate of reliability and safety;
3. the certificate of Customs procedures simplification as well as reliability and safety.

Table 1

Simplifications granted to an enterprise –a certificate holder

Certificate title	Privileges
The certificate of reliability and safety	<ul style="list-style-type: none"> • reducing the amount of information that is to be reported to Customs authorities concerning arrival or departure of goods and means of transport for commercial use from the territory of Ukraine; • authorization of temporary storage of goods and commercial vehicles under Customs control in premises at the sites of an authorized economic operator; • withdrawal of Customs security without Customs permission; • departure of goods from the open or close premises of an authorized economic operator without their presentation to a Customs authority at the place of departure.
The certificate of Customs procedures simplification	<ul style="list-style-type: none"> • Customs control on a priority basis; • possibility of placing the goods at a private warehouse under temporary storage without Customs authorities authorization; • exemption from the obligation to provide safeguards during internal Customs transit of goods (except for excise goods) in case the declaration is made by an AEO; • Customs clearance of goods at the AEOs' premises; • submission of a single Customs declaration, in case within a certain period of time the goods have been imported/exported by the same person under the same foreign trade contract.

List of simplifications provided to AEOs depends on the type of the certificate issued (table 1). The holder of the “combined” certificate is granted with all the privileges listed.

The grounds for suspension of any kind of AEO certificate imply:

1. Reliable evidence and facts identified by Customs authorities, which refute the information specified in the self-evaluation form. The duration of the suspension period is up to three months.
2. Submission of a statement from an AEO to suspend a certificate. The duration of the suspension is determined according to the statement, but not more than three months.
3. Debts in Customs payments and fines. The suspension period is up to full recovery of debts.
4. Bringing AEO management (its founders, individual shareholders owning a majority stake) to criminal liability for crimes against property, in the sphere of business and/or employment

activities. The suspension period is until a court judgment entry into force or a ruling on the criminal case termination.

5. Administrative proceedings against the complainant in case of offences under Articles 472, 482 or 485 of the Customs Code of Ukraine. The suspension period is until the ruling on administrative responsibility or the decision to terminate the administrative proceeding entry into force.

6. Failure to comply with the requirements for mandatory notification of Customs authorities of any changes in the data provided for the issuance of the certificate. The term of suspension is up to one month.

7. Outstanding monetary obligations defined by the results of a documentary check. The suspension period is up to full recovery.

Under certain grounds Customs authorities may suspend the certificate. They should notify AEOs in writing not later than within five working days.

The grounds for a certificate revocation include:

1. AEO's written statement about its exclusion from the AEOs register.
2. Liquidation of an entity being an AEO in accordance with the legislation of Ukraine.
3. Entry into force of a court verdict against the ownership of an AEO enterprise (its founders, shareholders owning a majority stake) and their conviction for crimes against property, in the sphere of business and/or employment activities.

4. Bringing AEO officials to administrative responsibility for offences under Articles 472, 482 or 485 of the Customs Code of Ukraine, more than two times a year.

5. Failure to comply with the requirements for mandatory notification of Customs authority of any changes in the data provided for the issuance of the certificate and failure to file such information during the term of the certificate suspension.

The decision to revoke a certificate is made by the Customs authority having issued the certificate. It shall be formalized by the order, which comes into force since the moment of its publication. No later than a day after its issuing, a certified copy shall be handed out to the AEO management or sent to the AEO address by a registered letter with a notification.

3. The problem of obtaining the AEO status in Ukraine

According to Article 13 of the Customs Code (Customs Code of Ukraine 2012), the certificate is issued by Customs situated at the place of an enterprise location (in other words, at the Customs office where this company is accredited as a subject of foreign economic activity). At first glance, the package of documents for obtaining a certificate is minimal: a statement and an application form. But, to begin with, according to Article 13 the statement, application and certificate forms as well as the procedure of a certificate issue shall be approved by the Ministry of Finance of Ukraine. In addition, appropriate regulations are not available yet (Prus 2012).

Moreover, Article 13 of the Customs Code stipulates that at least 20 questions of the questionnaire concerning different areas of an enterprise activity should be answered (Determining the AEO status in Ukraine today). But it is unclear in what form this should be done: in descriptive or assertive (i.e. "Yes"/"No"). In addition, clarifications as to the contents of answers to some questions in the questionnaire are still absent. For example, in order to obtain the status of an authorized economic operator, a company is bound to have a certain stock accounting system. But it is nowhere said in what form this system should be (in paper or electronic form, using special software etc.).

Also taking into account the completeness and amount of information to be specified in the questionnaire, which will be further checked by Customs, it can be equated to a full-scale Customs audit. Appropriate mechanisms to ensure the confidentiality of such information should have been established, but unfortunately they are also not provided (Lisovec 2012).

Not entirely logical and accurate are the special simplifications provided for an authorized economic operator. The mechanism of Customs procedures application for the implementation of special simplifications is very superficial. For example, the holder of the AEO certificate of reliability and safety is allowed to submit less information to be reported to Customs concerning arrival or departure of goods and means of transport for commercial use from/into the territory of Ukraine, but the Customs Code does not provide for a submission of a short import/export declaration as well as doesn't indicate minimal frameworks for presenting this information.

Concerning the holder of the certificate of Customs procedures simplification, the Customs control on a priority basis is impossible, as after the introduction of electronic declaration all subjects of foreign economic activity go through the Customs control in the order of regular turn. The separate zones intended especially for AEOs are still absent (Lawyer & Law). Regarding the submission of a single Customs declaration used in case of regular import/export by the same person under the same foreign trade contract, its function is performed by a periodic declaration.

Thus, even abovementioned simplifications do not always grant privileges to AEOs.

Therefore, to attract enterprises to obtain the AEO status it is necessary:

- to clarify special simplifications provided by certificates;
- to ensure international exchange of Customs information;
- to improve the infrastructure of border crossing points for the implementation of the priority principle and expedite passage of AEOs;
- to establish economic operator registration systems compatible with those of the countries, with which Ukraine plans to sign international agreements on AEOs mutual recognition.

Summary and concluding remarks

An authorized economic operator as a new subject and a new entity in the foreign economic activity participants institute constitutes a specific category of legal persons enjoying a special confidence from Customs administrations together with the possibility to use simplified procedures for minimizing time and financial costs of Customs operations.

Of course, the status of an authorized economic operator improves business, since it allows for special simplifications. But before the first AEO certificate holder occurrence, there will be dozens of problems to be solved and many inaccuracies to be corrected. It is obvious that special simplifications and mechanisms for their implementation need long time to be developed.

Nevertheless, introduction of such a subject of Customs law as an authorized economic operator means implementation of new principles of safe international trade as well as marks the beginning of a fundamentally new approach to the performance methods and interaction between Customs administrations and business partners.

There may come a time when the institution of authorized economic operators will indeed be turned into a mutually beneficial cooperation between the government and business. But nowadays the process of receiving special simplifications by authorized economic operators has many flaws that young specialists have a chance to correct.

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