

FOREIGN TRADE IN UKRAINE: TRENDS OF 2011



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In this brief overview, we intend to focus on key developments, which took place in 2011 and make predictions on what may happen in the field of Ukrainian foreign trade in 2012.

Regional Trade Liberalization

Ukraine is one of the leaders in regional initiatives on formation of new free trade zones and updating existing ones.

On 18 October 2011 members of the CIS (except for Azerbaijan, Turkmenistan and Uzbekistan) signed the new CIS free trade agreement (the FTA) in Russia, largely due to rather outdated provisions of the previous FTA. The updated and the more comprehensive CIS FTA will limit the application of import restrictions and further liberalize trade in goods within CIS countries. Taking into account that the majority of parties to the CIS FTA are not members of the WTO, the signing of such an agreement shall be beneficial for Ukraine. However, the drawback of such agreement is a wide list of exemptions from free trade regime. Therefore, the CIS FTA will not cover a whole range of goods.

Additionally, Ukraine is working on establishing a free trade area with the European Union, which is a very important indicator of the Pro-Western stance of Ukraine. At the end of 2011 the head of the Ukrainian delegation, Mr. Pyatnytskiy, unofficially informed that Ukraine and the EU have reached an understanding on all principal issues and that the technical part of negotiations is almost completed. Therefore, in 2011 the parties almost finalized a "wide and deep" EU-Ukraine FTA. These comprehensive free trade area rules will provide for almost complete elimination of all import duties (most customs du-

ties will be zero, while the majority of others will be progressively lowered within the next 10-15 years) and quantitative restrictions (except for tariff quotas), gradual phase-out of export duties, harmonization of technical regulations and phytosanitary rules applicable to goods, improved legal framework for active attraction of investments, etc. In addition, both parties will be able to use such new tools as minimum entry prices, simplified application of surcharge to normal import duties in case of a sudden sharp increase in import volumes. It is expected that after its entry into force, the EU-Ukraine FTA could be a good impulse for the development of the Ukrainian economy and should attract inbound investments.

It must be noted that despite many existing myths the simultaneous participation of Ukraine in both FTAs with the EU and CIS is in fact permitted by WTO law and may not be considered as a breach of Ukrainian international undertakings.

Comprehensive Customs Reform

At present interaction with the Ukrainian customs authorities in most cases is a real headache for many importers. In 2011 Ukraine took ambitious actions to reform its customs legislation in line with international standards.

Firstly, in February 2011 the Ukrainian Parliament ratified the Protocol of amendment to the *International Convention on the Simplification and Harmonization of Customs Procedures of 1999*. By implementing standards and recommended practices of the Convention and Protocol of amendment thereto, Ukraine will achieve a high degree of harmonization of its customs procedures with the highest international standards, which will help to effectively develop foreign trade.

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In 2011 Vasil Kisel & Partners merged its trade and antitrust practices into a single Antitrust, Competition & Trade Practice.

The united practice has attained a great synergy effect by offering more complex and tailor-made solutions to its clients. This consolidation has generated a competitive advantage for both teams.

Last year Vasil Kisel & Partners successfully represented the interests of LG Electronics in safeguard investigation related to the importing of refrigerating and freezing appliances into Ukraine.

The Interdepartmental Commission on International Trade terminated the said investigation without the application of safeguard measures.

As Ukraine was not active in initiating trade defence measures in 2011, the main focus of Vasil Kisel & Partners in the field of international trade was customs law and contractual structuring of foreign trade transactions.

Thus, the attorneys of Vasil Kisel & Partners represented the interests of a European ferroalloy plant and a Ukrainian steel mill before customs authorities as to the re-refund of ex-

Secondly, in November 2011 the Parliament approved amendments to the *Customs Code of Ukraine*. In fact, Vasil Kisel & Partners lawyers actively participated in the working group of the Cabinet of Ministers of Ukraine created to develop these amendments. The new version of the Code proposes some principal changes to Ukrainian customs legislation, to name but a few: (a) the introduction of an imperative time limit for completion of customs formalities; (b) the possibility of importers/exporters to conduct customs clearance in customs office all over Ukraine comparing to place of state registration of importer/exporter as provided now; (c) the establishment of liability of customs officers for delay of customs formalities; (d) the harmonization of customs valuation procedures with the WTO customs valuation agreement; (e) the introduction of authorized economic operator status, which results in simplified customs procedures for its holder; (f) the introduction of risk management system and post-clearance audit procedure in order to simplify customs clearance; finally, (g) importers/exporters shall not be punished for minor errors or omissions in submitted declarations or documents.

However, at the end of 2011 the President of Ukraine vetoed the Draft *Customs Code*. Currently it is hard, if not impossible, to predict when the new *Customs Code* shall enter into force.

The Agricultural Market “On-Hold”

Despite many optimistic forecasts of the stakeholders, trade in Ukrainian agricultural commodities was substantially restricted in 2011. At the beginning of the year the Government introduced quotas on grain exports. Due to the insignificant volume of such quotas as well as non-transparent procedure for their allocation, many key exporters were left overboard. In addition, the right of grain traders to a VAT refund was abolished by the newly-adopted *Tax Code of Ukraine*, which came into force on 1 January 2011.

cessively paid import duty. The trade team also successfully represented the interests of Zara before customs authorities in complex customs valuation issues related to royalty structuring and payment. The firm's specialists ensured compliance of BP International with complicated export control requirements in Ukraine, provided legal support of establishing toll manufacturing of complex equipment in Ukraine for Man Oil Group, represented the interests of Philips before customs authorities in countering the smuggling of Philips products, etc.

In February 2011 the new requirement on obligatory registration by the state agricultural exchange of foreign trade contracts on export of agricultural products, which fall under the state price regulation (the list of such items includes almost all agricultural commodities) was introduced. Such registration is conducted subject to payment of a commission fee. Absence of certificate on foreign trade contract registration results in customs clearance denial.

In May-July 2011 the Parliament of Ukraine gradually increased export quotas for grains, but introduced export duties for wheat, meslin, emmer wheat, barley and corn. Additionally, the above mentioned goods were exempted from the free trade regime between Ukraine and its FTA partners.

At the end of the year grain traders signed a memorandum of understanding with the Ministry of Agrarian Policy, establishing voluntary export restraints for agricultural commodities. In turn, the export duties for wheat, barley and corn were increased. However, new export duties for soy beans, rapeseed and sunflower oil were introduced. In addition, the Government amended the *Tax Code*, allowing grain traders to claim export VAT refunds.

Further positive liberalization measures which will allow enhancing exports and the reviving of the Ukrainian agri market in 2012 are expected from the Government.

“Sensitive” Trade Remedies

In 2011 Ukraine was active in initiating trade defence measures. Despite the termination without the application of definitive measures in (a) anti-dumping investigation related to imports into Ukraine of tires for passenger cars originating from Belarus, and (b) safeguard investigation related to imports into Ukraine of household refrigerating and freezing appliances irrespective of country of origin, Ukraine initiated two large-scale safeguard investigations irrespective of country of origin. The first one deals with imports of certain crude oil refining products (including petroleum and

Also as part of it cross-border work, Vasil Kisel & Partners provided contractual structuring and legal support to HS International, a supplier of complex industrial equipment. This mandate also included legal support for establishing distance sales in Ukraine by one of the global leaders in the field of distance sales of non-food products as well as many other complicated cases.

The firm's client roster includes leading foreign and national companies to name, but a few: LG, Philips, Zara, Yves Rocher, TNI, CAT Groupe, Thomson Reuters, Recticel, Man Oil Group, Hasbro, HS International, Kikkoman, BP International and others.

diesel fuel) and the second — with new passenger cars.

It is worth mentioning that fuel and cars markets are very sensitive for many Ukrainian trade partners. Therefore, if Ukraine applies definitive safeguard measures in such investigations in the form of quotas or safeguard duties, it will greatly affect all importers dealing with fuel and cars and may spur smuggling. At the same time, such actions may have far-reaching negative implications for Ukraine, like freezing FTA talks with the EU, application of some retaliatory measures in response, etc. In addition, as the WTO law allows application of safeguard measures only to the minimum extent necessary to remedy or prevent the injury to the domestic industry of like or directly competitive products and only as an exceptional measure, initiation of WTO dispute settlement proceedings against Ukraine is not excluded.

By Way of Conclusion

The previous year was a rather controversial one. On the one hand, trade in agricultural commodities was substantially restricted by the Government through a non-transparent quota allocation and high export duties. Additionally, Ukraine initiated a few safeguard investigations, which may raise questions in terms of their compliance with the underlying principles and rules of the WTO.

At the same time, Ukraine was an active player in the field of regional trade liberalization by signing the FTA with CIS countries and almost completing negotiations on establishment of the extended free trade area with the EU.

However, in our opinion, the biggest achievement of Ukraine in the field of foreign trade is comprehensive customs reform. It is intended to harmonize domestic customs legislation with the standards of the World Customs Organization and, hopefully, make Ukraine an import-friendly country, allowing relatively smooth movement of goods through its customs border.

Denis Lysenko, a partner at the firm, leads its Antitrust, Competition & Trade Practice. His expertise is strengthened by Mariya Nizhnik and Ivan Yurchenko who are recognized and highly recommended professionals in the field. Another team member — associate Oleksandr Tereshchenko — was an active participant of the working group that drafted amendments to the *Customs Code of Ukraine* within the Parliamentary Committee on Finance, Banking, Tax and Customs Policy and has been consistently acknowledged as a leading expert in the field of customs law.