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ГАРМОНІЗАЦІЯ ЗАКОНОДАВСТВА УКРАЇНИ ПРО ДЕРЖАВНИЙ КОНТРОЛЬ БЕЗПЕЧНОСТІ ХАРЧОВИХ ПРОДУКТІВ ІЗ ЗАКОНОДАВСТВОМ ЄС

Анотація. *Стаття присвячена проблемам гармонізації національного законодавства України про державний контроль безпечності харчових продуктів з відповідними вимогами законодавства ЄС. Розглядаються теоретичні та практичні виклики гармонізації законодавства на основі використання методу системного аналізу у поєднанні з методами діалектики та порівняльного аналізу. Зокрема, встановлено, що більшість положень законодавства України, що застосовуються до заходів контролю безпечності харчових продуктів не виходять за рамки того, що традиційно вважається в Україні держаним наглядом. Продемонстровано, що попри те, що безпечність харчових продуктів залежить від безпечності кормів, законодавство про харчові продукти та законодавство про корми доцільно розглядати як різні галузі законодавства замість того, щоб включати законодавство про корми до складу законодавства про харчові продукти. Особлива увага звертається на проблеми імплементації вимог законодавства ЄС в національне законодавство України, що виникають внаслідок поширення корупції в Україні. Стверджується, що поряд із боротьбою з корупцією правовими засобами також необхідно запроваджувати цифрові технології для запобігання корупції в системі державного контролю безпечності харчових продуктів. Звертається увага на те, що деякі вимоги законодавства ЄС про*

харчові продукти не зможуть ефективно застосовуватися в Україні до того часу поки інституційна спроможність компетентного органу, відповідального за безпечність харчових продуктів, буде не покращена, а також не буде побудована інфраструктура, необхідна для здійснення заходів державного контролю на кордоні. Крім того, належна реалізація європейського підходу до організації контролю безпечності харчових продуктів вимагає застосування деяких інструментів м'якого права, яких на даний момент не вистачає в Україні. Серед іншого, видання методичних настанов можна було б використовувати як інструмент м'якого права для роз'яснення деяких нових положень законодавства про державний контроль безпечності харчових продуктів.

Ключові слова: законодавство про харчові продукти, безпечність харчових продуктів, державний контроль, державний нагляд, гармонізація законодавства, Угода про асоціацію

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HARMONIZATION OF THE UKRAINIAN FOOD SAFETY CONTROL LEGISLATION WITH THE EU LAW

Abstract. *The article deals with the problems of harmonizing Ukrainian national legislation on the official control of food safety with the relevant requirements of the EU law. Both theoretical and practical challenges of harmonization are examined using comprehensive system analysis coupled with dialectic and comparative analysis research methods. In particular, it has been established that most of the provisions of Ukrainian law applying to food safety checks do not go beyond what is regarded in Ukraine as official oversight. It has been shown that although the safety of food depends on the safety of feed, it is expedient to consider food law and feed law as separate areas of law instead of viewing feed law as part of food law. Special attention is paid to the problems of implementing EU legal requirements into Ukrainian national legislation arising in connection with widespread corruption. It is argued that apart from combating cor-*

ruption through legal means it is also necessary to use digital technologies for the prevention of corruption in the system of food safety official control. It is also pointed out that some requirements of the EU food law cannot be effectively applied in Ukraine until institutional capacity of the competent authority, responsible for food safety, is improved and appropriate infrastructure for carrying out official controls at the border is built. Besides, proper implementation of the European approach to food safety control requires the application of some soft law instruments, which are currently missing in Ukraine. In particular issuing guidances might be used as a soft law instrument for the clarification of some new provisions of the legislation on food safety official control.

Keywords: *food law, food safety, official control, official oversight, legal harmonization, Association Agreement*

INTRODUCTION

Since the signing of the Association agreement with the European Union in 2014 Ukraine has been working very hard to bring its legislation in line with the EU law [1]. One of the key areas of this legal harmonization has been sanitary and phytosanitary (SPS) legislation. If this particular area of Ukrainian national law is not overhauled in accordance with the EU law as soon as possible, it may create significant hurdles for trade in food and agricultural products between Ukraine and the EU. It's worth pointing out that Ukraine has made some progress in the development of its food safety legislation in recent years. At least two important laws based on relevant EU regulations and directives have been adopted. One of them, entitled the Law of Ukraine «On the main principles of safety and quality of food», which was passed in 2014, lays down basic rules of ensuring food safety in line with the relevant provisions of Regulation (EC) № 178 [2; 3]. The other one, entitled the Law of Ukraine «On official controls over the compliance with food and feed law, by-products law, animal health and welfare rules» was passed in 2017, establishing procedures of carrying out official controls in the field of food safety (hereinafter – the Law on official controls) [4].

At the same time the development and adoption of new laws aimed at the implementation of Ukraine-EU Association Agreement is a difficult and challenging process, which raises numerous issues of theoretical and practical nature. The above-mentioned Law on official controls is a good example of such challenges.

For instance, the Law on official controls uses the term «official control». In this connection a natural question arises – is the use of this term really justified? Is there a more appropriate term for the official activities defined as official control in this Law? This question needs an answer, because Ukraine has its own legal doctrine and legal traditions and therefore its legal terminology may differ from the terminology used in the EU legislation. Hence, there may be a totally different perception of the European legal terminology in Ukraine. As a result, the practical application of this terminology may also differ from its application in the EU. So, it is necessary to turn attention to the studies of well-known scholars in the field of administrative law dealing with official

control issues such as O. Andriyko, V. Belyaev, V. Gorshenev, E. Shahov in order to understand the true essence of official control and similar terms [5; 6; 7]. From the theoretical perspective it is also necessary to comprehend the essence of the feed law, which is a new area of law for Ukraine. In this regard the main question is how this new area of law correlates with the food law, which has been in place in Ukraine for a long time.

As for practical issues arising from the Law on official controls the most important of them seem to be the efficiency of official controls, corruption challenges and low institutional capacity of the competent authority.

With regards to the efficiency of official controls it has to be pointed out that the new legal grounds for inspections introduced by this Law still need to be clarified in order to be applied in practice. So, there have to be legal instruments available for making such clarifications. It is also important to bear in mind that the EU food safety control system is also in the process of transition in an attempt to achieve better efficiency as it is illustrated in the article of Boris Antunovic, Bojan Blagojević and their colleagues [8].

As for corruption issues it is necessary to find out how the difference of approaches to defining the discretion of the competent authorities in Ukraine and the EU can affect the problem of corruption. At the same time, it is also important to look at some universal ways of combating corruption offered by digital technology and described in the articles of Tim K. Mackeya and Xiao-Wei Wena [9; 10].

Taking into account the above considerations, the purpose of this study is to highlight current issues arising in connection with the adoption of the Law on official controls and outline some avenues solving these issues.

1. MATERIALS AND METHODS

First of all, the examination of the issues arising in connection with the harmonization of legislation on food safety official control requires the analysis of the Law on official controls, which is the basis of Ukraine's national legislation in the field of food safety control. This Law was developed on the basis of Regulation (EC) № 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [11]. Thus, it is also necessary to take a look at some of the provisions of this EU Regulation. It also has to be born in mind that this Regulation is now replaced with a new one, namely Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products [12]. Although Regulation (EC) № 882/2004 is no longer in force its main provisions are still relevant because they are reflected in the new Regulation (EU) 2017/625. In addition to these pieces of legislation relevant scientific literature also has to be used. In particular

works of well-known legal scholars such as O. Andriyko, V. Belyaev, V. Gorshenev, E. Shahov will come in handy for examining some theoretical issues whereas articles written by foreign authors such as Boris Antunovic, Tim K. Mackeya and Xiao-Wei Wena may be useful for studying practical issues.

The methodology of this research must include a set of methods appropriate for dealing with the issues that need to be addressed. The methods of research also have to be suitable for dealing with the factors having an impact on the system of food safety official control. In particular, the efficiency of food safety official control, its risk-assessment approach, organizational issues, corruption challenges, legitimate business interests, institutional challenges and other factors influencing the development of food safety legislation have to be examined on the basis of a comprehensive system analysis research method. Moreover, the development of food law, in particular provisions on food safety control, should be examined as a dynamic process driven by the above-mentioned factors. Therefore, the method of comprehensive system analysis has to be coupled with the dialectic method of legal research. On top of that, the analysis of this area of Ukrainian national law has to be conducted in the context of harmonization with the EU law, which requires the application of comparative analysis method for comparing relevant provisions of the national legislation of Ukraine and the EU legislation. The method of comparative analysis should also be applied for establishing the correlation between such areas of law as food law on the one hand and the feed law on the other hand.

Applying this set of research methods to organizational arrangements of food safety official controls one can draw some interesting conclusions regarding the development of Ukrainian food safety legislation in the light of its harmonization with the EU law.

2. RESULTS AND DISCUSSION

The Law on official controls is meant to lay down the groundwork for verifying the compliance of food business operators' activities with the requirements of food law. Therefore, the first theoretical issue arising in this regard comes down to one simple question – does the Law on official controls actually deal with official control or official oversight?

In spite of the fact that legal issues relating to food safety are starting to come into the spotlight of Ukrainian legal doctrine, so far there have been no major specialized studies on the correlation of official control and official oversight in the field of food safety. Therefore, it is necessary to pay attention to general theoretical legal studies on this issue.

Although both legal terms «official control» and «official oversight» are widely used in Ukrainian national legislation, there is no unanimous understanding of their essence and correlation in legal theory.

According to O. Andriyko official control may be regarded as a form, method or kind of activity as well as a principle or function of the state, depending on the level or

context of research. In her opinion the essence of official control consists in checking the correspondence of actions with rules, requirements and standards as well as obtaining information about what is going on in society [5, p. 30]. Furthermore, many well-known scholars, in particular V. Belyaev, V. Gorshenev, E. Shahov argue that apart from the verification of compliance with legal requirements official control also includes checking the performance efficiency of subordinates by their superiors within a given institutional framework as well as giving orders and instructions on how to improve performance [6, p. 52; 7, p. 23].

As for official oversight it is often viewed as an official activity distinct from official control or simply an abridged form of official control. One way or the other the essence of official oversight usually comes down to simple verification of compliance with the requirements of legislation. Unlike official control it does not involve checking the accomplishment of tasks given to subordinates. In other words official oversight is only concerned with the issue of legality.

In light of this it is worth noting that the Law on official controls contains provisions applying mostly to oversight functions of the state. It does not provide for the possibility of the competent authority in the field of food safety to interfere in the business operations of food and feed manufacturers. This approach is typical for official oversight.

So, what are the reasons for defining the official oversight as official control? The most obvious answer is that the relevant act of the EU law, namely Regulation (EC) №882/2004 uses the term «official control» instead of «official oversight». Another explanation is that some other acts of Ukrainian legislation, like the Law of Ukraine «On the fundamental principles of official oversight (control) in the field of business», use these legal terms as interchangeable [13].

Thus, we can witness the situation when despite clear theoretical distinction between official oversight and official control, the current national legislation of Ukraine does not clearly distinguish these legal terms. Although this may be an attempt to bring Ukrainian national legislation as close as possible to the EU law at the level of legal terminology, in practical terms it may have some undesirable consequences. The danger is that there may be a false impression that if official oversight is given a broader meaning, which is typical for official control, it may entail attempts on the part of the authorities to interfere with daily business operations of food business manufacturers and distributors.

Another issue of largely theoretical nature stems from the correlation of food and feed law, falling within the scope of the Law on official controls. Are we dealing with the same area of law or two different areas? The answer to this question may have practical implications in terms of legal terminology as well as the structure of relevant legislation.

With regard to this issue it would be fair to point out that in recent years a number of Ukrainian lawyers have turned their attention to some practical issues of food and feed law, which is well demonstrated in the articles of E. Gorovets, Y. Burylo and M. Tsezareva [14; 15; 16]. Those articles mainly touch on practical issues of food and

feed law application, leaving theoretical issues, including those raised above, unexplored. Therefore, it is necessary to shed some light on the issue of correlation between food and feed law on the basis of relevant legislation analysis.

As it follows from the definition of food law, laid down in Regulation (EC) 178, this area of law includes the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at Community or national level, and covering any stage of production, processing and distribution of food, and also of feed, produced for, or fed to food-producing animals. Hence, it is possible to infer from this definition that feed law should be regarded as part of food law. Another argument in favor of such this conclusion is that food safety can only be ensured on the basis of the so-called «from farm to fork» approach, implying that the law has to govern every step of food production along the food chain. In other words, it is impossible to ensure with legal means the safety of food without ensuring the safety of feed first, because whatever is fed to food-producing animals at a later stage becomes part of the food, consumed by human beings via the food chain.

Nonetheless, this simple conclusion is not always consistent with the EU legislation. Strangely enough, despite the fact that the definition of food law includes feed law, the EU legislation occasionally uses legal terms, such as «food law» and «feed law» simultaneously, meaning that they may be regarded as two different areas of law, e.g. Regulation (EC) № 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules. This inconsistency of the EU law does not cause much harm in the EU member-states, since this problem is easily dealt with by way of proper interpretation of the law. As for Ukraine, such an inconsistency may cause problems, since Ukrainian courts often resort to literal interpretation of the law, giving preference to the letter of the law over its spirit. Perhaps, that's why the national legislation of Ukraine defines feed law as an area of law distinct from food law in order to avoid such inconsistencies.

The main objective of the European system of food safety control is to ensure a high level of consumers' health protection at an affordable cost. This can only be achieved on the basis of a risk-assessment carried out with regards to food manufacturing and distribution facilities as well as relevant activities of food business operators. The main idea of a risk-based approach is pretty straightforward – high-risk facilities are supposed to undergo more inspections than those posing a lower risk. It helps cut expenses on organizing official controls. This approach is more or less adequately reflected in the Law on official controls. Just like in the EU, where special attention is paid to the safety of food of animal origin – meat, fish, dairy products, eggs, whereas food of plant origin is not subject to stringent controls, most of the provisions in the Law on official controls are aimed at ensuring the safety of foodstuffs of animal origin.

For example, one of the cornerstones of the European system of food safety control implies that inspections are supposed to be carried out without warning. This enables

an inspector to see the complete picture of how a food business operator complies with the requirements of the food law [17]. Before the Law on official controls came into force all official controls had been performed with prior notification. As a result, the efficiency of such official controls was very low. After the entry into force of the Law on official controls allowing to carry out inspections without warning the situation started to improve.

One of important novelties of the Law on official controls affecting the efficiency of official controls is the introduction of new legal grounds for *ad hoc* inspections. The most curious of them is an inspection on the basis of a justified suspicion of non-compliance. Although it is widely used in the EU, it is still quite new for Ukraine. The main problem arising in this regard is that the concept of justified suspicion is not clearly defined in the Law on official controls. Whereas in the EU competent authorities are empowered to issue guidances explaining how to apply complex legal terms and provisions, in particular those relating to justified suspicion, in Ukraine the competent authority in the field of feed safety does not have such powers. Therefore, it is easy to predict that the application of this new legal concept of justified suspicion may cause legal disputes between the authorities and businesses.

The solution to this problem lies in the dimension of administrative reform, which is still under way in Ukraine. It would make much sense to fully use European experience and give the Ukrainian competent authority in the field of food safety as well as other central bodies of executive power such new instruments of soft law as issuing guidances.

It is also worth noting that the EU system of food safety control is constantly evolving. For instance, the EU is currently upgrading its meat inspection system. According to Boris Antunovic an updated meat inspection approach should contribute to better public health protection, because the traditional meat inspection system was often ineffective, resulting in the outbreaks of foodborne disease [8, p. 461]. Therefore, Ukraine has to be ready to adjust its food safety control system to relevant changes taking place in the EU.

Perhaps, the greatest practical challenge stemming from the harmonization of Ukraine's national legislation in the field of food safety control with the relevant EU law lies within the dimension of combating corruption. The thing is that the EU law gives the competent authorities of the EU member-states a wide discretion when it comes to official control of food safety. For example, both Regulation (EC) 882/2004 and the new Regulation (EU) 2017/625 include provisions giving the EU member-states' competent authorities powers to suspend operation or close all or part of the food or feed business concerned for an appropriate period of time in case of none-compliance. Moreover, in case of none-compliance the competent authority has the power to take any other measure it deems appropriate to ensure that the problem is fixed. This approach works fine in the EU countries with well-established rule of law and a low level of corruption.

As for Ukraine with a legal system still in transition and a high level of corruption the situation looks completely different. According to the Interior Ministry of Ukraine

over 2,8 thousand corruption cases were investigated and sent to courts in the first ten months of 2020 [18]. The impacts of corruption are multiple, affecting service access, utilization and cost [19].

In a situation when wide discretion often leads to the abuse of power it would be too risky to give the competent authority in the field of food safety the same amount of power as in the EU countries. What Ukrainian food safety authority really needs at the moment is a bunch of official control powers with a number of effective checks and balances. That's why under the Law on official controls the competent authority has the power to suspend operation or close a food or feed business for no longer than ten days. If a ten day period is not sufficient for eliminating a none-compliance it is up to the court to decide whether to suspend the operation or close the business concerned for a longer period. This distribution of punitive powers between the executive and judicial branches of state power is supposed to lower corruption opportunities and protect the rights and legitimate interests of food business operators in the field of food safety control.

Another corruption concern arising in connection with the Law on official controls is the so-called delegation of powers to carry out certain control tasks. While in the EU delegation of powers in this field is a common practice aimed the optimization of competent authorities' institutional structure and ensuring cost-effectiveness of official controls, in Ukraine it may prove to be a risky path leading to the abuse of power and embezzlement of public funds. That's why the Law on official controls contains a very short list of control tasks that can be delegated, unlike Regulation (EC) № 882/2004 making it possible to delegate many more of such tasks. The reason behind it is quite straightforward – if the competent authority has too much discretion to delegate its powers corruption opportunities may increase significantly. In other words, what is good for the EU is not always good for countries like Ukraine, which means that corruption risks have to be taken into consideration in the course of legislation harmonization with the EU.

At the same time, it has to be emphasized that Ukraine has to step up its efforts aimed at combating corruption. According to recent studies one of the most promising ways to combat corruption is to apply digital technologies (blockchain, cloud-based platforms, machine learning etc.) in order to improve transparency and accountability [9]. For instance, radio frequency identification technology (RFID) can be used for ensuring traceability of foodstuffs. With RFID, information about the product location can be recorded throughout the supply chain [10, p.752]. This information is important for the purposes of food safety control. It is also important that this information is gathered by relevant IT systems instead of potentially corrupt people. Hence, the application of this digital technology can reduce opportunities for corruption in the food safety control system.

The harmonization of Ukraine's national legislation with the EU law often requires a significant improvement of its institutional capacity, which is necessary for ensuring

proper implementation of relevant legal requirements. This is particularly evident in the case of legal reform in the field of food safety.

These days a lot of efforts are being made to strengthen Ukraine's institutional capacity in the field of food safety. For instance, with the support of its European partners Ukraine is trying to provide proper training for its personnel involved in official control activities. Nevertheless, some serious problems still remain. The problem of institutional readiness for ensuring proper application of the European legal principles regarding food safety control in Ukraine is very well exemplified by the current situation with official controls of food and feed imports.

Due to the lack of institutional capacity of the public authorities responsible for food safety, in most cases consignments of food and feed entering Ukraine have been undergoing only customs checks at the border with proper food safety checks being carried out deep within its territory. This situation poses a threat to public health because any consignment carrying diseases dangerous for human or animal health can easily spread such diseases throughout Ukraine while on its way to a final destination.

In the EU this risk is prevented by carrying out proper food safety controls at the border. It is also crucial that safety checks of food and feed consignments are carried out by qualified staff at well equipped facilities, such as designated border inspection posts and designated points of entry, depending on the type of food or feed, imported into the EU.

Despite the fact that Ukraine also has a number of border inspection posts and points of entry, they do not comply with the EU standards. In addition, these border inspection posts and points of entry are not fully integrated into the institutional framework of the competent authority, responsible for food safety. That's why the Law on official controls provides for a 5-year transition period, which necessary for upgrading food safety control infrastructure at the border. During this transition safety checks of food and feed imports will continue to be carried out inside Ukraine. It shows how good intentions of European integration and legal harmonization are hampered by the lack of institutional capacity, caused by years of underfunding and poor governance. It is clear that these problems cannot be resolved solely through legal means such as harmonization of legislation. So, it will still take some time, investment and institutional reform to fully align Ukraine's system of food safety control with the requirements of the EU.

CONCLUSIONS

Although the harmonization of Ukraine's national legislation with the EU law in the field of food safety official control has been gaining pace recently, it is facing a number of challenges, hampering its progress. Some of these challenges are caused by differences in theoretical interpretation of legal terminology as well as differences in the arsenal of legal instruments in Ukraine and the EU, while others result from systemic problems such as corruption, lack of institutional capacity and appropriate infrastructure etc.

At the theoretical level from the perspective of Ukrainian legal doctrine the term «official control of food safety» which is used in the current legislation should be regarded as official oversight over food safety. As for the correlation of food law and feed law, these two areas of law should be considered as separate areas of law for practical reasons even though there are theoretical arguments to define feed law as part of food law from the perspective of the EU law.

The Law on official controls includes some new provisions that can improve the efficiency of food safety official control, in particular new grounds for ad hoc inspections such as the justified suspicion of non-compliance. At the same time, it would be appropriate to empower the competent authority responsible for food safety to use the instruments of soft law such as issuing guidances in order to facilitate the implementation of the concept of justified suspicion of non-compliance.

In some cases, the discretion of the Ukrainian competent authority responsible for food safety is limited compared to the discretion of the competent authorities in the EU. In this regard Ukrainian legislation is not fully aligned with the EU law, which can be explained by an attempt to lower corruption risks stemming from wide control powers. However, corruption challenges can also be dealt with using digital technologies in the system of food safety official control.

Unfortunately, Ukraine is not fully prepared to for the implementation of all components of the EU system of food safety control due to the insufficient institutional capacity of and poor infrastructure. However, these problems cannot be dealt with solely by way of legal harmonization. The solution of these problems requires also requires time, investment and institutional reform.

RECOMMENDATIONS

Although Ukraine has made a significant progress in the harmonization of its national legislation on the official control of food safety with the relevant legislation of the EU, there are still some theoretical and practical problems with the application of this legislation.

Some of these issues like corruption or the lack of modern legal instruments at the disposal of the central bodies of executive power extend far beyond the field of food safety and require comprehensive solutions relating to many aspects of public life. Therefore, further research efforts of legal scholars should be focused on developing solutions to these problems.

All of this has to be done taking into consideration relevant European experience along with Ukrainian national legal traditions and legal culture as well as economic situation in the country.

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