

- On May 17, 2023, Regulation (EU) 2023/956 of the European Parliament and of the Council of 10
  May 2023 establishing a carbon border adjustment mechanism (hereafter the "EU CBAM
  Regulation") came into force.
- 2. On October 30, 2024, the European Commission published a draft Commission implementing regulation (EU) .../... of XXX laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards the conditions and procedures related to the status of authorised CBAM declarant, including its annex ("the draft implementing regulation")<sup>1</sup> and invited feedback which, according to the European Commission, "will be taken into account for finalizing this initiative". The feedback period is from 30 October 2024 to 27 November 2024 (midnight Brussels time).
- 3. In response to this invitation, the Ministry of Economic Development of the Russian Federation (the "Ministry") would like to draw the European Commission's attention to the European Union's obligations in the WTO, in particular to Articles X:3 and XI:1 of the GATT 1994 and several provisions of the Agreement on Import Licensing Procedures, including its preamble and Articles 1 and 3.
- 4. The above mentioned Articles of the WTO Agreements apply to the draft implementing regulation. The Ministry recalls that from January 1, 2026, the EU will prohibit the importation of goods covered by Regulation (EU) 2023/956 into its customs territory for declarants without "the status of authorised CBAM declarant". The EU requires obtaining this status "prior to importing goods into the customs territory of the Union". Articles 5 and 17 of Regulation (EU) 2023/956 and the draft implementing regulation prescribe rules, conditions, and requirements for an application, including supporting documents and relevant information, as well as administrative procedures for obtaining and revoking the status of authorised CBAM declarant. Based on the provisions of Regulation (EU) 2023/956 and the draft implementing regulation, it is evident that not all applications for the status of authorised CBAM declarant will be approved. Therefore, the administrative procedures in question fall under the category of "non-automatic import licensing", as defined by the Agreement on Import Licensing Procedures.

<sup>&</sup>lt;sup>1</sup> Published in EUR-L ex, 30 October 2024, Document Number: Ares(2024)7706795, online: <u>EUR-Lex</u> - <u>Ares(2024)7706795 - EN - EUR-Lex</u>. The annex to the draft implementing regulation provides the content of the decision granting the status of authorised CBAM declarant.

<sup>&</sup>lt;sup>2</sup> See Article 4 of Regulation (EU) 2023/956.

<sup>&</sup>lt;sup>3</sup> Article 5(1) of Regulation (EU) 2023/956.

- 5. Despite the EU's persistent claims that its CBAM is compatible with WTO law, the draft implementing regulation clearly contradicts these assertions.
- 6. Reading Articles 5 and 17 of Regulation (EU) 2023/956 alongside the draft implementing regulation reveals a complex evolution of an already trade-restrictive and trade-distortive mechanism, escalating it to a next level of trade barriers and distortions. For example, the current text of the draft implementing regulation indicates potential violations of the EU's obligations under Articles X:3, XI:1 of the GATT 1994 and Articles 1.2, 1.3 and 3.2 of the Agreement on Import Licensing Procedures.
- 7. The Ministry recalls that Article XI:1 of the GATT 1994 forbids Members to institute or maintain prohibitions and restrictions, be it through import licenses or other measures, on the importation of any product of the territory of any other WTO Member. Article 1.2 of the Agreement on Import Licensing Procedures requires WTO Members to "ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 ... with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures". Article 1.3 provides that "[t]he rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner". Furthermore, Article 3.2 prescribes that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction". Article X:3 of the GATT 1994 requires a prompt review and correction of administrative actions by an independent tribunal or a court.
- 8. The result of our preliminary analysis demonstrates that the draft implementing regulation will have trade-restrictive and trade-distortive effects on imports. Such effects will be caused, *inter alia*, by the European Commission's excessively high standards of protection against alleged risks posed by non-bona fide applicants and their associates. These negative effects on trade will also result from burdensome and costly administrative conditions and procedures outlined in various provisions of this implementing regulation, including: expanded applicant requirements (including coverage of other persons); extensive verification of eligibility; extensive documentation requirements; discriminatory differentiation among applicants; unnecessary consultation procedure, and delays in granting the status of authorised CBAM declarant.

- 9. To demonstrate some of these concerns in the draft implementing regulation, the Ministry provides extracts from Articles 5 and 17 of Regulation (EU) 2023/956 and provisions of Articles 10(1), 10(3), 11(1), 12(1) and 12(2) of the draft implementing regulation in Tables 1-3 below.
- 10. Table 1 illustrates the extension of certain requirements initially applied to "an applicant" to other persons. It also highlights that, previously, based on Article 5(e) of Regulation (EU) 2023/956, the EU only required a "declaration of honour" from the applicant essentially a formal statement affirming that the conditions of this Article were met without the need for supporting documentation. However, the draft implementing regulation reveals that the European Commission now requires more than just the declaration. For instance, the Commission proposed to prescribe that "the competent authorities shall request" criminal records of natural personapplicant and "the beneficial owner of the legal person acting as applicant and the managers of that legal person".<sup>5</sup>

Table 1. Comparison of certain requirements for an applicant in Regulation (EU) 2023/956 and the draft implementing regulation

<b>Regulation (EU) 2023/956</b>		Draft implementing regulation
Article 5(e)	Article 17(2)(a)	Articles 10(1) and 10(3)
The application for an authorization shall include	The criteria for granting the status of authorised CBAM	Article 10(1)
the following information about <b>the applicant</b> :	declarant shall be the following:	The criteria laid down in Article 17(2), point (a), of Regulation (EU) 2023/956 shall be fulfilled where the applicant, the persons in charge of
(e) declaration of honour	(a) the applicant has not	the applicant's CBAM matters, the persons in
that the applicant was not involved in any serious	been involved in a serious infringement or in repeated	charge of the applicant and the persons exercising control over the management of the
infringements or repeated infringements of customs	infringements of customs legislation, taxation rules,	applicant meet the following conditions:
legislation, taxation rules or market abuse rules during the five years preceding the year of the application, including that it has no record of serious	market abuse rules or this Regulation and delegated and implementing acts adopted under this Regulation, and in particular the applicant has	(a) there is no decision, made after administrative or judicial proceedings, concluding that they have been involved, during the five years preceding the application, in a serious or repeated infringement of customs legislation, taxation rules, market abuse rules or of Regulation (EU) 2023/956 or
criminal offences relating to its economic activity;	no record of serious criminal offences relating	delegated and implementing acts adopted under

<sup>&</sup>lt;sup>4</sup> The EU defines the term "applicant" as "an importer, or indirect customs representative, who applies for the status of authorised CBAM declarant". Article 2(4) of the proposed Commission implementing regulation (EU) .../... of XXX laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards the CBAM registry, online: EUR-Lex - Ares(2024)7742910 - EN - EUR-Lex.

4

<sup>&</sup>lt;sup>5</sup> Article 10(3) of the draft implementing regulation.

(emphasis added)	to its economic activity during the five years preceding the application; (emphasis added)	that Regulation in relation to their economic activity;  (b) they have no record of serious criminal offences in relation to the economic activity of the applicant.
		Article 10(3)
		The competent authority shall request the following information, where necessary to establish that the applicant has not been involved in a serious or repeated infringement referred to in Article 17(2) point (a) of Regulation (EU) 2023/945:  (a) the criminal record or any other document that is accepted under national law as a criminal record of the natural person applying for authorisation;  (b) the criminal record, or any other document that is accepted under national law as a criminal record, of the beneficial owner of the legal person acting as applicant and the managers of that legal person. (emphasis added)

11. Table 2 provides another example of how the European Commission further expands certain conditions for obtaining the status of authorised CBAM declarant.

Table 2. Expansion of requirements related to the applicant's financial and operational capacity

Regulation (EU) 2023/956		Draft implementing regulation
Article 5(f)	Article 17(2)(b)	Article 11(1)
The application for an authorization shall include the following information	The criteria for granting the status of authorised CBAM declarant shall be the	The criteria laid down in Article 17(2), point (b), of Regulation (EU) 2023/956 shall be fulfilled where the following conditions are met:
about the applicant:	following:	(a) the applicant is not subject to bankruptcy
(f) information necessary	(b) the applicant	proceedings;
to demonstrate the applicant's financial and	demonstrates its financial and operational capacity to	(b) the applicant is not in arrears with the payment
operational capacity to	fulfil its obligations under	of customs duties, taxes or charges which are
fulfil its obligations under this Regulation and, if	this Regulation; (emphasis added)	collected on or in connection with the import of goods, financial regulatory obligations and all
decided by the competent authority on the basis of a		other duties related to its economic activity;

risk assessment, supporting				
documents confirming that				
information, such as the				
profit and loss account and				
the balance sheet for up to				
the last three financial				
years for which the				
accounts were closed;				
(emphasis added)				
* *				

- (c) the applicant demonstrates, on the basis of supporting documents provided together with the application, a sufficient financial standing to meet its obligations and fulfil commitments having regard to the type and volume of the economic activity performed by indicating the financial figures and any other financial information;
- (d) the applicant has an administrative organisation suitable for fulfilment of the estimated obligations to surrender CBAM certificates, and has internal controls capable of preventing, detecting and correcting errors in CBAM declarations and CBAM certificates management, and of preventing and detecting illegal or any irregular transactions.
- 12. Furthermore, the European Commission's draft implementing regulation establishes the legal basis for the competent authority's discriminatory differentiation among applicants in the administrative assessment of whether they fulfilled certain conditions. In the third column of Table 2, the Ministry provides the text of Article 11(1) of the draft implementing regulation. The following provisions of the same Article outline certain derogations or additional requirements, depending, *inter alia*, on "the specific characteristics of the applicant" and "the applicant's annual estimated obligation to surrender CBAM certificates":
  - 2. If the applicant has been established for less than two years, the financial capacity as referred to in Article 17(2), point (b), of Regulation (EU) 2023/956 shall be checked assessed on the basis of records and information that are available.
  - 3. When examining the conditions referred to in paragraph 1 of this Article, the competent authority shall take into account the specific characteristics of the applicant, including the information on the estimated volume of imports provided by the applicant in accordance with Article 5(5), point (g), of Regulation (EU) 2023/956.
  - 4. Where the competent authority expects that **the applicant's annual estimated obligation to surrender CBAM certificates exceeds the amount of EUR 500 000**, when examining the conditions referred to in paragraph 1 of this

Article, the competent authority shall request the financial statement audit report, where applicable, in addition to the financial statements referred to in Article 5(5), point (f), of Regulation (EU) 2023/956. (emphasis added)

- 13. Turning to the required "consultation procedure" involving "the competent authorities in the other Member States and the Commission", the Ministry highlights several reasons why these procedures and the required "confirmations" from "the consulted parties" constitute unnecessary procedural barriers. See Table 3 below with the relevant provisions of Regulation (EU) 2023/956 and the draft implementing regulation.
- 14. The first reason is that all information required by the EU CBAM will be accumulated in the CBAM registry, created by the EU to monitor compliance with the CBAM. The EU considers the CBAM registry as one of the key component of the CBAM framework. Both Article 17(1) of Regulation (EU) 2023/956 and Article 12 of the draft implementing regulation require holding the consultation procedure "via the CBAM registry". The European Commission describes the CBAM registry as "a standardized and secure electronic database containing data elements of CBAM declarations, of applications with a view to obtaining the status of CBAM declarants, registration of operators and installations, accredited CBAM verifiers, and providing access, case handling and confidentiality".<sup>7</sup>
- 15. The second reason is that the structure of the CBAM registry and its main functions ensure easy access for competent authorities, the EU customs authorities and the European Commission. Article 14 of Regulation (EU) 2023/956 requires the European Commission to "make the information in the CBAM registry available automatically and in real time to customs authorities and competent authorities". If the information must be available "automatically and in real time",

<sup>&</sup>lt;sup>6</sup> Article 17(1) of Regulation (EU) 2023/956 states, in particular, that the consultation procedure shall involve the competent authorities in the other Member States and the Commission.

<sup>&</sup>lt;sup>7</sup> See Article 3 of the proposed Commission implementing regulation (EU) .../... of XXX laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards the CBAM registry, online: EUR-Lex - Ares(2024)7742910 - EN - EUR-Lex.

<sup>&</sup>lt;sup>8</sup> The structure and functions of the CBAM registry are described in Articles 4 and 3, respectively, of the proposed Commission implementing regulation (EU) .../... of XXX laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards the CBAM registry, online: <a href="EUR-Lex-Ares(2024)7742910-EN-EUR-Lex">EUR-Lex</a>. The CBAM registry shall consists of special portals, including: the CBAM Declarants Portal; the CBAM National Competent Authorities Portal, the CBAM European Commission Portal, the CBAM Operators Portal. The CBAM registry shall enable communication, notification, registration, checks and information exchange between the Commission, the competent authorities, authorised CBAM declarants, applicants, persons for whom the status of authorised CBAM declarants was revoked, and operators. It shall also allow for information exchange with customs authorities.

<sup>&</sup>lt;sup>9</sup> Emphasis added.

then additional "confirmations" are not necessary. Another indication of the excessive nature of the consultation procedure is the provision indicating that the consulted parties may not respond to requests from the competent authority. Article 13(4) of the draft implementing regulation states:

Where the consulted parties do not respond within the deadline established for the consultation in accordance with paragraphs 2, 3 and 4, the conditions and criteria for which the consultation took place shall be deemed to be fulfilled.<sup>10</sup>

- 16. The third reason is the condition for the initiation of the consultation procedure by the competent authority, namely its intension "to grant the status of authorised CBAM declarant". Such an intention must be based on the competent authority's examination of the application, including its information, and the applicant's fulfilment of the legal requirements (conditions). Otherwise, the competent authority's actions and decisions would be arbitrary and illegal. If the conditions for the application for authorization described in Article 5(2) of Regulation (EU) 2023/956 are met, the applicant shall be granted the status of authorised CBAM declarant without delay.
- 17. The CBAM registry shall have information updated **in real time** and provide for "**the interoperability**" between the CBAM registry and the customs systems "to ensure that data is **cross-checked accurately, efficiently** and confidentially". Thus, an official of the competent authority will have access to all necessary data to check and re-check it multiple times: immediately after receiving the application, during its assessment, and at the time of the final decision. There is no need to waste 15 working days waiting for "confirmations" in the consultation procedure <sup>12</sup> when all relevant information is collected in one place the CBAM registry and all interested parties have easy access to it to update the information in real time. In other words, the consultation procedure appears to duplicate the process and are, therefore, an unnecessary barrier.

Table 3. The internal consultation procedure: an unnecessary barrier causing delays in granting the status of authorised CBAM declarant

<sup>11</sup> Articles 2 and 14 of the proposed Commission implementing regulation (EU) .../... of XXX laying down rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards the CBAM registry (emphasis added), online: EUR-Lex - Ares(2024)7742910 - EN - EUR-Lex.

<sup>&</sup>lt;sup>10</sup> Emphasis added.

<sup>&</sup>lt;sup>12</sup> Article 17(1) of Regulation (EU) 2023/956 provides, inter alia, that "[t]he consultation procedure shall involve the competent authorities in the other Member States and the Commission and shall not exceed 15 working days".

## Article 17(1) of Regulation (EU) 2023/956

1. Where an application for an authorisation is submitted in accordance with Article 5, the competent authority in the Member State in which the applicant is established shall grant the status of authorised CBAM declarant provided that the criteria set out in paragraph 2 of this Article are complied with. The status of authorised CBAM declarant shall be

recognised in all Member States.

Before granting the status of authorised **CBAM** declarant, the competent authority shall conduct a consultation procedure on the application for an authorisation via the CBAM registry. The consultation procedure shall involve the competent authorities in the other Member **States** and Commission and shall not exceed 15 working days.

(emphasis added)

## Articles 12(1) and 12(2) of the draft implementing regulation

- 1. The competent authority shall initiate, in electronic format via the CBAM registry, the consultation procedure involving consulted parties referred to in Article 17(1), second subparagraph, of Regulation (EU) 2023/956 (the 'consultation procedure') within 45 calendar days from the moment where it received an application in relation to which it intends to grant the status of authorised CBAM declarant.
- 2. During the consultation procedure, the competent authority shall require confirmation from the consulted parties of the following:
- (a) that they do not have any objections to granting the status of authorised CBAM declarant;
- (b) that the applicant has not submitted an application for authorisation in another Member State;
- (c) that the applicant has not been granted an authorisation in another Member State;
- (d) that the applicant has not had an authorisation revoked in another Member State.

(emphasis added)

18. Another important issue is the unnecessary and costly delays in granting the status of authorised CBAM declarant. According to Article 4(1) of the draft implementing regulation, "[t]he competent authority shall assess the application within 120 calendar days from the date of receipt of the application". If the competent authority requests additional information, this deadline may be extended by up to 30 calendar days. <sup>13</sup> In cases where additional information is requested, the assessment of an application should be completed within **180 days from the date of receipt of the application**. <sup>14</sup> Another concern is that the deadline for processing the application may also be extended for "investigations" into whether the applicant has been involved in serious or repeated

<sup>&</sup>lt;sup>13</sup> Article 5(2) of the draft implementing regulation.

<sup>&</sup>lt;sup>14</sup> Article 5(3) of the draft implementing regulation (emphasis added).

- infringements.<sup>15</sup> The draft implementing regulation does not provide details on the deadlines for such "investigations" or the associated delays in granting the status of authorised CBAM declarant.
- 19. Depending on the results of its "assessment" or, in other words, the basis for determining its intention (to refuse or grant the status), the competent authority will either inform the applicant of the refusal or initiate the consultation procedure. Article 12(1) of the draft implementing regulation requires the competent authority to initiate the consultation procedure "within 45 calendar days from the moment where it received an application in relation to which it intends to grant the status of authorised CBAM declarant". Importantly, within these 45 days, the competent authority must be able to make a sufficient legal assessment of the application in order to formulate its intentions. Even if this deadline is extended by up to 30 calendar days in cases where additional information is requested, the total period will still be 75 days instead of 180 days! The Ministry stresses that delays in obtaining authorizations increase the costs of conducting business and international trade.
- 20. The Ministry would also like to comment on Article 6 of the draft implementing regulation, titled "Intended negative decision and appeal", and to stress the importance of effective remedies. Article 6 does not include a provision requiring the competent authority to issue a final decision to the applicant, to register that decision and to explain, within it, the right of all concerned parties to appeal the decision in court. It is unclear from the text of Article 6 whether the "observation" submitted by the applicant will be treated by the competent authority as merely an "observation" (the right to be heard) or as a formal appeal. The current wording of Article 6 creates legal uncertainty and does not require informing applicants and other affected parties of their right to appeal an administrative decision in the European court system.
- 21. Therefore, it appears that the text of Article 6 does not comply with Article X:3 of the GATT 1994, Article 17(3) of Regulation (EU) 2023/956 (see Table 4 below) and Article 47 of the Charter of Fundamental Rights of the European Union. Article 47 guarantees everyone the fundamental right to an effective remedy and to a fair trial. This Article states, in particular:

<sup>&</sup>lt;sup>15</sup> Recital 8 of the preamble of the draft implementing regulation.

<sup>&</sup>lt;sup>16</sup> Emphasis added.

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

**Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal** previously established by law. Everyone shall have the possibility of being advised, defended and represented.<sup>17</sup>

Table 4. Comparison of Article 17(3) of Regulation (EU) 2023/956 and Article 6 of the draft implementing regulation.

## Article 17(3) of Regulation (EU) Article 6 of the draft implementing regulation 2023/956 3. Where the competent authority finds Intended negative decision and appeal that the criteria set out in paragraph 2 of 1. When the competent authority intends to refuse granting the this Article are not fulfilled, or where the status of authorised CBAM declarant, the competent authority applicant has failed to provide information shall inform the applicant thereof and shall provide the applicant listed in Article 5(5), the granting of the with the possibility to submit **observations**. status of authorised CBAM declarant shall 2. The competent authority shall state the following in the be refused. Such decision to refuse the **communication** to the applicant: status of authorised CBAM declarant shall provide the reasons for the refusal (a) the intention of and the reasons for refusing to grant the status and include information on of authorised CBAM declarant; **possibility to appeal**. (emphasis added) (b) the period within which the applicant can submit its observations. 3. The period referred to in point (b) of the second paragraph shall run from the date on which the competent authority notified the applicant of the **communication** and shall not exceed 30 calendar days. 4. After the expiry of the period referred to in point (b) of the second paragraph the competent authority, taking into account any observations submitted by the applicant, may proceed with its final decision making. 5. Where the competent authority refuses to grant the status of

authorised CBAM declarant, and the applicant has exercised

<sup>&</sup>lt;sup>17</sup> Charter of Fundamental Rights of the European Union (emphasis added), online: <u>EUR-Lex - 12012P/TXT - EN - EUR-Lex</u>.

the right of appeal, the competent authority shall register the existence of the appeal and its result in the CBAM registry.
(emphasis added)

- 22. *In conclusion*, the Ministry would like to reiterate that the European Union, as a WTO Member, shall comply with its WTO obligations. The Ministry urges the European Commission to ensure that its regulations and practices are in accordance with WTO Agreements, including Articles XI:1 of the GATT 1994 and Articles 1 and 3 of the Agreement on Import Licensing Procedures.
- 23. The Ministry stresses that measures aimed at protecting the environment and combating climate change shall not be used as a pretext to conduct protectionist trade policy and requests the European Commission to carefully consider these comments and take them into account.

\*\*\*