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CRIMINAL LIABILITY FOR SMUGGLING IN UKRAINE: SOME ISSUES OF THEORY AND PRACTICE

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Abstract. The article highlights certain problematic aspects related to the legal assessment of certain features of crimes provided for in Articles 201, 201-1, 305 of the Criminal Code of Ukraine. Attention has been drawn to the high level of scientific study of this issue. The content of the social danger of smuggling has been analyzed; the negative impact of the researched crimes on the relations of the market economy in Ukraine has been shown. The features of the object and the subject of the respective encroachments have also been clarified, and the special legal status of certain objects moving across the customs border of Ukraine has been emphasized. Attention has been also focused on the importance of taking into account the blanket method of describing dispositions of "contraband" prohibitions. It has been emphasized on the importance of taking into account the provisions of the Customs Code of Ukraine, as well as by-laws, which detail the procedure for moving certain items across the customs border of Ukraine, when qualifying the crimes investigated in the article. Finally, the controversy in criminal law science and the inconsistency of judicial practice in determining the moment of the end of smuggling have been demonstrated.

Key words: contraband, object, crime, customs border, public danger, criminal liability, Criminal Code.

Introduction. Problematic issues related to smuggling as a criminal law phenomenon, its essence and subject, have remained relevant for a long time. Nowadays, with the development of market economy relations, it is hard to overestimate the importance of combating smuggling, which directly affects the economic security of the state. This is why the creation of appropriate measures, mechanisms and control tools to avoid illegal supplies of goods, valuables and objects should be one of the prerogatives of state policy in terms of ensuring economic stability, economic activity and crime prevention.

In the theory of criminal law, we have not yet received an unambiguous and final solutions: 1) to the issues related to statutory elements of illegal movement of objects across the customs border of Ukraine in the system of criminal norms; 2) to understanding which outwardly similar actions should constitute an administrative or criminal misdemeanor, and which should constitute crimes; 3) correlation of crimes, which contain elements of illegal movement of objects across the customs border of Ukraine, methods of committing such acts. These and related issues are still being discussed in academic circles. The situation is even more complicated by the inconsistency, sometimes-outright contradiction, of judicial practice in terms of qualification of Articles 201, 201-1, 305 of the Criminal Code.

The goal of the study. The article explores some problematic issues related to the legal assessment of elements of crimes provided for in Articles 201, 201-1, 305 of the Criminal Code of Ukraine.

Analysis of recent research and publications. A significant number of academic works has been written on the subject of criminal liability for smuggling, especially since the 2000s, when the current Criminal Code of Ukraine (hereinafter – the Criminal Code) was adopted and the attention of domestic criminologists to the issues of liability for economic crimes increased significantly. Legal issues of smuggling as a crime (it refers primarily to acts provided for in Articles 201 and 305 of the Criminal Code)

has been discussed in the studies of many scientists, including: P. Andrushko, L. Bagriy-Shakhmatov, O. Bantyshev, O. Horoh, N. Gutorova, O. Dudorov, D. Kamensky, V. Kyrychko, O. Kravchenko, Yu. Kurylyuk, P. Matyshevskyi, R. Movchan, P. Mykhaylenko, A. Muzyka, V. Navrotsky, O. Omelchuk, O. Protsyuk, A. Savchenko, V. Silenko, S. Soroka, E. Streltsov, M. Havronyuk, V. Shakun and some others.

It is also worth briefly recalling the main dissertation studies which have addressed issues of criminal liability for smuggling. In his the dissertation "Smuggling under the criminal law of Ukraine" (2002), the first modern dissertation-level work after the adoption of the Criminal Code of Ukraine in 2001, O. Omelchuk offered a thorough analysis of theoretical and law enforcement issues related to the first edition of Art. 201 of the Criminal Code – that study retains a high degree of relevance even today. Among the main provisions of this scientific work, the following should be mentioned: 1) provisions on the social conditioning of criminal liability for smuggling; 2) proposal to recognize social relations regarding the provision of economic activity in Ukraine as the generic object of smuggling protected by the criminal law; 3) proposal to clarify the methods of illegal movement of contraband items across the customs border of Ukraine with concealment from customs control (Omelchuk, 2002: 9).

Next, O. Protsyuk's dissertation "Criminal liability for smuggling" (2006), while also having a universal title, became an independent monographic study in the development of those provisions, which were first considered by O. Omelchuk. O. Protsyuk has focused, in particular, on the following aspects: 1) the latest interpretation of the term "goods" used in Art. 201 of the Criminal Code (that is, in the current version of the article), which covers criminal law, economic and customs characteristics of the subject of the specified composition of the Code of Criminal Procedure; 2) it was also argued that guilt in smuggling can be expressed only in the form of direct intent, and the motive and purpose, as a rule, are selfish and do not affect the qualification of smuggling; 3) provisions regarding such contraband items as gas, oil and oil products, electricity were specified and clarified; 4) comparative legal analysis of domestic legislation with European and world legislation was also carried out regarding the assessment of the relationship and the need for unification of the norm establishing criminal liability for smuggling; 5) finally, it was proposed to clearly distinguish smuggling from related crimes by comparing the objects of crimes, the objects being moved and the nature of the actions committed by the criminal (Protsiuk, 2006).

Finally, among dissertation studies that are complex in terms of object and subject, devoted to the criminal-legal evaluation of smuggling, the work of O. Kravchenko "Criminal law characteristics of smuggling (Article 201 of the Criminal Code of Ukraine)" (2010), has successfully combined theoretical provisions with examples of their practical application. The author emphasizes the following theoretical and practical aspects of liability for smuggling: 1) definition of the generic object of smuggling is formulated as social relations protected by criminal law, which are formed in the field of foreign economic activity and are aimed at protecting economic interests of the state and legal interests of subjects foreign economic activity; 2) the main immediate object of the crime provided for in Art. 201 of the Criminal Code, as social relations protected by criminal law in the sphere of state regulation of the procedure for the movement of goods and other objects across the customs border, established for the implementation of the customs policy of Ukraine, procedures for customs control, customs clearance, tax and fee collection; 3) justified necessity of introducing changes and additions to Part 1 of Art. 201 of the Criminal Code regarding the legislative expansion of a range of contraband items (Kravchenko, 2010: 12, 161).

While recognizing the significant contribution of the mentioned and some other researchers to the development of the current criminal legislation on combating smuggling, at the same time there are many unresolved issues in terms of the correct assessment of the violation of customs rules, especially against the background of constant changes in customs-related regulatory framework in our country.

Main part. The main part of this paper covers several theoretical and law-enforcement issues related to the definition of objective signs of "smuggling" crimes, provided for in Art. Art. 201, 201-1, 305 of the Criminal Code.

I will start with the element of public danger of smuggling, the establishment of which helps to determine the content of the object of this crime. Smuggling remains one of the biggest threats to Ukraine's national security in the economic sphere. In particular, in one of his speeches at a meeting of the National Security and Defense Council of Ukraine, the President of Ukraine Volodymyr Zelensky announced that the state budget loses UAH 300 billion annually as a result of smuggling schemes (Zelenskyi, 2021). Somewhat more "modest" indicators are mentioned in the expert environment: for example, as a result of the implementation of smuggling schemes during 2018–2020, Ukraine has lost from UAH 63 to 96 billion annually (Dubrovskyi, Cherkashyn & Hetman, 2020). It is not difficult to predict that the negative dynamics are still observed today, although in view of the military aggression against Ukraine, which began on February 24, 2022, the prevalence of this phenomenon has somewhat decreased, primarily due to the military capture of or blocking activities of Ukrainian seaports.

Based on his own scientific research in the field of economics, A. Tymoshenko rightly draws attention to the fact that in modern conditions of the development of economic relations, the need to ensure customs security as a component of the economic security of the state is growing, thus directly affecting the economic security of enterprises, which participate in customs operations. Therefore, the primary task for our state is the fight against smuggling, which is taking on increasingly sophisticated and organized forms. This, in turn, endangers national security and further economic development of the country (Tymoshenko, 2021: 14).

From a purely economic point of view, offenses and crimes of economic orientation are always more profitable, when compared to legal business. A significant factor in deterring an offender may be the risk of being prosecuted. At the same time, in Ukrainian realities, given the mass of economic delinquency, the latency of relevant acts, corruption in the ranks of regulatory and law enforcement agencies, and the imperfection of legislation, such risk is actually insignificant. As a result, none of the countries in the world, whatever the development of its economy, can boast of victory over smuggling activities (Orlovska, 2018: 78.).

Taking into account the content of the current versions of Articles 201, 201-1 and 305 of the Criminal Code, it can be stated that the main direct objects of the provisions provided for by them are, respectively: 1) procedure established by law for the movement of certain restricted or prohibited items across the customs border of Ukraine, which ensures the implementation of customs control and customs clearance; 2) similar procedure for moving timber or sawn timber of valuable and rare tree species, as well as unprocessed timber; 3) procedure for the movement of narcotic drugs, psychotropic substances, their analogues and precursors across the customs border of Ukraine established for the purpose of ensuring public health protection.

As one may see, the element of public danger and the actual characteristics of the objects of these three encroachments essentially "revolve" around a common mechanism of committing illegal acts, namely: movement of specially defined prohibited items across the customs border of Ukraine.

Next, regarding the elements of crimes, which refer to the illegal movement of items across the customs border of Ukraine. First, it makes sense to study the text of the official law.

1. The object of the crime provided for in Art. 201 of the Criminal Code includes: items of cultural value; poisonous substances; potent substances; explosive substances; radioactive materials; weapons or ammunition (except for smooth-bore hunting weapons or ammunition for them); parts of firearms; special technical means of secretly obtaining information.

2. The object of the crime provided for in Art. 201-1 of the Criminal Code includes: lumber or lumber of valuable and rare tree species; unprocessed lumber; other timber, prohibited for export outside the customs territory of Ukraine.

3. Finally, the object of the crime provided for in Art. 305 of the Criminal Code includes: narcotic drugs; psychotropic substances; their analogues; precursors; falsified medicinal products.

Despite the rather voluminous list of items in these prohibitions, in practice only some of them are mentioned in materials of criminal cases; as for other material objects, the facts of their illegal movement across the customs border are almost never recorded by law enforcement agencies.

Free circulation of the above-mentioned groups of objects can be significantly limited by legislation – their movement across the customs border requires, as a general rule, a special permit. The specificity of the subject of the crime in such situations necessitates the qualification of the committed crimes as a group. Except for Art. 201 and Art. 305, the following statutes can be incriminated: Articles 263, 265, 267, 307, 309, 321 of the Criminal Code (Naukovo-praktychnyi komentar, 2018: 637).

An example of determining elements of a potent substance that has become the subject of illegal movement across the state border of Ukraine can be found in the text of the following court verdict.

According to the verdict of the Hlybotsky District Court of the Chernivtsi region, PERSON_1 was found guilty of committing the crime provided for in Art. 201 of the Criminal Code. The court established that the accused, while being in Radauci, Romania, has purchased medicine "Romparkin 2 mg comprimate" in local pharmacies, in the amount of 10 packages (50 tablets per package) containing the active substance Trihexyphenidyl, which according to the order Ministry of Health of Ukraine dated August 17, 2007 No. 490 is included in the "List of poisonous medicinal products by international non-proprietary or common names".

In fulfillment of her criminal intent, aimed at the illegal movement of poisonous substances (namely, the medicinal product "Romparkin 2 mg comprimate" containing the active substance trihexyphenidyl) across the customs border of Ukraine, from Romania to Ukraine, with concealment from customs control, PERSON_1 hid and kept the specified medicine in one of his two bags. Subsequently, during customs control at the customs post "Vadul Siret" of the Chernivtsi customs office of the SFS of Ukraine, during the inspection of hand luggage and personal inspection of PERSON_1, the above-mentioned medicinal products, which she did not present to customs control, were discovered and seized. She recognized the 10 packages of the drug "Romparkin 2 mg comprimate" containing the active substance trihexyphenidyl as hers and reported that she moved them across the state border of Ukraine to treat her sick parents.

The court has reached the conclusion that PERSON_1 committed a criminal offense provided for in Part 1 of Art. 201 of the Criminal Code (Vyrok Hlybotskoho raionnoho sudu: 2018).

An important point: in case the object of illegal movement would not be poisonous, but falsified medicinal products, the qualification should be carried out according to Art. 305 of the Criminal Code, instead of Art. 201.

A careful study of the elements of smuggling reveals that in order to clarify the essence of these concepts, it is necessary to refer to the norms of other, non-criminal, legislation. It is obvious that in order to clarify the meaning of the words used in the disposition of Part 1 of Art. 201 of the Criminal Code, the terms "movement", "customs border", "customs control", "place of customs control", "time of customs control" etc. one should refer to various regulations, for example the Customs Code of Ukraine.

O. Kravchenko rightly observes that there are not many articles in the current Criminal Code, the content of which would be as "blanket" as the articles on smuggling. In fact, the content of all elements of its objective side is revealed with the help of other normative acts, primarily normative acts in the field of customs law. That is why it is fair to say that for the correct application of the norms on smuggling crimes in practice, the issue of harmonization of various branches of law (primarily criminal, administrative, customs) becomes extremely important (Kravchenko, 2010: 72).

As is known, the question of the sectoral appropriateness of normative acts related to the "blanket" dispositions of the Criminal Code is resolved in the literature ambiguously. Some scientists recognize such acts as a source of criminal law, because they, together with the provisions of the Criminal Code, determine criminality of acts. At the same time, other scientists deny the thesis about the "criminal legal affiliation" of normative acts, to which the blanket provisions of the Code of Criminal Procedure are referred, considering that all, without exception, features of the composition of crimes are concentrated in the Criminal Code, and not scattered throughout other normative acts (Kamensky, 2021: 22). Thus, academic discussion in this direction continues.

There are numerous erroneous and even conflicting situations in connection with the issue of blanket dispositions of "contraband" prohibitions in practice. Here is an example. Art. 201-1 of the Criminal Code recognizes movement across the customs border of Ukraine in an appropriate manner of timber and lumber of valuable and rare species of trees, as well as unprocessed timber, as a crime despite the fact that regulatory legislation, in particular the above-mentioned Law of Ukraine, in order to ensure the implementation of the provisions of which the Criminal Code was supplemented by Art. 201-1, prohibits only the export of the specified items outside the customs territory of Ukraine. However, according to the logic of things, it would be wrong (taking into account the fact that the Criminal Code cannot recognize as criminal types of behavior that are permitted by regulatory legislation) to claim that the importation into the customs territory of Ukraine outside of customs control or with concealment from customs control of timber and lumber of valuable and rare species of trees, as well as unprocessed timber cannot be qualified under Art. 201-1 of the Criminal Code. After all, such actions, taking into account the method of their execution, are prohibited by the current legislation (Kamensky, 2018: 245).

The "blanketness" feature of the dispositions of the investigated prohibitions can be found, for example, in the Instruction on the procedure for the registration of the right to export, temporary export of cultural values and control over their movement across the state border of Ukraine, approved by the Order of the Ministry of Culture and Arts of Ukraine No. 258 of April 22, 2022. There, in particular, the terms of cultural values, declaration, as well as the list of cultural values prohibited for export outside the customs territory of Ukraine, are defined. These concepts are important for the purposes of prosecution under Art. 201 of the Criminal Code.

Currently, there is no unity in science and law enforcement practice regarding the solution to the issue of the conclusion of smuggling as a crime, when it is committed by hiding items from customs control. The actions of persons who tried to illegally export and hide items from customs control across the customs border of Ukraine, but were detained by customs officials before crossing the customs border of Ukraine, are considered by the vast majority of courts as attempted smuggling. At the same time, the courts proceed from the fact that individuals did not carry out their intention to the very end for reasons beyond their control.

Traditionally smuggling is recognized as a completed offense from the moment of the actual crossing of the customs border. At the same time, it does not matter whether the person who moved the object of the crime in the appropriate manner has crossed the customs border of Ukraine. Determining the moment of end of smuggling should be approached differently and should take into account whether the objects of crime are being imported or exported. Actions related to an attempt to remove items from the customs territory and which were not completed due to reasons beyond the control of the culprit (for example, contraband items were discovered during an inspection of things or a personal inspection before the actual movement of them across the customs border) should be regarded as an unfinished attempt to commit a crime.

Conversely, if the objects are imported into the customs territory of Ukraine, the fact of completed smuggling is established during customs control, which is carried out already after the objects of the crime have crossed the customs border, which allows to establish the concluding moment of the crime, and therefore excludes the possibility of voluntary refusal.

In general, two opposite points of view have expressed on the researched issue in academic literature. Thus, some scholars claim that smuggling is considered a completed crime not only when the perpetrator managed to smuggle certain items across the state border, but also when the attempted smuggling was stopped by customs authorities or border guards during an inspection. Therefore, these authors identify the moment of the end of smuggling with the moment of customs inspection and detection of guilty goods hidden from customs or border control, when elements listed in the provision on liability for smuggling have been established. Criminal liability for smuggling can be discussed only if the actions aimed at the illegal movement of goods across the border were committed within the country, and not outside its borders.

Conversely, another group of researchers adheres to the opposite point of view, arguing that smuggling should be considered a completed offense only when the cargo crosses the state (customs) border outside of customs control or with concealment from customs control, regardless of whether the cargo had been imported into the territory of the state or exported from it (Omelchuk, 2002: 132–137).

From the de lege ferenda standpoint, the following should be noted in particular. While critically responding to the draft law No. 5420 "On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine regarding the criminalization of smuggling of goods and excise goods, as well as false declaration of goods" (hereinafter – draft law No. 5420), registered in the Ukrainian Parliament on April 23, 2021, which was submitted by the President of Ukraine, and was intended to solve the problem of restoring criminal liability for goods smuggling, O. Dudorov and R. Movchan have made the following comment. Proposal to use the phrase "actions in the prohibitions projected in this document aimed at movement across the customs border of Ukraine" (instead of the wording "movement across the customs border of Ukraine" used in Article 201, Article 201-1 of the Criminal Code) is perceived ambiguously. This novel is designed to solve the issue related to the differential determination of the end of smuggling. Instead, inherent in the current wording of Art. 201 of the Criminal Code "tying" of the moment of the end of smuggling to the actual crossing of the border in case of export of objects outside Ukraine leads to the fact that the end of smuggling is usually established only when the objects have already entered the territory of another state, which complicates the fight against smuggling. Transferring the end of smuggling to an earlier stage (compared to the actual crossing of the customs border by the relevant items) is possible only after necessary amendments to Art. 201 of the Criminal Code. Here it is worth considering in particular the fact that in the case when the objects are moved to the customs territory of Ukraine, the fact of completed smuggling is established during the passage of customs control, which is carried out already after the objects of the crime have crossed the customs border, which makes it possible to ascertain the conclusion of the crime discussed (Dudorov, Movchan: 2021).

Examples from the practice of the Criminal Court of Cassation at the Supreme Court (hereinafter referred to as the Cassation Criminal Court) demonstrate the difficulties in qualifying the smuggling of narcotics (Article 305 of the Criminal Code), which are related precisely to the moment of the end of the illegal act. There is every reason to extrapolate these cases to the other two types of smuggling crimes as well. It should immediately be noted that the inconsistency admitted by the cassation level court creates a problem of accurate qualification not only of the act provided for in Art. 305 of the Criminal Code, but also in the process of legal evaluation of the total composition of contraband (Article 201 of the Criminal Code).

In particular, during the cassation review of one criminal case, the Supreme Court of Justice formulated the conclusion that the fact of crossing the customs border of Ukraine with narcotics, in particular by means of postal communication, even before the completion of customs clearance already forms a finished composition of narcotics smuggling (Postanova Kasatsiinoho kryminalnoho sudu Verkhovnoho Sudu: 2020).

The Cassation Criminal Court reached a diametrically opposite conclusion, although in a different panel, in a decision that will also be adopted in 2019. Referring to paragraph 8 of the resolution of the pervious Supreme Court of Ukraine recommendations "On judicial practice in cases of smuggling and violation of customs rules", the Court held that this crime is considered completed from the moment of illegal movement of contraband items across the customs border of Ukraine.

At the same time, the Cassation Criminal Court has noted, according to the factual circumstances of the case established by the lower courts, the subject of the crime – a psychotropic substance – was discovered during the customs inspection of the postal shipment, which had arrived in the name of the accused. Therefore, according to the Cassation Criminal Court, the object of contraband has actually not yet been moved across the customs border. That is why it is necessary to talk here not about a finished crime, but rather about an attempt at smuggling (Postanova Kasatsiinoho kryminalnoho sudu Verkhovnoho Sudu: 2019).

Thus, under essentially identical conditions for the objective side of the act provided for in Art. 305 of the Criminal Code, and at the moment of their termination in the two cited criminal cases, the Cassation Criminal Court resorted to potentially dangerous, for future law enforcement actions, practice of "differentiation" of approaches to the qualification of the committed offense: in one case, elements of the completed smuggling of narcotics were established, and in the other – elements of a completed attempt to commit this crime.

Therefore, it is worth supporting the position of the Cassation Criminal Court, according to which the detection of narcotics imported into Ukraine and at the same time prohibited for import during customs clearance should be qualified as a completed crime under Art. 305 of the Criminal Code, and not as a finished attempt on this crime. Analyses of the positions of the majority of scientists who researched this issue also indicates the correctness of this particular approach based on the conditional formula: "moving prohibited items across the state border (by importing) = finished crime."

Conclusions. The study of issues of criminal liability for smuggling conducted within the scope of this research paper prompts the formulation of several scientifically and practically relevant conclusions.

First, the content of the element of public danger of three "smuggling" crimes is directly related to the elements of the object and subject of such offenses. In particular, the movement of items specified in the law across the customs border of Ukraine is generally prohibited or requires obtaining a special permit (subject to a special declaration).

In general, the objective elements of smuggling are provided by the legislator in the dispositions of all three prohibitions and include: a) specially indicated types of objects; b) an act expressed in the movement of contraband items across the customs border; c) place – customs border; d) methods of movement: 1) outside customs control; or 2) with concealment from customs control.

The analysis of court practice demonstrates that offenders use any, even specific, methods of moving objects across the customs border – outside of customs control or with concealment from customs control.

Secondly, the importance of taking into account the "regulatory referral" (or "blanket") method of describing dispositions of "contraband" offenses has been stressed out. Primarily this applies to the provisions of the Customs Code of Ukraine, as well as secondary regulations, which detail the procedure for moving certain items across the customs border of Ukraine. It was determined that the guarantee of correct qualification under Art. Art. 201, 201-1, 305 of the Criminal Code is the correct definition of the provisions of the regulatory legislation specifying the objective elements of smuggling crimes.

Thirdly, regarding the moment of the conclusions of smuggling: the controversy in criminal law science and the inconsistency of judicial practice in this part have been revealed. Position of the Supreme Court of Justice, according to which the detection of narcotic drugs imported into Ukraine

and prohibited for import at the same time during customs clearance, should be qualified as a completed crime under Art. 305 of the Criminal Code, and not as a finished attempt on this crime, has been supported.

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