

CRIMINAL LIABILITY FOR SMUGGLING OF GOODS: UKRAINIAN PROSPECTS AND FOREIGN EXPERIENCE

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Abstract. *The purpose* of this article is to determine the prospects and economic consequences of the introduction of criminal liability for violation of customs regulations and to study foreign experience in this matter. The closer Ukrainian legislation is to the legislation of neighboring countries in the customs sphere, the more effective the fight against cross-border crime will be. The aim of this research is to compare the attitude to smuggling of goods in different countries and to reveal the future effect of criminal liability for smuggling of goods. *Research methodology.* In this paper a theoretical research method was used. We were studying published academic journals, legislation and databases. Correlation analysis method was used to determine the strength of the relationship between the smuggling liability and budget revenues. Also we used the results of the questionnaire between the professional exporters and importers. The *result* of this study is the conclusion that granting smuggling the status of a criminal offense will give more opportunities for Ukrainian law enforcement agencies to more thoroughly investigate this type of crime, will give more opportunities for international cooperation and cooperation in combating cross-border crimes. *Practical implications* of launching the criminal liability for smuggling of goods will give our country the chance to widen the borders of smuggling investigation, to fulfill the state budget with increasing customs revenues and to prevent dishonest enterprisers from smuggling of goods instead of goods' pure declaring. *Value/originality.* After the beginning of Russian aggression against Ukraine, the State Budget of Ukraine stopped receiving customs revenues because of international trade blocking. Still Ukraine as a state must think of renovation of its economy and trade, that's why customs regulations and violation of customs rules are still very important for fiscal policy of the country. Researching of criminal liability for violation of customs rules is not the new theme, but making comparison to European legislation and the US experience contributes to the developing of Ukraine national research school of customs affairs with the relevant data, examples of customs regulations and prospects for the national economy.

Key words: smuggling, criminal liability, criminalization, goods, foreign experience, violation of customs rules, sanctioning systems.

JEL Classification: G28, H26, H71, H83, K14, K34

1. Introduction

Today, there are many discussions in political and scientific circles on the need to criminalize commodity smuggling in Ukraine. Proponents of such criminalization cite examples of advanced world economies. Opponents cite as an example the experience that Ukraine already had before 2012, when in the previous Customs Code of Ukraine, smuggling of goods was already the subject of criminal liability and was abolished due to the humanization of criminal liability. Today, the issue of combating commodity "smuggling" is identified by the President of Ukraine as a priority.

This is evidenced by the sanctions imposed by the National Security and Defense Council against the "top" smugglers of the country, and the bill introduced by the President of Ukraine for consideration by the Verkhovna Rada of Ukraine. However, in addition to the political aspect of this issue, it is important to consider the economic effect that is expected to be obtained after the introduction of criminal liability for smuggling goods. The study of foreign experience, in particular, the experience of the European Union, which Ukraine seeks to join, should answer the question: does Ukraine choose the

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right path in the fight against violations of customs rules?

The literature review shows that many authors and scientists have studied the question of smuggling in different countries. Previous research showed that the problem of smuggling can not be the inner problem of the country, but this is the question of an international liability. A number of questions regarding the procedure of goods' smuggling investigation in criminal cases in Ukraine remain to be addressed. Although studies have been conducted by many authors, this problem is still insufficiently explored. As far as we know, no previous research has investigated studying the issue of today's bill on the criminalization of commodity smuggling in Ukraine. In order to rectify the problem of the shadow economy, the government is trying to introduce tougher methods to combat economic offenses. We will review the main approaches to solve this problem. The contributions made here have wide applicability for the future public administration in the sphere of customs affairs.

A challenging problem which arises in this domain is to establish a fair and effective measure of liability for violations of customs regulations, which will reduce the number of such violations.

2. Prospects for criminalization of smuggling of goods in Ukraine

Since 2012, movement of goods across the Ukrainian customs border without fulfilling customs declaration or giving wrongful data about the quality or quantity of goods is not smuggling and is not considered a crime. The current version of Article 201 of the Criminal Code of Ukraine provides for criminal liability only for movement with violation of current legislation of cultural property, poisonous, weapons, ammunition. Illegal movement of other goods specified in this article, except for narcotic substances (Article 305 of the Criminal Code of Ukraine), and exports of timber or lumber from Ukraine (Article 201-1 of the Criminal Code of Ukraine), today is not smuggling. In accordance with Article 2 of the Code of Ukraine on Administrative Offenses, issues of administrative liability for violation of customs rules are regulated by the Customs Code of Ukraine (Official website of the Verkhovna Rada of Ukraine, 2021).

Section XVIII "Violation of customs rules and liability for them" of the Customs Code of Ukraine

provides that "for non-declaration of goods, commercial vehicles" (Article 472), "movement or actions aimed at moving goods, commercial vehicles across the customs border of Ukraine out of customs control" (Article 482), "movement or actions aimed at moving goods across the customs border of Ukraine with concealment from customs control" (Article 483), there is "liability in the form of a fine of 100 percent of the value of goods (vehicles) with their confiscation" (Customs Code of Ukraine, 2012).

However, this does not provide a proper preventive function and does not eliminate the desire of individuals to engage in further illegal activities and, ultimately, negatively affects the filling of the budget and thus narrows the state's ability to adequately fund the needs of both the state and the individual. Thus, based on the results of organizational and practical measures aimed at detecting and preventing the facts of illegal movement of goods across Ukrainian border, in 2019 on the basis of these offenses by customs officials against officials of enterprises made 1,105 protocols, 6 billion hryvnia. During 2020 – 1234 protocols on violations of customs rules in the amount of 1.96 billion hryvnias. At the same time, in 2019, 984 cases of this category worth 348.22 million hryvnias were sent to the courts, based on the results of which the courts decided to impose a fine in 788 cases (80%) amounting to 40.46 million hryvnias (11.6%). and confiscation was applied in 765 cases (77.7%) in the amount of UAH 39.56 million (11.4%). Based on the results of consideration of 126 cases (12.8%) in the amount of UAH 142.96 million (41%), the courts decided to close the cases, mostly on the grounds of lack of corpus delicti, including failure to prove certain elements of the corpus delicti (Official website of the Verkhovna Rada of Ukraine, 2021).

Thus, in the framework of administrative proceedings in accordance with Ukrainian customs legislation, given that the courts close cases with a significant value of the offenses, customs authorities do not have sufficient powers and are unable to take all necessary measures to document and proving the circumstances of the offense, which further makes it impossible to bring the perpetrators to justice. As noted in the explanation to the bill on criminalization of smuggling in Ukraine, the lack of criminal liability for illegal goods' crossing Ukrainian customs border

(including excisable) out of customs control, as well as for false declaration of goods contributes to sector of the shadow economy, promotes among entrepreneurs the use of illegal means and methods in doing business. In addition, criminal proceeding means much longer terms of pre-trial investigation than the terms of administrative proceedings, which will ensure the quality of evidence collection.

At the same time, this article proposes to release a person who has committed acts that led to the illegal reduction or exemption from payment of customs duties in significant, large and especially large amounts from criminal liability, if such person has paid double the amount of unpaid customs payment.

To summarize given above, as well as the fact that the application of administrative sanctions under the Customs Code of Ukraine does not deter persons from further illegal behavior, it is proposed to establish criminal liability for smuggling goods, excisable goods (except electricity) and for false declaration of goods.

The need to introduce criminal liability in Ukraine for smuggling of goods and excisable goods, as well as for tax evasion is constantly emphasized by representatives of the European Union Advisory Mission to Ukraine (EUAM), EUBAM Mission and other international institutions.

According to the results of the fifth wave of the annual survey of Ukrainian exporters and importers:

- more than 50% of respondents support the criminalization of smuggling of commercial goods, but without imprisonment;
- 26% believe that criminal liability with imprisonment should be introduced for smuggling;
- only 15% do not support the criminalization of smuggling.

To the question: in which cases should smuggling be criminalized?

- more than half of the respondents (who support the criminalization of smuggling) answered that criminal liability should be introduced for the import of all goods with violations;
- every eighth respondent believes that smuggling should be criminalized in large volumes and as much – in large volumes + excisable goods.

The study was conducted by the Institute for Economic Research and Policy Consulting in the framework of the project Support to the Public

Initiative for Fair and Transparent Customs with the financial support of the European Union, the Renaissance Foundation and Atlas Network (Research of the Institute for Economic Research and Policy Consulting, 2020).

3. European experience in criminalizing smuggling

The European Union's customs legislation is harmonised, but the enforcement, including supervision, control, investigation, prosecution and application of customs sanctions remains in the hands of Member States. As interpretation of the customs rules varies between Member States and the practical application differs based upon historically developed national principles, habits and local guidelines, customs remains significantly fragmented along national borders, which may create additional costs for economic operators and consumers. Sanctions for customs infringements currently remain entirely a non-harmonised national matter. These sanctioning systems are based upon national legislation, national policies and legal culture with respect to controls, prosecution and sanctions. Most Member States have a legal system that provides for both criminal and non-criminal proceedings and sanctions. The other Member States have a legal system that only provides for criminal sanctions and proceedings for customs infringements. Furthermore, there is a large diversity in the types of sanctions that are applied by the individual Member States (Analysis and effects of the different Member States' customs sanctioning systems, 2016).

In cases where the likelihood that the violation of the economic operator will be discovered is 100% or close to 100%, the obligation to pay legal interest on the unpaid duties in addition to the unpaid import duties may already be a sufficient deterrent for motivating economic operators to comply with customs law. However, such a 100% detection likelihood is not generally the case in the European Union. Member States have therefore implemented various instruments to enforce economic operators' compliance with customs law. These instruments for enforcing compliance with customs regulations are required under the current customs control system for safeguarding the financial interests of both the EU and the Member States and the market surveillance function of the customs authorities (Analysis and

effects of the different Member States' customs sanctioning systems, 2016).

EU Customs Code Regulation (EU) No 952/2013 stipulates that every State – the member of Union must provide sanctions for customs' legislation violation. These sanctions must be effective. Where administrative penalties are applied, they may take, inter alia, one or both of the following forms:

- (a) a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty;
- (b) the revocation, suspension or amendment of any authorisation held by the person concerned (Union Customs Code, 2013).

In its 2016 analysis of the sanctioning systems of different Member States for customs offenses, the European Parliament revealed that EU States were encouraged distinguishing between criminal and administrative liability for customs offenses. It is recommended to leave criminal liability only for the sphere of illegal trade (goods, the circulation of which is prohibited), introducing only administrative liability for other offenses.

European experience in criminalizing smuggling shows that in a number of developed countries with stable strong economies, the emphasis is on the use of economic incentives to combat smuggling, given the high level of law-abiding businesses and citizens. At the same time, among the levers of influence there is criminal liability for smuggling goods, including excisable, in particular in some European Union countries (Italy, Republic of Lithuania, Republic of Poland, Romania, Slovak Republic, Kingdom of Sweden, Federal Republic of Germany, Hungary, etc.) severe criminal liability for smuggling.

4. US criminalization experience

US initiated trend towards criminalization that is influencing other countries. Effect has been to cause US Customs to refer more cases to the US Department of Justice for criminal investigation and prosecution.

Criminalization of import violation expands ability to conduct broad investigations, such as:

- more targets (foreign-based producers and traders; consignees);
- more theories of culpability and liability (including broad conspiracy statutes; obstruction of justice);
- significant prison terms and/or fines.

Failure to comply results in penalty proceeding under 19 U.S.C. §1592 – Elements of 1592 Claim:

- by fraud (i.e., voluntarily and intentionally), gross negligence (i.e., with actual knowledge or wanton disregard), or negligence (i.e., fails to exercise reasonable care);
- enters or introduces (or attempts to enter or introduce) any merchandise into the commerce of the US;
- by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or any omission;
- which is material.

Corporations can criminally liable based on respondent superior:

- certain criminal conduct by employee acting within scope of employment;
- pressure on corporation to monitor activities of employee;
- complicates investigation because of potential tension between corporation and employee (Brown, 2011).

Upon receipt of penalty notices, importers are generally given sixty days to file a written petition responding to the allegations and presenting additional information that may be considered mitigating factors. In most cases, upon request, CBP will agree to grant extensions of time in which to submit the petitions. Customs law cases are not frequently taken up by the Supreme Court. If the Supreme Court chooses not to hear the case, the import community will have to adopt a "wait-and-see" approach as to whether CBP will begin targeting individuals for their companies' customs violations. As the old cliché goes, the best offense is a good defense. Prudent importers should solidify their compliance programs, train their employees, establish robust auditing mechanisms, and erect swift escalation measures so that the appropriate corrective actions can be taken when and if issues arise (Miller Proctor, 2015).

5. Practical aspects of criminal proceedings in EU cases of smuggling

In the vast majority of EU countries, customs are endowed with law enforcement tools. Customs has primary responsibility for controlling international trade in and taking measures to protect the EU from unfair and illegal trade. Customs is vested with broad powers – it can

conduct any customs checks it deems necessary – in particular, based on a risk analysis. It is not surprising that the Customs Code, which establishes general procedures and procedures for goods entering or leaving the EU customs rules, approves the institution of customs, the main task of which is duties or simply control of goods at the border, but endows customs with all kinds of tools to control the safety of goods and assigns it the role the so-called "cargo police". In different EU countries, the limit on the value of goods, from which criminal liability arises, differs significantly. For example, in Slovakia this figure does not reach 300 euros, while in Portugal the amount is over 50 thousand. In general, border controls prevent less than half of all illegal traffic. One of the reasons is that in most cases the "payback" of smuggling is quite high: it is no secret that, for example, tobacco products in Lithuania are 3-4 times more expensive than in Ukraine, and in Great Britain – 10 times.

Administrative responsibility focuses on a quick process against the offender, but not on the identification of the entire group, including the organizers. The criminal process, in contrast to the administrative one, makes it possible to conduct work and development in relation to the organizers. It takes much more time, but a well-planned operation, a comprehensive investigation makes it possible to detain not a single consignment of contraband, but the entire group, including the organizers. If the service does not have such tools, deep development is virtually impossible. It should be borne in mind that the criminal process, in comparison with the administrative one, is much more complicated both in time and in the assessment of evidence.

Effective criminal investigation depends on the well-functioning and cooperation of all services, including the prosecutor's office and the courts. Work experience and sufficient funding also play a very important role – the service receives the proper competencies not after months of practice and only with qualified personnel and technical support. Customs services of the absolute majority of EU countries are endowed with law enforcement tools, that is, they can conduct full-fledged investigations in the field of customs offenses. Even those countries that do not have problematic external borders or ports see the institution of customs as a full-fledged player in the

field of law enforcement. Customs services have relevant competencies not only at the national but also at the interstate level. This is very important in our case, when the specificity is the movement of goods between countries. Although the EU Customs Code does not give customs services the right to conduct operational and criminal procedural actions, and law enforcement is mainly regulated by national legal acts, international agreements and conventions set out in some detail the rules for conducting law enforcement in the field of international cooperation.

The most commonly used tool for the exchange of urgent information between customs services is the Naples Convention. It allows the exchange and provision of information without prior agreement, surveillance (surveillance), controlled deliveries between EU countries, provides for special actions. In particular, it is possible to carry out pursuit, surveillance, surveillance in another state (of course, with a restriction on the distance from the border), and this information will be considered obtained by legal means. It should be noted that the legal systems of the EU countries are only partially unified, and this can complicate the planning of international operations. When planning them, you should always take into account that the rules of other countries differ in the qualification of offenses, authorization of various kinds of law enforcement methods, in the use of the information received, etc. However, the use of international law enforcement institutions (Europol, Olaf, Eurojust and a new institution, which began to work only this year, the European Prosecutor's Office) saves time and allows you to foresee possible legal nuances before the operation begins. The European Prosecutor's Office is empowered with the tools to conduct independent investigations with representatives of law enforcement agencies of the EU countries in relation to international corruption, fraud and crimes that cause great damage to the EU budget.

Thus, customs in the EU countries are generally incorporated into the law enforcement system and are endowed with appropriate legal instruments. For the effective fight against offenses between countries, it is important both the possibility of information exchange, and a similar qualification of offenses in the EU countries (Sarapinas, 2020).

6. Conclusions

Research on liability for smuggling has a long tradition. Though beforehand smuggling used to be a crime inside one state, today this problem is of international level. Most of the research in this field is aimed at solving this problem. Recent theoretical developments have revealed that smuggling is complex phenomenon, that needs to use all instruments inside and outside the country to determine all officials and companies, included in this process. This seems to be a common problem in definition the level of responsibility for violation of customs regulations. The scope of this study can be both a theoretical study of this problem and the practical application of the results in further management decisions.

Implementation of the draft law for criminalization of smuggling in Ukraine will create conditions for increasing revenues to the State Budget of Ukraine from the application of fines for smuggling goods, excisable goods. The introduction of criminal liability for smuggling goods and excisable goods, as well as for inaccurate declaration of goods will reduce the number of violations of the customs rules, will help stop illegal movement of goods, which will increase revenues to the State Budget of Ukraine. Nevertheless, Ukrainian authorities should count on the fact, that law enforcement system of Ukraine may not be able to provide investigation in this field of criminal law.

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