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# Smuggling or violation of customs rules: actual questions of application of administrative and criminal liability

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## Abstract

The article deals with the peculiarities of the application of legal liability for commercial contraband in accordance with the current legislation of Ukraine. In particular, the authors of the article investigate the feasibility of criminalization of the smuggling of a wide range of goods, and not only withdrawn from the circulation of things and forests, as recorded in the Criminal Code of Ukraine at this moment. In addition to a thorough analysis of the current legislation of Ukraine, the authors carried out a comparative analysis of Ukrainian legislation with the legislation of foreign countries, which helped to objectively assess the state of the studied issues in Ukraine. The methodology of the study includes general scientific methods, among which the methods of analysis and synthesis should be noted, as well as special-legal methods, among which it is necessary to distinguish system-functional, and comparative methods. As a result of the study, the authors concluded that the criminalization of commercial smuggling (in connection with additional corruption risks and an increase in law enforcement agencies) is inappropriate. Thus, it is proposed to leave the current legislation of

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Ukraine in the investigational sphere in the current state and do not make any changes to it.

Keywords: smuggling; crime; offense; customs rules; criminalization.

## Contrabando o violación de las normas aduaneras: temas de actualidad de responsabilidad administrativa y penal

### Resumen

El artículo trata sobre las peculiaridades de la aplicación de la responsabilidad legal por el contrabando comercial de acuerdo con la legislación vigente de Ucrania. En particular, los autores del artículo investigan la viabilidad de tipificar como delito el contrabando de una amplia gama de bienes, y no solo los retirados de la circulación de cosas y bosques, como consta en el Código Penal de Ucrania en este momento. Además de un análisis exhaustivo de la legislación actual de Ucrania, los autores llevaron a cabo un análisis comparativo de la legislación ucraniana con la legislación de otros países, lo que ayudó a evaluar objetivamente el estado de las cuestiones estudiadas en Ucrania. La metodología del estudio incluye métodos científicos generales. Como resultado del estudio, los autores concluyeron que la tipificación como delito del contrabando comercial (en relación con riesgos adicionales de corrupción y un aumento de los organismos encargados de hacer cumplir la ley) es inapropiada. Por lo tanto, se propone dejar la legislación actual de Ucrania en la esfera de investigación en el estado actual y no realizar ningún cambio en ella.

**Palabras clave:** contrabando; delito; infracción; normas aduaneras; criminalización.

### Introduction

The issue of application of legal liability for movement through the customs border of goods in violation of the current customs legislation has acquired a special relevance in Ukraine (in connection with the submission to the Verkhovna Rada of Ukraine of Draft Law No. 5420 dated April 4, 2021 “On Amendments to the Criminal Code of Ukraine and Criminal Procedural Code of Ukraine on the criminalization of smuggling of goods and excisable goods, as well as an inaccurate declaration of goods”). The specified document proposes to criminalize the acts for which administrative responsibility is foreseen. It is about the smuggling of goods, smuggling of

excisable goods in significant, large amounts, or previously committed by a conventional person, according to a prior conspiracy using power, an official position, or an organized group, as well as a special relapse and repetition; Inaccurate declaration of goods in significant, large, especially large amounts, or committed by a prior conspiracy with a customs authority, or assistance in any form an official of the customs authority to commit such acts with the use of power or official position, as well as special recurrence and repetition.

The subject matter of the article is particularly relevant in view of the wide discussion in the domestic society regarding the need for the criminalization of smuggling, which began in connection with the submission to the Verkhovna Rada of Ukraine of the draft law on the criminalization of smuggling. The said draft law not only expanded the objective side of the crime with smuggling but also proposed to consider smuggling even preparation for the actual exercise of the illegal act. These proposals are controversial and require additional scientific comprehension. The draft law also proposes to clarify the composition of the existing articles on the smuggling of narcotic drugs (Article 201 of the Criminal Code of Ukraine (Law No. 2341-III, 2001)) and for the smuggling of timber (Article 201-1 of the Criminal Code of Ukraine (Law No. 2341-III, 2001)), recognizing a qualifying feature of “moving actions” instead of “moving”.

Interestingly, the actions mentioned in the draft law were previously considered crimes and contained in the Criminal Code of Ukraine, but in 2011 were decriminalized. As of this time, smuggling is considered to be moved through the customs border of Ukraine of cultural values, poisonous, potent, explosives, radioactive materials, weapons, and ammunition (except smooth-bodied hunting weapons and combat supplies to it), as well as special technical means of non-read information.

All other acts are considered to be offenses, namely – violations of customs rules, and the persons who commit them are subject to administrative responsibility. So, is it appropriate for the criminalization of commercial smuggling in modern conditions in Ukraine?

## **1. Theoretical Framework or Literature Review**

As to the state of development of problems associated with smuggling, there are quite a large number of authors both in Ukraine (Kuryliuk, & Khalymon, 2020; Kulish, Chumak, Chernysh, Khan, & Havrik, 2020) and in the world in general are engaged in these issues. However, if there are more relevant issues of commercial smuggling or wood smuggling, then for other countries more urgent can be problems of smuggling of narcotic drugs, excisable goods or, even people.

Thus, Kemp and Galemba (2020) studied the theoretical and practical problems of smuggling are investigated at the fundamental level. The authors conclude that smuggling is a complex phenomenon. In particular, the transportation of certain goods across the border may be legal in one country and a crime in another. At the same time, illegal cross-border trade is not always immoral, and legal trade is not always moral. However, developed countries are trying to shape global trade policy based on the principles of humanism and democracy. Global trade policy is formed through the conclusion of trade agreements, the introduction of international financial norms or trade regimes.

Moreover, Icduygu and Toktas (2020) in the article “Human Smuggling and Trafficking” explore the problem of smuggling of human resources across the borders of several countries in the Middle East. The article thoroughly considered the latest trends in such smuggling, the principles of formation and functioning of organized criminal groups engaged in such smuggling, as well as the peculiarities of illegal crossing of the border with illegal migrants and refugees, are investigated.

Grodetsky (2021) examines the advantages and disadvantages of a new draft law on the criminalization of smuggling in Ukraine. The article carefully analyzes the current and future legislation of Ukraine in the study area. The author of the article concludes that criminalization of smuggling is necessary, but notes that the draft law on amendments to existing legislation needs to be finalized.

Further, Mir Akmam and Yuslan (2019) consider the features of crimes related to smuggling, in Indonesia. The article concludes that the legislation of this country should be improved to reduce smuggling flows and replenish the country's budget.

Finally, Shustrova and Bohatyrova (2021) examine the current legislation of Ukraine on smuggling and offers their vision for its improvement. Among other things, the article suggests criminalizing the smuggling of valuable and rare species of animals and plants and endangered animals and plants, microbiological or other biological agents or toxins, transplants or human tissues, etc., and certain types of smuggling in the field of transport of goods and materials.

Despite the large number of scientific and journalistic studies on the qualification of smuggling, the purpose of further work should be a deeper analysis of the consequences of criminalization of smuggling for the domestic economy.

## 2. Methodology

The methodology of the study includes general scientific methods, among which the methods of analysis and synthesis should be noted, as well as special-legal methods, among which it is necessary to distinguish system-functional, formal-logical, and comparative methods.

So, the method of analysis (as a method of studying an object in a set of components of its components) allowed to carefully examine the signs of smuggling, as an administrative offense and as a criminal offense, that is – a crime. In particular, this method allowed to analyze the elements of the confiscation composition to which the subjects belong to the subjects, the subject, the subjective side, and the objective side of the offense.

Further, the method of synthesis (as opposed to the method of analysis of knowledge of objective reality) lets to combine different scientific approaches to solving the problem of criminalization of smuggling and to conclude that it is inexpedient to criminalize economic (commodity) smuggling, which should remain an administrative offense.

The system-functional method (as a method of studying social phenomena and processes in the form of structurally dismembered integrity, where each element of the structure has a specific functional purpose) allowed to study the current state of affairs in the movement of goods across the state border of Ukraine and to conclude due to the inability of domestic law enforcement agencies to qualitatively investigate a large array of crimes in the area under investigation, which could lead to increased corruption risks and the complete collapse of customs in Ukraine.

The formal logical method permitted to thoroughly investigate the domestic administrative and criminal legislation aimed at regulating the studied relations.

Finally, the comparative method provided a careful analysis of foreign experience in classifying offenses as smuggling and the application of administrative and criminal liability to violators of customs regulations.

## 3. Results and Discussion

To draw objective conclusions about the feasibility of criminalizing smuggling in Ukraine, we should first thoroughly analyze the current legislation in the field.

Thus, at the moment, commodity smuggling is recognized as an administrative offense, namely – a violation of customs regulations.

The composition of the violation includes signs that characterize the external act of behavior of the person, its direction, consequences, signs that characterize the offender, and his mental attitude to the offense.

Signs of violation of customs rules are grouped into four groups (elements) that characterize:

- object of violation of customs rules;
- the objective side of the violation of customs rules;
- subject of a violation of customs rules;
- the subjective side of the violation of customs rules.

All these elements of the violation of customs regulations are inextricably linked. The presence of these elements is mandatory for the qualification of a specific act as a violation of customs regulations. If at least one of them is missing or does not meet the properties provided by the relevant provision of the Customs Code, this act is not a violation of customs regulations.

The object of violations of customs rules is public relations, which are protected by law and which as a result of the encroachment is or may be harmed, as well as what the encroachment is aimed at.

The objective side of violations of customs rules is a set of legally prescribed features that characterize the external manifestation of the act that encroaches on the objects of legal protection, and the objective conditions of this encroachment.

Citizens who have reached the age of 16 (at the time of committing such an offense) may be subject to administrative liability for violation of customs rules, and officials of these enterprises may be subject to violations of customs rules by enterprises.

The subjective side of violations of customs rules is characterized by the mental attitude of the person to commit the offense:

- guilt – the mental attitude of a person to the act or omission provided by the Customs Code of Ukraine (Law No. 4495-VI, 2012), and their consequences, expressed in the form of intent or negligence;
- motive – the inner motivation of the person who created the psychological preconditions for the commission of the offense, and;
- goal – the consequence that a person seeks to achieve by committing an offense.

Administrative liability for violations provided for by the Customs Code arises if these offenses do not entail criminal liability. Prosecution for violation of customs rules does not release these persons from the obligation to pay duties and other taxes and fees.

The following penalties may be imposed for violation of customs regulations:

- warning;
- fine, and;
- confiscation of goods.

Among all types of penalties, warnings and fines are used only as the main type of penalty, and confiscation can be used as the main and additional. It should be noted that the application of an additional type of penalty without the main is not allowed. Therefore, if confiscation is an additional type of penalty and the fine is the main one (and if the fine is not applied within two months from the date of violation of customs rules, and, in case of a continuing offense, within two months from the date of its detection or one month from the date of closing the criminal case), if the act constitutes an administrative offense – then confiscation as an additional type of penalty in this case also can not be applied.

Smuggling is the movement across the customs border of Ukraine outside customs control or with concealment from customs control of cultural property, poisonous, potent, explosives, radioactive materials, weapons, and ammunition (except for smooth-bore hunting weapons and ammunition), and specialized equipment covert receipt of information. The mechanism for classifying actions that fall under the definition of “smuggling”.

According to Article 201 of the Criminal Code of Ukraine, the importation of contraband is punishable by imprisonment for a term of three to seven years with confiscation of contraband. If smuggling is imported by prior conspiracy by a group of persons or a person previously convicted of a crime, or an official using official position, - shall be punishable by imprisonment for a term of five to twelve years with confiscation of contraband and confiscation of property.

In 2018, the domestic legislator supplemented the Criminal Code of Ukraine (Law No. 2341-III, 2001) with Article 201-1, which also provides for criminal liability for forest smuggling.

In addition, Article 305 of the Criminal Code (Law No. 2341-III, 2001) also qualifies the movement across the customs border of Ukraine out of customs control or with concealment from customs control of narcotic drugs, psychotropic substances, their analogues or precursors, or falsified drugs also qualifies as smuggling.

It should be remarked that the most common violations related to the movement of goods across the customs border are:



- violations caused by the deliberately incorrect determination of the quantity, quality, or customs value of goods (many companies underestimate the quantitative, qualitative, and cost indicators of goods to reduce the number of customs duties);
- violations related to the dishonest issuance of certificates of goods to obtain customs preferences that apply to goods from certain countries;
- fictitious transit (violations related to the norm of Ukrainian legislation, according to which the transit of goods through the territory of Ukraine goods are exempt from import duties; in practice, a large number of goods declared as transit and exempt from customs duties remain in Ukraine for sale).

Interestingly, in 2011 the decriminalization of smuggling was explained by the need to bring Ukrainian legislation in line with European standards. In addition, the decriminalization of smuggling was explained by the need to optimize budget expenditures.

In particular, the pre-trial investigation in criminal cases of smuggling of goods involved significant budget funds, which was associated with paid storage of material evidence, expert research, and other procedural actions. The requirements of the criminal procedure legislation stipulated the conduct of a long pre-trial investigation, necessary to gather the evidence base, identify the perpetrators of the crime, their location, etc. In this case, the goods (recognized as material evidence) were stored in the case file and could not be transferred to state revenue until the cases are resolved by the courts. In addition, the analysis of the jurisprudence of smuggling cases shows that the vast majority of persons convicted of smuggling were not sentenced to actual imprisonment, judges decided to release them from serving a sentence with probation and a fine. Partial decriminalization of the analyzed acts led to the fact that moving across the customs border outside customs control or with concealment from customs control of goods, regardless of their value or category began to qualify as a violation of customs rules under Art. 351 (“Actions aimed at moving goods, vehicles across the customs border of Ukraine outside customs control”) and Art. 352 “Actions aimed at moving goods across the customs border of Ukraine with concealment from customs control” of the Customs Code of Ukraine (Law No. 4495-VI, 2012).

The attribution of minor smuggling to administrative offenses is in line with European practice, in particular, the provisions of the Geneva Convention on the Contract for the International Carriage of Goods by Road (United Nations, 1956) and the Kyoto Convention on the Simplification and Harmonization of Customs Procedures (United Nations, 2002), which were signed by Ukraine.

In particular, following paragraphs 20 and 21 of Special Annex H, Section 1 of the International Convention on the Simplification and Harmonization of Customs Procedures, if a customs offense is found to be insignificant during customs clearance to be given the opportunity of administrative settlement of this offense by the customs authority that detected it.

In general, EU recommendations for partner countries in the field of customs are set out in EU (Customs Blueprints (European Commission, 1998)) by defining certain standards:

- comprehensive and stable system of customs legislation;
- customs cooperation mechanism with national and international law enforcement agencies;
- introduction of the latest information technologies at customs;
- simplification of customs procedures;
- customs risk identification mechanism, and;
- efficiency of customs audit and post-audit as forms of customs control.

Admittedly, attitudes towards smuggling have changed in Europe in recent years.

On 5 July 2017, the European Union approved Directive № 2017/1371 of the European Parliament and of the Council, which provided that by July 2019 all EU Member States were to establish, inter alia, a minimum criminal penalty for crimes committed by individuals who harm to the EU's financial interests: 4 years' imprisonment in case of significant damage or significant gain or other punishment that is not a criminal sanction if the damage / benefit was less than € 10,000. Some member states have had criminal penalties for smuggling before.

For example, in Poland, the Criminal Finance Code (Law No. 930, 1999) (as amended in 1999) provides a fine or imprisonment for smuggling. The threshold after which an administrative violation becomes criminal is 10,500 zlotys (about 2.37 thousand euros). The fine can reach 20 million zlotys (about 4.5 million euros). In Germany, "illegal import, export, and transit of goods" is a tax crime. The penalty for this crime can be a fine of 10,500 to 250,000 euros or up to 5 years in prison. Large-scale smuggling can lead to 10 years in prison (2000 Tax Code) (International Renaissance Foundation, 2020).

In different EU countries, the limit of the value of goods, from which criminal liability arises, differs significantly. For example, in Slovakia, this figure is 300 euros, and in Portugal, it is more than 50 thousand euros (Sarapinas, 2020).

At the same time, it is quite difficult to objectively determine which system is more effective – with a lower or higher “threshold” of criminal liability.

How has the reduction in the level of criminal liability affected the dynamics of offenses? For example, in Lithuania, from 2019, the minimum limit of criminal liability for smuggling goods has decreased from 10 thousand euros to 6 thousand. This means that according to the current legislation of Lithuania, smuggling of goods up to 6 thousand euros is an administrative offense, from 6 to 10 thousand euros – a crime of medium gravity, more than 10 thousand euros – belongs to the category of serious crimes. Initially, a forecast was made and, it was assumed that after the legislative changes, all administrative offenses, worth from 6 to 10 thousand euros, in a similar percentage will be in the future.

But the allegations have not been confirmed, and after lowering the criminal liability threshold, a significant proportion of such smuggling cases have decreased. At the same time, the smuggling of goods worth up to 6,000 euros, which fall under administrative liability, has increased. This is a very clear example that despite the possibility of making more money, the alternative to criminal liability is scary and good prevention (Sarapinas, 2020).

Thus, it is obvious that neither in Ukraine nor in European countries at present there is no unity of understanding of further directions of development of the institution of smuggling.

While changes to the current Criminal Code of Ukraine have not yet been made, the three main options for criminalization are being most actively discussed:

1. To criminalize the illegal movement across the customs border of any goods committed in significant quantities, establishing a minimum amount of such smuggling, over which the criminal liability begins.

The sanction for such acts is imprisonment of the person (persons) concerned and may additionally provide for a fine, confiscation of the subject of smuggling, all property, etc. Critics of this position believe that the establishment of certain minimum amounts of smuggling will contribute to the abuse of law enforcement agencies in estimating such volumes, increase bribes at all stages of investigations of such cases, and fragmentation of parties by potential smugglers to avoid punishment.

Proponents, on the other hand, believe that the introduction of criminal liability should help reduce the number of such crimes and will have an educational impact on the perpetrators.

In their view, increasing accountability will help reduce smuggling, and offenders will be punished fairly for their illegal actions.

2. Criminalize the illegal movement of only excisable goods (tobacco and alcohol products, fuel) with the establishment of minimum volumes, over which criminal liability begins. The position of the supporters of this idea coincides with the previous one, but the peculiarity is that they recognize the greater public danger of smuggling of excisable goods both given the amount of payments to the budget and taking into account the specifics of excisable products. In addition to supporters, this idea has opponents who consider such actions only a partial solution to the problem. Because the definition of smuggling, in this case, does not include other popular goods, such as household appliances, electronics, perfumes, clothing, the illegal movement of which across the border is common in Ukraine. According to them, criminalizing the illegal movement of only excisable goods will reduce the effectiveness of the fight against smuggling.
3. Criminalize the illegal movement of goods across the customs border, committed in large quantities, establishing criminal liability in the form of financial sanctions and other types of a punishment without imprisonment. Such sanctions, in addition to fines and seizure of the subject of smuggling, maybe the seizure of a vehicle used for smuggling, confiscation of property, etc. Alternative punishments for this crime may include community service, house arrest, and even a travel ban. The latter type of punishment can be a significant restriction for many and, at the same time, not as severe as imprisonment. Notably when it comes to the central professional activity. Simultaneously, some of the listed sanctions can be applied for minor crimes that fall under criminal punishment.

Apparently, the authors of the draft law (submitted to the Verkhovna Rada of Ukraine) have chosen the first option to solve the problem.

However, this draft law not only expands the objective side of the act but radically changes the structure of the whole crime.

The legislator proposes to postpone the completion of crimes from the moment of actual movement of goods across the customs border of Ukraine (leaving the customs control zone) to the moment of active behavior in the movement, i.e. during the stay in the customs control zone.

Today, the law considers a crime of smuggling (Articles 201 and 201-1 of the Criminal Code of Ukraine) to be completed when the goods have been moved outside the customs control zone, but at the time of its stay there and detection of signs of this offense, the law refers to attempted crime. This was emphasized in more detail in the almost canonical resolution of the Plenum of the Supreme Court of Ukraine of June 3, 2005, No. 8 on smuggling issues. There, the attempt was described as the detection of signs of an offense during a customs inspection, re-inspection, etc. at a time when the goods have not yet been moved.

In the proposed version of the articles, the attempted crime is moved in time technologically to the stage before the movement of goods in the customs control zone for customs clearance, when the signs of a criminal offense are almost not detected. And the completed crime occurs at the time of detection of indications of a criminal offense during the movement of goods in the customs control zone or outside the customs control zones.

Secondly, the fight against smuggling is complemented by the fight against the inaccurate declaration of goods, which, in fact, can be considered as a kind of smuggling, as the inclusion in the customs declaration of wrong information about the goods is its concealment from customs control.

Third, the legislator establishes the amount of damage from which criminal liability arises, without any logic, because virtually the same criminal offenses related to tax evasion have completely different amounts of damage to classify such an offense as criminal. For example, the amount of unpaid taxes, which begins criminal liability (a significant amount) under Article 212 of the Criminal Code of Ukraine (Law No. 2341-III, 2001), is 3405000.00 UAH, but under the proposed Article 2014 of the Criminal Code of Ukraine – 147550.00 UAH. Moreover, the objective aspects of a criminal offense under both articles are almost similar – evasion of taxes and fees. The authorities proposed an even more striking disproportion in Article 2012 of the Criminal Code of Ukraine, according to which criminal liability for moving goods with concealment from customs control or outside customs control begins with the amount of UAH 113,500.00, which averages UAH 36,320.00 in taxes.

In addition, further attention should be focused on the impact of the pandemic (caused by Covid-19 (Kharytonov *et al.*, 2020) on changing smuggling schemes, and new opportunities for violation of customs regulations.

## **Conclusions**

In our opinion, the current legislation of Ukraine currently adequately regulates relations related to smuggling. In particular, smuggling is an administrative offense, which is justified given the economic nature of this offense. Accordingly, it is more expedient to bring the violator to administrative responsibility with the payment of a fine, per the amount of smuggling. The decriminalization of smuggling at one time relieved law enforcement agencies, which frankly could not cope with the large number of criminal proceedings related to smuggling. In addition, the corruption risks associated with the investigation of relevant crimes have been significantly reduced. Last but not least, the decriminalization of punishment took place following the recommendations of the European Union and under

European approaches to regulating these relations. However, this year the Ukrainian parliament is considering a draft law on the criminalization of smuggling, as it is believed that this measure will help fill the budget. Let us disagree with the authors of the bill and investigate the state of the issues under study before the decriminalization of smuggling in 2011. If the criminalization of smuggling cannot be avoided, we hope that the crime will not include any goods, but only certain groups of goods. In this case, the principal punishment for this offense should be fine.

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