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Combating commodity smuggling in Ukraine: in search of the optimal legislative model

ПРОТИДІЯ ТОВАРНІЙ КОНТРАБАНДІ В УКРАЇНІ: У ПОШУКАХ ОПТИМАЛЬНОЇ ЗАКОНОДАВЧОЇ МОДЕЛІ

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Abstract

The purpose of the paper is to identify optimal legislative model of criminal law counteraction to commodity smuggling in Ukraine, taking into account experience of foreign countries, primarily the European Union. The following research methods have been used to study criminal legislation, prove hypotheses, formulate conclusions: comparative law, system analysis, formal logic and modeling methods. Taking into account the achievements of criminal law science, materials of law enforcement practice, he results of sociological surveys and based on the analysis of accompanying documents to the relevant bills, social conditionality of criminalization of smuggling of goods have been clarified. Foreign experience of criminalization of commodity smuggling in the legislation of the European Union has been investigated.

Анотація

Метою статті є пошук оптимальної законодавчої моделі кримінально-правової протидії товарній контрабанді в Україні з урахуванням досвіду зарубіжних країн насамперед Європейського Союзу. Для дослідження кримінального законодавства, доведення висловлених гіпотез, формулювання висновків використано такі наукові методи: порівняльно-правовий, системного аналізу, формально-логічний та метод моделювання. З урахуванням здобутків кримінально-правової науки, матеріалів правозастосовної практики, результатів соціологічних опитувань і на підставі аналізу супровідних документів до відповідних законопроєктів з'ясовується соціальна обумовленість криміналізації контрабанди товарів. Досліджується іноземний досвід

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Legislative initiatives in this area have been critically considered. Major attention in this aspect has been paid to the shortcomings and debatable provisions of the draft law "On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine on the Criminalization of Smuggling of Goods and Excisable Goods and Inaccurate Declaration of Goods" (Registration # 5420 of April 23, 2021). Author's proposals on the relevant improvements of criminal legislation have been put forward and substantiated.

Keywords: smuggling, customs border, goods, criminal liability, criminalization, public danger.

криміналізації товарної контрабанди в законодавстві Європейського Союзу. Критично осмислюються законодавчі ініціативи у розглядуваній сфері. Основну увагу у цьому аспекті звернуто на недоліки і дискусійні положення внесеного Президентом України законопроєкту «Про внесення змін до Кримінального кодексу України та Кримінального процесуального кодексу України щодо криміналізації контрабанди товарів та підакцизних товарів, а також недостовірного декларування товарів» (реєстр. № 5420 від 23 квітня 2021 р.). Висуваються й обґрунтовуються авторські пропозиції щодо вдосконалення кримінального законодавства.

Ключові слова: контрабанда, митний кордон, товари, кримінальна відповідальність, криміналізація, суспільна небезпека.

Introduction

Today, smuggling is recognized among the biggest threats to Ukraine's national security in the economic sphere. Recently, the President of Ukraine V. Zelensky has announced that the state budget loses UAH 300 billion annually due to smuggling. This fact has provided grounds for comparing smuggling with economic terrorism (Radiosvoboda, 2021). Somewhat more "modest", but no less stunning numbers are voiced in the expert community, which states that due to the existence of smuggling schemes during 2018-2020, Ukraine has been losing from UAH 63 to 96 billion annually (according to other estimates – from 70-80 to 100 billion) (Hetman, 2020).

Globalization trends not only open state borders to international transactions for the circulation of goods, promote trade, but also booster the movement of goods outside the customs border or with their concealment from customs control, which is a significant threat to economic security and requires ways to combat smuggling (Andriichenko, Reznik, Tkachenko, Belanuk, & Skliar, 2020). Crimes related to smuggling of goods are among the most important factors of economic crime, causing irreparable damage to the economic system of the country, as well as seriously threatening social and cultural principles of society (Aghazadeh, Ardebili, Ashouri, & Mahdavisabet, 2017). Smuggling undermines government revenues, increases the tax burden on official businesses, kills the need for investment and innovation, reduces foreign exchange earnings that a country can earn from legal exports, increases unfair market competition (Karafo, 2018).

Given the threatening scale of the phenomenon under study, as well as the fact that smuggling is becoming more sophisticated and organized, one must agree with experts, who imply that for the time being, combating it is a state priority (Dopilko & Yavdoshchuk, 2019, 92). This fact is realized in the highest echelons of state power as well. On April 23, 2021, the Verkhovna Rada of Ukraine (hereinafter – the Verkhovna Rada) registered the President's Draft Law № 5420 "On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine on Criminalization of Smuggling of Goods and Excisable Goods and Inaccurate Declaration of Goods" (Draft Law 5420, 2021), which, in addition to supplementing the Criminal Code (hereinafter – the Criminal Code) of Ukraine with a separate Article on smuggling of goods, proposes a number of other amendments aimed at improving the efficiency of the relevant criminal law mechanism.

The said draft law not only expanded the objective elements of criminal smuggling but also proposed to consider even preparation for the actual exercise of the illegal act as s complete crime. As such, the major question arises: is criminalization of commercial smuggling in modern conditions in Ukraine appropriate and timely (Pidgorodynskyi, Kamensky, Bolokan, Makarenko, & Samilo, 2021)?

Overall, whether such proposals are balanced and whether there are grounds to consider the model initiated by the developers of the Draft Law 5420 as optimal, is yet to be seen. The need to obtain answers to these questions underlines the relevance of the proposed study.

Thus, *the purpose* of the research paper is to properly identify, while taking into account relevant foreign experience, primarily of the European Union member states, the optimal legislative model of criminal law counteraction to commodity smuggling in Ukraine.

Methodology

Social conditionality of criminalization of such smuggling has been analyzed, relevant foreign experience has been studied, the latest legislative initiatives in this area have been critically considered, including provisions of the Draft Law 5420, authors' proposals have been elaborated in this regard.

To achieve the declared goal, a methodology was chosen, the appeal to which made it possible to comprehensively study the subject of research. Philosophical, general scientific and specific scientific methods have been employed during the coverage of the selected issues. In particular, the dialectical method allowed to comprehend the issues of research, its methodological base, to structure research, to conduct research on a step-by-step basis. The statistical method made it possible to analyze relevant quantitative and qualitative indicators. The comparative method has been used to cover approaches of foreign states to regulate liability for such criminal offenses. While applying the modeling method, the optimal, according to the authors, legislative model of criminal law counteraction to commodity smuggling in Ukraine has been developed.

Results and discussion

1. Recriminalization of commodity smuggling: pro et contra

Commodity smuggling in Ukraine was decriminalized by the Law of November 15, 2011 "On Amendments to Certain Legislative Acts of Ukraine Concerning the Humanization of Liability for Offenses in the Sphere of Economic Activity" (hereinafter – the Law of November 15, 2011) (Law No. 4025-VI, 2011). The need to adopt this law was explained by the excessive interference of law enforcement agencies in the activities of economic entities, unreasonably high level of criminalization of offenses in the sphere of economic activity, unjustifiably wide range of grounds for imprisonment for crimes in the economic sphere, which did not contribute to the reimbursement of the damage caused by the convicts, frequent cases of law enforcement abuses in the course of prosecuting businessmen.

However, we have previously written that the exclusion from the disposition of Art. 201 "Smuggling" of the Criminal Code of Ukraine of reference to commodities was not on time, and the country was not economically ready for such legislative step. In fact, it was decided to solve the issue only from the point of view of economic profitability of disclosure and investigation of violations of customs legislation, as well as filling the state treasury (Dudorov & Movchan, 2020, 120-140).

As a result of such short-sightedness, today security authorities, which control state border, are virtually deprived of the ability to adequately respond to existing threats to national security in the border protection sphere (Babiy, 2016, 190).

It should be borne in mind that: a) absence of criminal liability for the analyzed encroachment does not allow to effectively influence criminogenic situation in the field of combating smuggling and provide appropriate assistance to partner special services and law enforcement agencies of foreign countries to eliminate channels of illegal movement of goods across the customs border of Ukraine (Omelchuk, 2002, 28); b) limited list of smuggling items, while being characteristic of the current version of Art. 201 of the Criminal Code of Ukraine, has led to the state, when commodity smuggling is not a predicate act of money laundering. This fact is extremely negatively assessed by the European partners, who have long been persuading Ukrainian state to criminalize smuggling of at least some types of goods, including tobacco products (Michalopoulos, 2021).

It should be noted, however, that there are many analysts, who are not in favor of this initiative. In particular, opponents of the recriminalization of commodity smuggling sometimes refer to administrative liability as being more effective than criminal one, allowing cases of relevant violations of customs legislation to be dealt with more expeditiously (Portnov, 2021). However, this position, as rightly emphasized in the explanatory note to the Draft Law № 5420, does not take two points into account: first, a large number of encroachments related to violations of customs rules remain unpunished, and

application of appropriate (administrative) sanctions does not prevent offenders from further illegal behavior institution of administrative liability, provided for under the Customs Code of Ukraine (hereinafter – CC) does not exercise preventive function); secondly, terms of pre-trial investigation of criminal proceedings, if the person has not been notified of investigation, are much longer than terms of administrative proceedings, which ensures better collection of evidence.

However, some experts do not agree with such arguments. In particular, while critically assessing the preventive role of criminal law in this part, they refer to the low efficiency of both pre-trial and judicial proceedings in criminal cases of commodity smuggling. Such group of experts includes: A. Portnov, one of the masterminds of the Law of November 15, 2011, who points out that for all the years of criminal liability for commodity smuggling almost nobody was put behind bars for its commission (Portnov, 2021). A. Savarets expresses his opinion in the same manner, citing information that only four of the forty-two convicts were sentenced to "real" imprisonment for "classic" smuggling last year; three people were convicted of illegal timber smuggling with none of whom receiving imprisonment sentences; 110 people have been convicted of drug smuggling with only 15 of them receiving "real" imprisonment (Savarets, 2021).

Entering into a debate with the authors of these statements, we would like to ask a question: since when the main criterion for the expediency of establishing criminal liability for a particular act was the effectiveness of both pre-trial and judicial review of relevant criminal proceedings? And what if adoption of such a dubious approach, which clearly ignores the doctrine of criminalization, has lead to the conclusion that it is expedient to decriminalize not only the majority of economic but also the lion's share of other criminal offenses under the Criminal Code of Ukraine?

Thus, according to the information published by the State Judicial Administration of Ukraine, a total of 475 people were convicted of economic offenses in 2020, of which 201 people were released from serving their sentences under Art. 75 of the Criminal Code of Ukraine; in comparison, for the intentional grievous bodily harm, the corresponding ratio was 765 to 511 respectively. If we follow the erroneous logic voiced above, will it mean that all such acts should be decriminalized?

We have to remind here the almost axiomatic thesis that the issue of inevitability and adequacy of criminal law influence on the behavior of violators of criminal law prohibitions lies today not so much in the legislative as in the law-enforcement area. Thus, appeal to the fact that the fight against commodity smuggling may take the form of criminal prosecution of "ordinary people, inattentive brokers, illiterate truck drivers and peasants" (Savarets, 2021) means an unacceptable shift of emphasis in the debate on the feasibility of recriminalizing such form of smuggling.

Based on these arguments, it is not surprising that today many domestic researchers support criminalization of smuggling. As D. Kamensky rightly writes in this regard, such a decision will help improve criminal law protection of foreign trade, the subjects of which are domestic companies, as well as have a positive fiscal effect in terms of increasing the revenue component of the state budget (Kamensky, 2020, 1115-1116).

2. Foreign experience of commodity smuggling criminalization

While justifying the need to adopt the Law of November 15, 2011, its drafters referred, inter alia, to the obvious need for bringing provisions of domestic law establishing legal liability for criminal offenses in the economic sphere in line with European standards, in accordance to which commission of these offenses give priority to the application of financial sanctions. It is alleged that criminal law of many member states of the European Union (hereinafter – the EU) does not provide for such crime as smuggling, and therefore liability for a significant number of violations of customs rules is grounded in other Arts. of the Criminal Code, including tax evasion (Novikov & Novikova, 2019, 408-409).

Based on in-depth legal analyses, some scholars rightly point out that currently there is no unity of understanding further directions of development of the legal and law enforcement parameters of countering smuggling neither in Ukraine, nor in other European countries (Pidgorodynskyi, Kamensky, Bolokan, Makarenko, & Samilo, 2021).

Indeed, after reviewing results of relevant comparative studies, it can be seen that there are countries among the EU member states, with no criminal liability regime for smuggling goods (e.g., Austria, Belgium, Norway) (Lepina, 2020, 226). However, can this fact be used as a basis for justifying the decision to abandon the idea of

smuggling recriminalization in Ukraine? Given the constitutionality of the irreversibility of Ukraine's European and Euro-Atlantic course, reference to the experience of European countries should be considered appropriate. The critical study of foreign experience will facilitate transposition of the relevant provisions of the criminal law of different foreign countries in order to adapt, converge, harmonize, unify, etc. (Vozniuk, Dudorov, Tytko, Movchan, 2020; Movchan, Vozniuk, Burak, Areshonkov & Kamensky, 2021). At the same time, when choosing the law of the EU countries as an object for comparison, it is necessary to take the following circumstances into account.

First, the assertion that there is no criminal liability for smuggling in the EU countries (France, Germany, Italy, etc.), and liability for its commission occurs only on the basis of administrative, tax, civil and economic sanctions, requires proper explanation. After all, legislation of some (in particular, the most developed) European countries contains rules on the regulation of criminal liability or for any kind of smuggling (Art. 289 of the Criminal Code of Denmark, Art. 337 of the Criminal Code of the Netherlands) drinks (Art. 280 of the Criminal Code of San Marino).

In Germany, criminal liability along with administrative sanctions is provided for violations of customs legislation (Weerth, 2013), although the latter is not regulated within the Criminal Code of this country.

The Finnish Criminal Code has a separate chapter 46 "Offenses related to exports and imports", which includes not only prohibition on "classic" smuggling (petty and "ordinary") (Chapter 1) but also provisions on illegal trade in imported goods (section 6), illegal transactions with imported goods (section 6-A), false declaration of origin of export products (section 10), as well as a number of other offenses related to customs declaration (sections 7-9).

Secondly, EU countries provide for a stable mechanism for counteracting analyzed encroachment by administrative, tax, civil and economic means, the one that Ukraine, let us be honest, can only dream of. The explanatory note to the Draft Law 5420 underlines the fact that in a number of developed countries with stable strong economies the emphasis in the fight against smuggling is put on the use of economic incentives, supported by a high level of law-abiding businesses and citizens. Given the effectiveness of this (non-criminal law) mechanism, a different level of socio-economic development and legal culture, as well as the effectiveness of law enforcement agencies, there is no need in European countries to resort to criminal remedies to combat smuggling, the urgency of which in these countries is incomparably lower than the one existing in Ukraine.

Thirdly, speaking of the European experience in the criminal law fight against commodity smuggling, it should be remembered that Europe and the EU are not only the most developed Western European countries, whose experience was mentioned above and which remained either at the origins of the EU or joined it later, but also other Central European and Baltic (conditional names) states which, as well as Ukraine, despite their long stay "in an orbit" of the Soviet Union influence, have either already become members of EU, or actively declare European aspirations. Despite Ukraine's efforts to immediately reach the level of development of the first mentioned group of European countries, due to similar legal traditions and current issues related to the transition to a market economic system, and, ultimately, commonality / proximity of state borders, which is especially important in the context of issues raised in this paper, our state must first of all take into account the experience of countries representing the "second" group of European countries, in which, as in Ukraine, the issue of combating commodity smuggling remains extremely relevant (Joossensa & Rawb, 1998, 66-71).

The experience of these countries is more than eloquent: legislation of almost every one of them provides for criminal liability for commodities smuggling.

In general, having analyzed the relevant foreign experience, we can state the presence of a shocking fact: both among absolutely all European countries, which have a comparable level of socio-economic development with our country, and among all countries of the "CIS group", which also have close to domestic legal traditions and even common borders, Ukraine remains almost the only country with no criminal liability for smuggling.

3. Analysis of the Draft Law 5420

With all the reasonable caution toward taking into account foreign experience, the demonstrated unanimity of parliamentarians of other countries, which is consistent with the conclusions we have drawn from writing the first

paragraph of this Art., leaves no doubt about the need to recriminalize commodity smuggling. The rhetoric of the current government, in particular of the President of Ukraine, gives reason to hope that required political will has emerged. Given this, as well as the current political situation, it is very likely that the initiative of our Head of the State, which is reflected in the Draft Law 5420, will be implemented at last.

However, having read the text of the Draft Law 5420, we (as well as the staff of the Main Scientific and Expert Department (hereinafter – MSED) of the Verkhovna Rada) have serious concerns that the option of improving the Criminal Code of Ukraine, proposed in the Draft Law 5420, in part of the fight against commodity smuggling is successful.

In particular, the proposal to supplement the Criminal Code of Ukraine with three new prohibitions – Art. 201-2 "Smuggling of goods", Art. 201-3 "Smuggling of excisable goods" and Art. 201-4 "Inaccurate declaration of goods", raises most questions. We have already expressed (in particular, in the context of supplementing the Criminal Code of Ukraine with Art. 201-1 on forest smuggling) (Dudorov, & Movchan, 2021, 145-147) our negative attitude to such initiatives, which propose to supplement the criminal law with casuistic prohibitions. In the case of commodity smuggling, our negative impression is reinforced by a number of arguments, the main of which are as follows.

First, the motives for the proposed differentiation of criminal liability for smuggling of excisable goods, on the one hand, and all other goods, on the other, are unclear. In our opinion, the main indicator of the public danger of smuggling any goods, and we are not talking here about items seized or restricted in civil circulation, is their value. Therefore, there are no sufficient grounds to believe that, for example, illegal movement of tobacco products across the customs border of Ukraine is more socially dangerous than the smuggling of household appliances, agricultural products, branded clothing or footwear, etc.

Second, the initiative of the drafters of the Draft Law 5420 to establish lower, compared with the projected Art. 201-2 of the Criminal Code of Ukraine, cost indicators of significant (crime establishing element) and large amount (aggravating element) of contraband items (50 and 400 non-taxable minimum incomes of citizens) (hereinafter – NMIC) and 100 and 600 NMIC, respectively), in the newly proposed Art. 201-3 causes even more misunderstanding. In this case, we also cannot find a logical explanation for the position that smuggling of, let us say, household appliances, agricultural products, etc. should be considered criminally illegal only if these goods' value exceeds 100 NMIC, while in order to impose criminal liability for smuggling tobacco products, alcoholic beverages and other excisable goods it is enough for the cost of the latter to merely exceed 50 NMIC.

In light of the above mentioned, we would like to note that in the projected Art. 201-4 of the Criminal Code of Ukraine, the relevant indicators of significant and large size are proposed to be fixed at the level of 130 and 650 NMIC, as well as to differentiate liability in case of incorrect declaration of goods, which led or could lead to illegal reduction or exemption from customs duties in exceptionally large amounts (1400 and more NMIC) (part 3). Thus in the current edition of Art. 201-1, the inclusion of which in the Criminal Code of Ukraine can also be considered as a fragmentary solution to the issue of smuggling recriminalization, cost indicators of large and especially large size constitute only 18 and 36 NMIC respectively.

These facts, even if we ignore the obvious arbitrariness of all these quantitative indicators, once again reveal the poor quality of the work of domestic parliamentarians and other actors in the draft law making process.

Thirdly, it is difficult to support the idea of the drafters of the Draft Law 5420 to supplement the Criminal Code of Ukraine with a separate provision on inaccurate declaration of goods (Art. 201-4), which proposes to establish liability for including inaccurate information in the customs declaration or failure to provide customs clearance in the prescribed form and reliable information on goods and / or commercial vehicles, if such actions have led or could lead to an illegal reduction or exemption from customs duties in significant amounts.

When launching such initiative, its authors do not take into account at least the fact that in the current Arts. 201 and 201-1 of the Criminal Code of Ukraine, as well as in the projected Arts. 201-2 and 201-3, smuggling means, among other things, the movement of relevant items with concealment from customs control. At the legislative level (Art. 483 of the Customs Code) it is stipulated that one of the forms of moving goods across the customs border of Ukraine with concealment from customs control is the

submission to the customs authority as grounds for moving goods containing false information about the name of goods and their characteristics. That is, in fact, actions referred to Art. 201-4 of the Criminal Code of Ukraine in the Draft Law 5420 (Draft Law 5420, 2021).

Unlike the developers of the analyzed Draft Law, we do not see gaps in the criminal law response to cases of false declarations, which leads to non-payment of these duties. After all, if the illegal movement of goods across the customs border of Ukraine is combined with evasion of mandatory payments levied by customs authorities, included in the taxation system and directly related to the movement of goods across the customs border, then the committed act, under the circumstances, has to be legally assessed under Art. 212 as evasion of taxes and fees or under Art. 222 of the Criminal Code of Ukraine as fraud with financial resources.

Inclusion of such aggravating element of false declaration as "assistance in any form by a customs official to commit such acts with the use of power or official position" (part 4 of Art. 201-4 of the projected Art. of the Criminal Code of Ukraine), will cause serious practical issues as to the correlation of corpus delicti "false declaration", on the one hand, and "smuggling of goods", "smuggling of excisable goods", on the other. After all, movement of goods outside of customs control, provided by the elaborated Arts. 201-2 and 201-3 of the Criminal Code of Ukraine, means, with reference to Art. 482 of the Customs Code of Ukraine, that such transfer is done "with illegal exemption from customs control due to the use of official position by an official of revenues and fees agency".

Besides, we share the fears of experts, who point out that even erroneous (careless) determination of the product code according to UKT FEA, erroneous information provided by the declarant during the customs declaration of goods, or other violations may qualify under Art. 201-4 (subject to its inclusion in the Criminal Code of Ukraine). Given the lack of indications in the projected prohibition on the intent of the punished behavior or knowingly inaccuracy of relevant information, we agree with J. Bauman, who states that the proposed novels establish a wide field for "imagination" by law enforcement officers, who may see grounds for criminal liability under Art. 201-4 even in merely formal violations, when goods are imported into Ukraine" (Bauman, 2021).

4. Theoretical model of criminal law prohibition on smuggling of goods in Ukraine: basic principles

Thus, despite the obvious need to recriminalize commodity smuggling, Draft Law 5420 requires serious revision.

Next, we will try to outline the most general principles, which, as we hope, will help to create a more or less solid foundation for further research in the direction of the projected criminal law prohibitions content. In view of the provisions set out in the preceding paragraphs of the Art., we believe that such principles should be as follows.

First, the Criminal Code of Ukraine has a single rule (for example, the traditional Art. 201) on the regulation of liability for smuggling. This Article, given the inherent "outsourcing" nature of its structure, will not require permanent changes, and therefore will ensure stability and flexibility of criminal law regulation of relevant social relations. We consider as promising the option of increasing the punishment of smuggling specific items as the formulation of aggravated types of crime and the establishment of stricter sanctions for their commission compared to sanctions for "ordinary" (economic) smuggling.

However, we do acknowledge high probability that the legislator will ignore our proposal (as well as similar remarks of parliamentary experts) and support the relevant initiative of the Draft Law 5420 authors, thus continuing the course of criminal lawmaking in recent years to supplement the Criminal Code with special provisions. Under such scenario, we can offer only two recommendations, referral to which will at least partially reduce its negative consequences:

1) it is expedient to provide unified cost indicators of the corresponding crime establishing (in the considerable size) and aggravating elements (in the large or especially large amount);
2) the legislator should determine and be consistent in assessing, which previous criminal offenses should form the basis for the differentiation of criminal liability – simplyidentical (provided for "in this Art.") or homogeneous as well.

Second, with regard to items seized or restricted in civil circulation (drugs, weapons, cultural property, etc.), as well as other items, for which

special rules and restrictions for movement across the customs border of Ukraine have been established, liability for their smuggling may be provided for:

a) either in an Art. placed immediately after the rule on commodities smuggling (such approach is embodied, for example, in Art. 190-1 of the Criminal Code of Latvia);
b) or in an Art. placed between the norms on criminal offenses against public safety (a similar approach is tested in the Criminal Codes of Kazakhstan (Art. 286), Kyrgyzstan (Art. 270), Uzbekistan (Art. 246), Montenegro) (Art. 235-b, which deals exclusively with items of cultural value));
c) or, given the non-identity of the main direct objects, in different sections of the Special Part of the Criminal Code of Ukraine depending on the properties of the subject (for example: provision on smuggling of wood (potentially amber as well) – among the provisions on offenses against the environment; provision on smuggling of weapons, explosives, etc. – against public safety).

The most successful is, in our opinion, the first of the above-mentioned approaches.

Third, it is advisable, within the improved Art. 201 of the Criminal Code of Ukraine, to consolidate the use of knowingly false documents as an independent way of committing a crime, in favor of which the following arguments can be made: 1) in cases of "documentary" smuggling there is intellectual camouflage and, as a result, there is no physical concealment of objects illegally moved across the customs border; 2) Art. 483 of the Criminal Code, which defines the concept of "concealment from customs control", does not mention the documents, which establish the grounds for the movement of other items, as well as invalid documents, which can lead to gaps in the criminal law regulation of the relevant group of social relations; 3) in practice, the issue of distinguishing between documents, which constitute basis for moving items across the customs border and documents, which are necessary for customs clearance, but which do not establish the grounds for moving items across the customs border, is quite pressing. However, part of the "documentary" smuggling is already covered by such a method of its commission as concealment from customs control, which explains why it is advisable to indicate "other fraudulent use of documents or means of customs security" in the improved Art. 201 of the Criminal Code of Ukraine.

Conclusions

The research analyses conducted within this paper testifies to the urgent need to restore criminal liability for smuggling, the decision to decriminalize which in 2011 was premature and unfounded. The main arguments in favor of recriminalization of commodity smuggling are: the scale of the latter, which leads to non-receipt of huge sums of money in the budget; the ineffectiveness of other, distinct from criminal, types of legal liability for committing this encroachment and the difficulty of exposing the persons who committed the said smuggling within the framework of administrative proceedings without the application of operative-investigative measures; impossibility of effective cooperation with law enforcement agencies of foreign states, etc. The need for making the proposed decision is confirmed by the results of a comparative analysis, which revealed that legislation of most European countries (and them only) provides for criminal liability for such actions. At the same time, the method envisaged by the Draft Law 5420 to implement the idea of recriminalization of smuggling is extremely failed, therefore this document needs serious revision, in particular within the parameters discussed above.

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