

Is criminalization of commodity smuggling necessary?

Presentation of consultative and analytical work expert discussion

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PROJECT

SUPPORT OF THE PUBLIC INITIATIVE FOR FARE AND TRANSPARENT CUSTOMS

- aimed at increasing the capacity of civil society to participate in the development of economic policy in Ukraine
- focuses on the Public Initiative created by the IER in 2018
- the Initiative is an informal network of CSOs from different regions of Ukraine that care about improving the business climate
- the activities of the Initiative are aimed at monitoring the implementation of customs reform and promoting dialogue between government, business and other stakeholders on the implementation of institutional reform of customs in accordance with the principles of good governance and free trade.

GOAL

- draw public attention to the idea of criminalizing commodity smuggling
- to find out the attitude of the main stakeholders to the idea of criminalizing commodity smuggling
- to analyze the main ways to strengthen the responsibility for such actions and their possible consequences
- identify the main recommendations for the decision-making process on this issue

PREMISES

The work considers the main preconditions for the idea of criminalization of commodity smuggling, the history of the issue and the position of the main stakeholders, as well as analyzes the feasibility or inexpediency of such a step at the current stage of development of Ukraine

The work is prepared on the basis of information obtained from the Fifth Annual Survey of 1000+ exporters and importers, as well as information obtained during two advocacy campaigns in Volyn and Kherson regions, conducted to further study the attitude to criminalization of smuggling in some regions of Ukraine.

THE HISTORY OF THE QUESTION

1. Until 2012, large-scale smuggling in Ukraine entailed criminal liability
2. On November 15, 2011, the Verkhovna Rada agreed to decriminalize the relevant acts by adopting the Law of Ukraine № 4025 "On Amendments to Certain Legislative Acts of Ukraine on Humanization of Liability for Economic Offenses", which, inter alia, amended Article 201 of the Criminal Code of Ukraine
3. In the last few years, there have been proposals in Ukraine to criminalize smuggling. During 2017-2018, several regulations were registered in the parliament, which proposed strengthening the responsibility for such actions.

ABOUT THE CONCEPT OF SMUGGLING

Prior to the amendments to Article 201 of the Criminal Code in 2012, smuggling was considered “movement of goods across the customs border of Ukraine outside customs control or with concealment from customs control, committed on a large scale, as well as illegal movement of historical and cultural values, poisonous, powerful, explosives, radioactive materials, weapons and ammunition (except for smooth-bore hunting weapons and ammunition), special technical means of secret information, as well as smuggling of strategically important raw materials, for which the law establishes appropriate rules for export outside Ukraine.”

Smuggling of goods committed on a large scale was considered if their value is a thousand times or more than the non-taxable minimum income.

Smuggling also includes movement across the customs border of Ukraine outside customs control or with concealment from customs control of narcotic drugs, psychotropic substances, their analogues or precursors or falsified drugs - Article 305 of the Criminal Code.

ARGUMENTS FOR DECRIMINALIZATION

- the need for general humanization of penalties for economic crimes
- overestimated level of criminalization of offenses in the field of economic activity in Ukraine
- abuse by law enforcement agencies in prosecuting entrepreneurs and their negative impact on the activities of economic entities
- additional revenues to the state budget through the simplification of the procedure for bringing perpetrators to justice and more prompt confiscation of offenses into state revenue

References were also made to European practice, according to which responsibility for this type of crime had to be humanized.

All these arguments continue to be relevant today, and none of them has lost its significance!

EUROPEAN PRACTICE

On 5 July 2017, Directive № 2017/1371 was approved in the European Union, which stipulated that by July 2019 all EU Member States should establish, inter alia, a minimum criminal penalty for crimes committed by individuals that harm the EU's financial interests:

- 4 years in prison in case of significant harm or significant gain;
- another penalty that is not a criminal sanction if the damage / benefit was less than 10,000 euros.



THE HISTORY OF DECRIMINALISATION

Since 2012, movement across the customs border of Ukraine outside customs control or with concealment from customs control of goods (except for timber and drugs) is not smuggling and is not considered a criminal offense.

But since then, discussions about the correctness of such a step have not stopped.

Given the negative impact of smuggling on Ukraine's economy, there are calls for the resumption of criminal liability for such acts. And in the last few years such discussions have not only intensified, but also had a specific formalized manifestation in the relevant bills.



NON-OBVIOUSNESS IS OBVIOUS/ EVIDENT NON-OBVIOUSNESS

The answer to the question of whether a smuggler should be in jail is not as simple as it seems at first sight.

Who is a smuggler?

In which case should he be criminally responsible?

Who exactly and which responsibility exactly?

A responsibility for 3 bottles of vodka and 3 blocks of cigarettes?

Or for importing 10 blocks of cigarettes or a container of cigarettes?

Should smuggling be punished for 100 US dollars or for 100 thsd US dollars?

What if this amount is 99 998 US dollars?

Who will determine the amount of this smuggling and how?

And if the import was legal, but six months later the inconsistencies in the documents was found?

Is it a smuggle? Or not?....

CASE Ukraine expert Andriy Savarets in his article "Criminal unpunished smuggling" analyzed the register of court decisions and summarized the statistics of the system of criminal penalties for smuggling of all groups of goods operating until 2012:

So, before the abolition of criminal liability for smuggling goods, for the whole 2011 year:

3 people received real terms of imprisonment for smuggling goods

8 people were on probation

12 persons were commuted to a lesser sentence, including a fine (10 persons) and arrest (2 persons)

EFFECTIVENESS OF PUNISHMENT



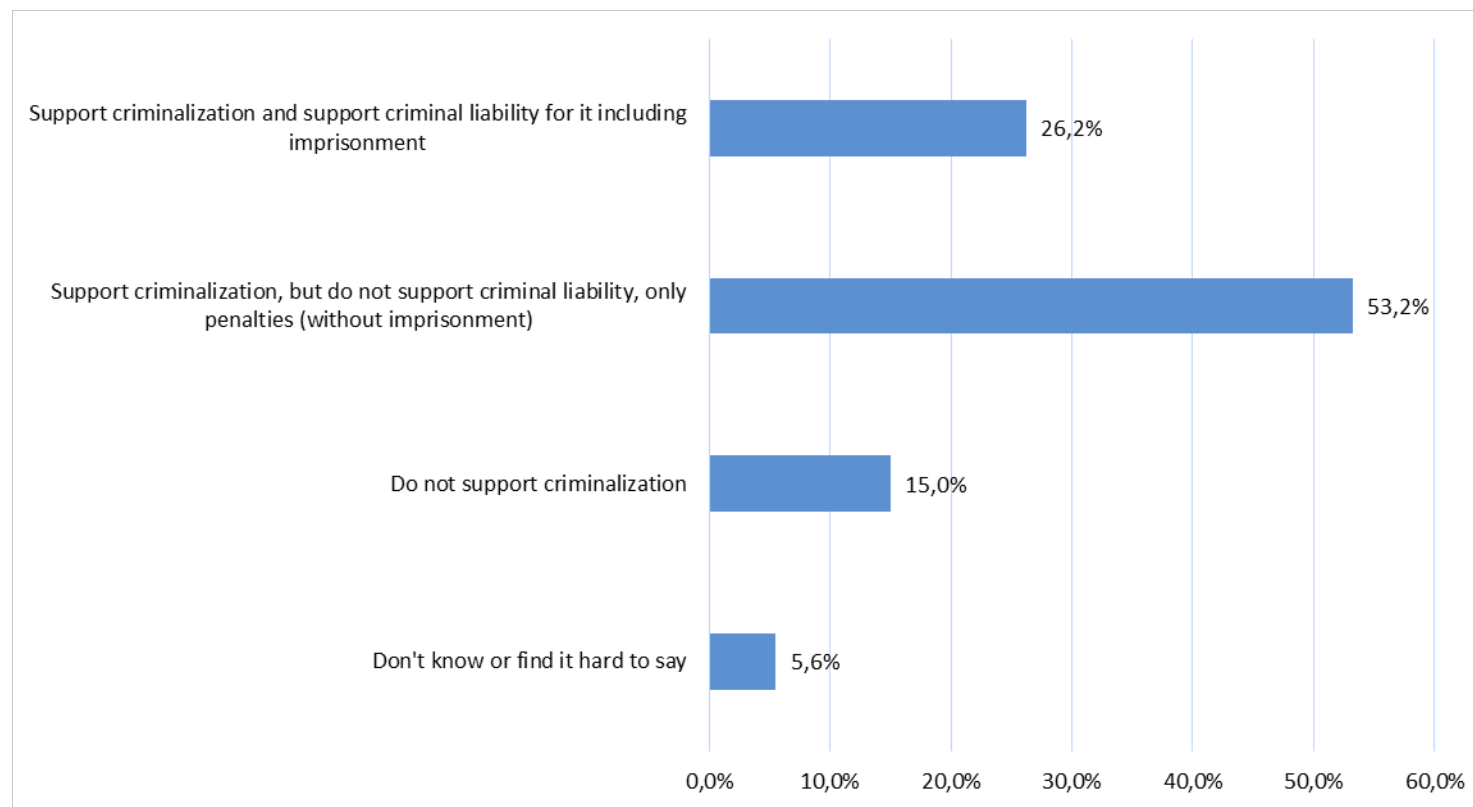
We used the diagram, that is given in the article of the CASE Ukraine expert Andriy Savarets "Criminal unpunished smuggling"

Source: <https://cost.ua/news/762-kryminalno-nekarana-kontrabanda>

RESULTS

Of the Fifth Annual 1000+ Survey Of exporters and importers

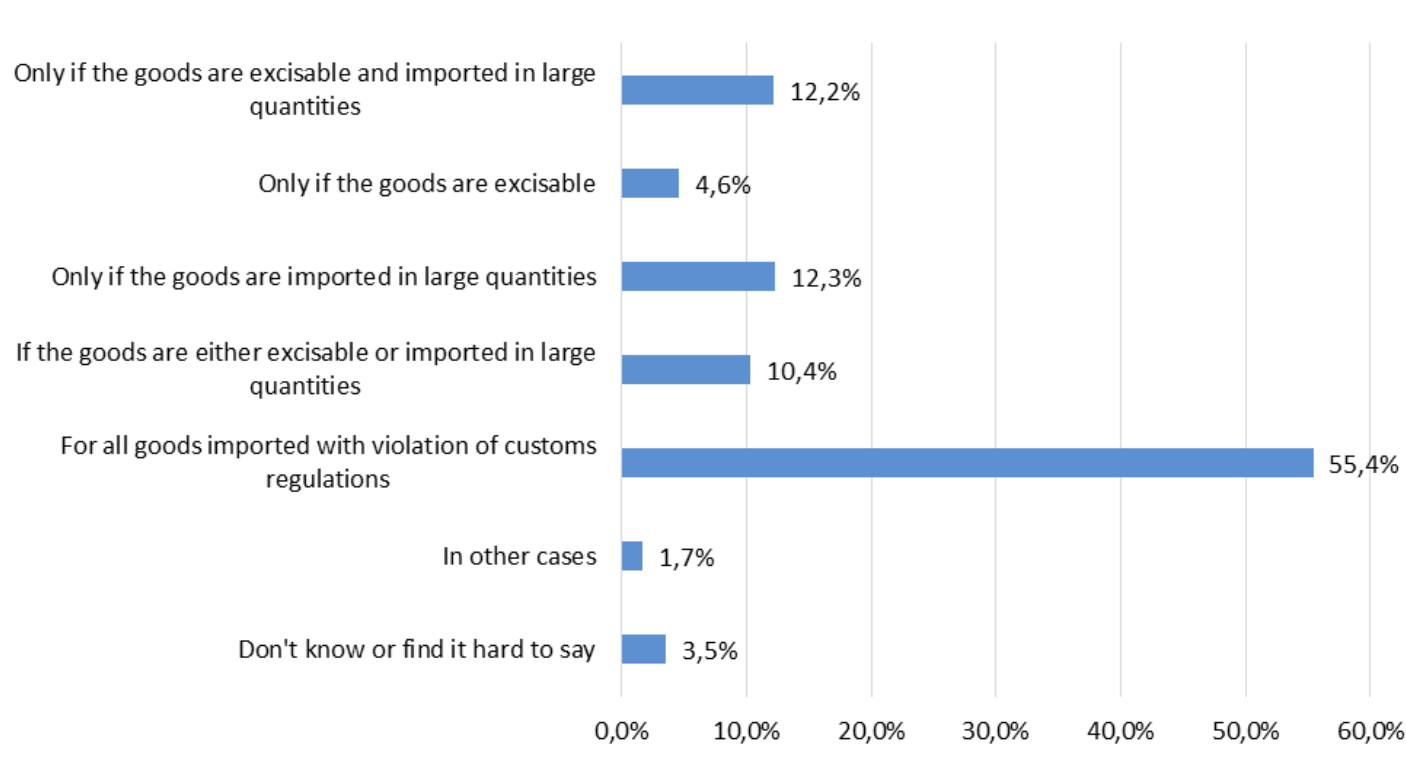
Support for criminalization of commodity smuggling, % of respondents



RESULTS

Of the Fifth Annual 1000+ Survey Of exporters and importers

Views on the grounds for criminalization of commodity smuggling,% of respondents among those who supported criminalization



RESULTS OF REGIONAL RESEARCH

1. Today, the state does not have enough tools to overcome commodity smuggling
2. The introduction of criminal liability for smuggling is necessary
3. It is important to be able to use alternative types of criminal liability for smuggling, but in the framework of criminal proceedings
4. The approach to solving the problem of smuggling should be comprehensive and include the following components:
 - *responsibility not only of the perpetrators but also of other accomplices in the smuggling*
 - *organization of information exchange with other countries*
 - *introduction of a full-fledged post-customs audit*
 - *improvement of technical equipment of customs and automation of processes*
 - *increase in salaries for customs officers*

CONCLUSIONS

1. Currently, the state does not have effective tools to overcome commodity smuggling.
2. There is a high level of support among key stakeholders for the need to strengthen liability for smuggling by introducing criminal liability for such acts.
3. At the same time, there is a widespread opinion among stakeholders that criminal liability should not be introduced in the form of imprisonment. Instead, it is proposed to apply other types of sanctions in the framework of criminal liability.
4. Effective fight against smuggling is impossible without an effective law enforcement and judicial system, as well as the use of the full range of customs instruments.

Criminalization of such acts alone without the introduction of other instruments in the customs sphere will not solve the problem.

1. Before deciding to introduce criminal liability for smuggling of goods, it is necessary to hold a broad public discussion on this issue with the involvement of all stakeholders to avoid making ill-considered decisions.
2. In dealing with this issue, attention should be paid to alternative sanctions to imprisonment for such an offense. Such sanctions, in particular, may be:
 - application of significant fines,
 - 100% confiscation not only of contraband, but also of contraband, including cars,
 - confiscation of all property,
 - ban on travel abroad, etc.

This approach will ensure both the potentially high effectiveness of the sanction and its humanity to the offender compared to imprisonment.

RECOMMENDATIONS

- The proposed approach is a compromise option that can combine the positions of supporters of increasing responsibility for smuggling and opponents of re-criminalization of such acts.
- In any case, the authorities should avoid hasty decisions and analyze the various options and their consequences.
- In the conditions of imperfect law enforcement system and existing problems in the judicial system of Ukraine, hasty criminalization will not only not solve the existing problem, but may contribute to additional corruption of export-import activities and increase the risks of law enforcement interference in business activities.



THANK YOU!



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