Administrative Penalties for Customs Infringements in Ukraine: Wandering Sideways

Sergiy Kivalov*

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*Doctor of Law, Professor, President of National University “Odessa Law Academy” (23, Fontanska Doroga, Odessa, Ukraine) https://orcid.org/0000-0002-4651-1805

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ABSTRACT

The effectiveness of customs enforcement is one of the critical issues of Ukrainian customs legislation. This is due to the emphasis on the fiscal functions of customs and the excessively high share of state revenue administered by customs authorities. Unlike other parts of the Ukrainian customs legislation, the issue of sanctions for customs infringements remains unharmonized and contains norms inherited from Soviet law. The lack of sanctions against legal entities, the differentiation between negligence and intention, and the disproportionate size of sanctions negatively impact customs enforcement. However, attempts to reform this field have not addressed these problems. The proposals to follow the experience of the EU member states, as a rule, do not consider the work being done to create the Union legal framework for customs infringements and sanctions.

The keywords: customs infringements, sanctions, administrative penalties, harmonization, the EU, Ukraine.
**Introduction**

Most modern customs legislation is harmonized with global and regional standards. At the same time, those parts which deal with penalties for violations of customs rules are entirely at the discretion of national legislators. Even within the EU, harmonizing customs infringements and sanctions remains a long overdue task of EU legislators (Muniz, 2018). On the one hand, this enables local specifics to a greater extent. On the other hand, this part of the customs legislation is frequently outdated and ill-equipped to meet modern challenges.

An essential feature of the Ukrainian customs system, which affects almost all its daily operations, is the emphasis on fiscal function. In 2021, Ukrainian customs authorities administered 38.44% of the total budget revenue. This included taxes such as:

(i) value added tax on imported goods (29.36%);
(ii) excise tax on excisable goods imported into Ukraine (6.14%);
(iii) import customs duty (2.84%);
(iv) export customs duty (0.1%) (Revenues of the state budget of Ukraine in 2021).

These taxes primarily apply to the real sector of the economy, production processes, exports, and imports, whereby the taxpayers are primarily companies. The revenues from these taxes in Ukraine demonstrated an increase in entropy until 2019. However, a significant and increasing negative entropy production occurred in 2019–2020, caused by the deepening of crisis processes in the real sector (Skorba et al., 2021). In addition, research suggests that a customs fiscal emphasis may cause a tax evasion gap, which is highly correlated with tax rates, the widespread practices of underreporting the unit values of imports, and mislabeling higher-taxed products as lower-taxed varieties (Fisman & Wei, 2004). For example, according to Tadesse (2022) “increasing taxes levied on a given product by 1% leads to an increase in import tax evasion...
by 1.12% and over 2% for products reported by both partners and entirely ‘missing imports,’ respectively.”

In aggregate, the problem has gained significant importance for the Ukrainian government. For example, in 2021, customs revenue and smuggling issues were under consideration by the National Security and Defense Council of Ukraine (NSDC) in the context of the main threats to the security of the State. Consequently, president Volodymyr Zelenskyy emphasized that smuggling may be compared to “economic terrorism,” calculating the total revenue losses of Ukraine due to smuggling at approximately $11 billion (Sorokin, 2021).

Therefore, assessments of Ukrainian customs authorities’ effectiveness primarily focus on their ability to resist customs infringements related to tax evasions. However, if we examine the administrative penalties for violations of customs rules imposed by Ukrainian customs authorities, one characteristic feature is noticeable. In most cases, the amounts of fines, and the cost of the goods subject to confiscation as stated in the decisions of customs officials, are up to ten times higher than the actual administrative penalties imposed after court appeals.

For example, according to the data of the State Customs Service of Ukraine in 2021, customs officials made decisions on 12,582 cases of customs infringements, and the imposed administrative fines totaled UAH 489 million (approximately $19 million). Another 9,046 administrative cases were referred to the courts because they involved confiscating goods. The total administrative penalties and the cost of goods subject to confiscation were claimed at UAH 2.8 billion ($1.02 billion). However, ultimately, the total amount of administrative fines and proceeds from the sale of confiscated goods totaled UAH 147 million (approximately 5.4 million). As is evident, most decisions to impose administrative penalties were subsequently either canceled or not enforced (Report on the implementation, 2022, p. 13).
This obvious inefficiency of customs enforcement led to a search for methods of solving the problem, following which two directions prevailed. First, several proposals were made to increase the liability for customs offenses, which was an expected move. Second, some actions were taken within the framework of public administration. Several of the measures from the second category can be considered fairly unconventional. For example, the application of legislation on sanctions against persons and enterprises suspected of being involved in large volumes of smuggling and tax evasion. Respective decisions of the NSDC were introduced by the President’s Decrees No. 140 of April 3, 2021, implementing NSDC decisions of April 2, 2021; and No. 169/2021 of April 21, 2021, implementing NSDC decision of April 15, 2021 “on the application of personal special economic and other restrictive measures (sanctions).” Those measures included freezing the bank accounts and assets of a dozen businessmen and removing more than a hundred customs officials from their positions.

It should be noted that many professionals questioned both the legitimacy and effectiveness of such measures. For example, according to the May 2021 Public Initiative’s “For Fair and Transparent Customs” survey, 55% supported imposing personal sanctions against smugglers, whereas 36% were opposed. In particular, opponents expressed concerns about selectivity and the lack of clear criteria for the imposition of sanctions. At the same time, even the proponents of these measures acknowledged that they were a sign of the weakness and inefficiency of state institutions. Only 20% indicated their effectiveness, whereas 38% were skeptical and 36% could not answer (Attitude to the Sanctions, 2021).

It is worth noting that eventually, the NSDC admitted the ambiguous effect of its sanctioning policy, confirming that despite a minor increase in budget revenues, there was information that
persons previously under sanctions had not stopped their activities completely (NSDC, 2021). This appears to be a typical issue of enforcement capacity regarding the state’s ability to control large borders or supply chains, which depends on its interaction with a small number of large-scale actors potentially tied to the formal sector (Gallien & Occhiali, 2022).

Therefore, the focus returned to proposals focused on increasing the effectiveness of customs enforcement. However, these not go beyond tightening penalties, including replacing administrative penalties with criminal ones. At the same time, the questions over the inefficiency of the existing customs enforcement system, particularly administrative penalties, remain unanswered.

**Methodology**

The analysis of the peculiarities of administrative responsibility for customs infringements is conducted based on the Customs Code of Ukraine (CCU), European Court of Human Rights (ECHR) decisions, and decisions by the Constitutional Court of Ukraine. In addition, the article reviews the pro and cons of using the experience of the EU member states to reform the sanctions imposed by Ukrainian customs legislation, considering the differences in general approaches to administrative sanctions in these countries. The main arguments are that the current Ukrainian legislation in this area has historically been designed for sanctioning natural persons for infringements rather than concerning international trade. This has led to its reduced efficiency and the disproportionality of sanctions if applied to business activities.

1. **Soviet legacy vs. modern standards: the unsolved dilemma of Ukrainian customs enforcement**

   After 1991, Ukraine proceeded to implement the customs codes of 1992, 2022, and 2012, each with numerous editions.
At the same time, the logic and main provisions of the sections on administrative penalties have undergone minimal changes, mainly concerned with correcting wording and increasing administrative fines. Moreover, the customs code of 1992 was merely a translation into Ukrainian of the previous customs code of the former USSR. Hence, Soviet era traditions still influence the Ukrainian system of administrative responsibility for customs offenses in many aspects, and this influence leads to at least three serious shortcomings.

First, the administrative penalties provided by the CCU ignore the liability issues of legal entities. Article 459 CCU provides that in cases where enterprises commit violations of customs rules, their officials are the subjects of administrative liability. This becomes an issue when administrative penalties can total 200% of the value of goods or 300% of the customs duties and taxes due to be paid, and the businesses concerned are those with multi-million imports or exports.

This issue was the subject of the case Krayeva v. Ukraine filed before the ECHR. The applicant, a customs clearance officer of a private company, was fined under Article 483 CCU for providing false data in the customs declaration in the amount equal to the value of the imported goods (EUR 48,661.56). The Court ruled that “the sanction imposed on the applicant, in particular the amount of the fine which she was ordered to pay... constituted a disproportionate interference with her property rights contrary to the requirements of Article 1 of Protocol No. 1 to the Convention.”

Furthermore, it should be noted that in sixteen EU member-states, direct customs penalties, fines, and the sanctioning of offenses are possible against legal persons (for example, in Austria, Denmark, Belgium, Luxembourg, the Netherlands, and Poland), whereas in another ten, there are options to make owners of businesses accountable (Weerth, 2013). Such legal constructions may be an example of a proper and proportional approach to the liability for customs infringements committed by business entities.
Second, and related to the first point, the Ukrainian approach to violations of customs legislation emerged from penalties established for natural persons and violations regarding their personal belongings. Hence, the respective provisions do not reflect the peculiarities of international trade and the functioning of modern supply chains. For example, Articles 472 and 485 CCU dealing with non-declaration or declaration of incorrect information do not distinguish between negligence and intention, which is a significant issue for customs brokers and freight forwarders who typically rely on information obtained from a consignor or consignee.

These circumstances were also assessed by the ECHR in the above-mentioned Krayeva case. The ECHR ruled (Para 26) that the wording of Article 483 UCC, “in the Court’s view implies the deliberate provision of false data and documents to the customs authorities by a declarant.” However, Ukrainian courts gave no consideration to the applicant’s arguments that she had provided the wrong data to the customs authorities by mistake, having overlooked the fact that the invoice sent to her by the seller had been incorrect, “a fact which raises doubts as to the lawfulness of the interference in question.” The issue was even further emphasized in the Concurring Opinion of Judges O’Leary and Mourou-Vikström, who pointed out (Para 4) that “questioned by the Court about the general interpretation and application of Article 483 § 1 UCC, the respondent State failed to provide details of relevant domestic case-law. Based on the information available to the Court, the impugned interference cannot be regarded as having been lawfully imposed.”

Third, Ukrainian administrative penalties make no distinction between approaches to cases of importation of prohibited goods on the one hand and, on the other, cases of procedural violations or different interpretations of the terms of the transactions, classification of goods, or completeness of information by customs
authorities and subjects concerned. In other words, Ukrainian customs enforcement does not distinguish between smuggling or shortcomings that emerge during daily business operations.

The latter feature of Ukrainian legislation was highlighted by the ECHR by ruling a violation of Article 1 of Protocol No. 1 to the Convention in Sadocha v. Ukraine concerning the confiscation of EUR 31,000 belonging to the applicant which he failed to declare at customs. The ECHR emphasized (Para 28) that despite the failure to declare the amount of cash, the important factors are that:

(i) the act of taking foreign currency out of Ukraine was not illegal under Ukrainian law;
(ii) the sum which could be legally transferred or, as in the present case, physically carried across the customs border was not, in principle, restricted to the time of the events if declared.
(iii) Those elements distinguish this case from certain others in which the confiscation measure is applied to goods whose import was prohibited or to vehicles used for transporting prohibited substances.

In aggregate, typical examples of the distorted application of administrative penalties for customs infringements in Ukraine include shifting responsibility from actual importers and exporters to customs brokers or freight forwarders. Furthermore, customs authorities and courts do not consider if the latter subjects relied on information obtained from importers and exporters and whether they have taken reasonable steps to verify such information.

Although the confiscation of goods subject to customs infringements is a liability of the goods’ owners, fines are typically imposed on employees and appear to be highly disproportionate, given that the amounts match the sum of customs duties or the value of the goods. In aggregate, such fines constitute a form of double taxation imposed on natural persons and appear to be an instrument of property deprivation rather than a method of ensuring compliance.
In addition, in many cases, the enforcement of such disproportionate fines proves to be fairly difficult given the amounts that explicitly exceed the median annual personal income in Ukraine and industry. This factor appears to be one of the elements causing the above-mentioned enforcement issues of customs penalties and the overall low efficiency of customs enforcement.

Unsurprisingly, a series of cases on respective UCC provisions were eventually filed before the Constitutional Court of Ukraine. For example, in 2021 the Court, in the case of the constitutional complaint of Odintsova, ruled that the provisions of Article 471 UCC, which established the mandatory confiscation of currency over EUR 10,000 for violations of the “green channel” rules, “do not provide a fair balance between the requirements of the public interest and the protection of property rights, and are not consistent with the rule of law.” Accordingly, these provisions were declared unconstitutional.

In 2022, the Constitutional Court of Ukraine, in the case on the constitutional complaints of Barseghyan and Linenko, ruled specific provisions of Article 485 CCU unconstitutional. Those provisions established liability in the amount of 300% of the unpaid amount of customs payments for declaring, for purposes of tax evasion, false information regarding the terms of the contract, weight or quantity, the country of origin, the sender or recipient of the goods, the code of the goods, or the customs value. The Constitutional Court emphasized that Article 485 CCU does not provide the desired flexibility in the actions and decisions of the state authority when determining the amount of the fine against the offender, considering all the circumstances of the case. Therefore... a fair balance between the requirements of the public interest and the protection of a person’s property right is not ensured,” which constitutes an excessive interference with the property right.
Hence, eventually, Ukrainian legislators faced the need to adjust CCU provisions on customs infringements. Unfortunately, respective bills were primarily focused on addressing the consequences, not the causes, i.e., legislators attempted to change the amounts of fines rather than clarify elements such as intention and negligence, the liability of legal entities and employees, the reasonability of relying on the information provided by clients, etc.

For example, amendments to Article 471 UCC excluded undeclared currency from confiscation and limited the amounts of fines. The same path was taken regarding Article 485 UCC when the respective bill proposed replacing the non-alternative sanction of 300% of customs duties evaded with an alternative ranging from 50 to 100% of the amount.

2. Approximation to the EU standards: wishful thinking and misinterpretation issues

As already mentioned, Ukrainian attempts to solve the problem of liability for customs infringements have typically included the criminalization of a more extensive range of customs infringements. It should be noted that currently in Ukraine, criminal liability is established for the smuggling of goods prohibited for importation or exportation, such as cultural heritage, poisonous substances, explosives, radioactive materials, weapons and ammunition, certain types of timber, etc. In addition, there is the possibility of criminal liability for tax evasion. However, most customs infringements are subject to administrative penalties.

Starting from 2019, the Ukrainian customs service has made several attempts to advocate for the “criminalization of goods smuggling,” appealing to the objectives of Europeanization. For example, proposals were made in the context of the development of integrated border management within the framework of the Decree of the Cabinet of Ministers of Ukraine “On the Approval of the Strategy of Integrated Border Management for the Period Until
2025,” of July 24, 2019, No. 687-r and the Decree of the Cabinet of Ministers of Ukraine “On Approval of the Plan of measures for 2020-2022 regarding the implementation of the Integrated Border Management Strategy for the period until 2025” of December 27, 2019 No. 1409. Ultimately, these Ukrainian proposals were included in Para 131 of the European Parliament resolution of February 11, 2021 on the implementation of the EU Association Agreement with Ukraine, which “urges the Ukrainian authorities to criminalise the smuggling of all goods as a crucial element of the integrated border management.” Subsequently, a respective bill was introduced to the Parliament by the President of Ukraine.

It is worth noting that this issue has been the subject of broad discussion among importers and exporters. Concerns have been raised regarding the vague wording of the bill, which may allow the possibility of bringing company declarants to justice for unintentional errors in customs declarations and will lead to the need for a 100% preliminary inspection of goods (Criminalization for Inaccurate Customs Declarations Can Harm Transparent Businesses, 2021). The concerns are particularly based on integrity issues within Ukrainian customs service which remain unsolved. For example, according to surveys for the National Anti-Corruption Strategy, Ukrainian businesses place tax and customs sectors in third place (32%) after judiciary (57%), and police and prosecution services (41%) concerning the major priorities in countering corruption (National Agency on Corruption Prevention, 2020, p. 5). The increase in the percentage of goods inspections also means that the Ukrainian “automated” customs risk management system “is not able to analyze the transport, shipping, and commercial documents required for customs control and customs clearance”; hence, it depends on the professional qualities and principles of customs officials (Fedotov & Zotenko, 2020, p. 89).

In addition, the same survey specifies the nature of customs enforcement problems, consisting of “law enforcement authority
interference in operation of the customs authority and abuse in the process of transfer of ‘signals’ on goods re-inspection” (National Agency on Corruption Prevention, 2020, p. 23). Therefore, giving additional enforcement powers to customs authorities or other law enforcement units may exaggerate existing integrity problems and informal practices among the agencies involved. The advocacy of the respective bill on the part of the customs service was more like a competition between different authorities for additional powers, again with reference to the European experience (Alisauskas, 2021).

Furthermore, enhancing liability for customs infringements may negatively affect compliance and transaction costs for importers and exporters. For example, according to Messina (2021), disproportionately strict liability may have two-fold consequences; on the one hand it puts importers under an uncertain liability regime which requires higher standards of proof; on the other hand it may lead to indirect discrimination between national and imported goods.

A disproportionate increase in enforcement measures runs the risk of impacting trade facilitation. Moreover, an increase in importers’ transaction costs, with unresolved integrity issues within the customs service, can increase the economic attractiveness of gray imports. In the first decade of the 2000s, the smuggling of, for example, consumer electronics in Ukraine was dramatically reduced due to the industry transition to the delivered duty paid (DDP) model (Maximov, 2016). Therefore, simplifying the customs procedures and, accordingly, a further reduction in transaction costs is critical to support legitimate business and further reduce the market share of goods imported with tax evasion or other infringements.

In the context of the “European experience,” the rationale for most proposals to increase liability in the field appears even more ambiguous as the current Ukrainian division between criminal and
administrative sanctions does not match those in the EU member states. Furthermore, whereas most EU member-states have a three-step sanction system in force – customs criminal sanctions, customs summary fines, and customs administrative sanctions – it is difficult or sometimes impossible to define the exact type of sanction “because in some MS the same offense is either seen as a criminal act or as a summary offense” (Weerth, 2013).

According to the EU Directorate General for Internal Policies survey, the principal difference between criminal and administrative sanctions for customs infringements lies in the jurisdiction. Criminal proceedings may lead to sanctions imposed by a criminal court; in contrast, non-criminal proceedings may lead to sanctions imposed by an administrative body, frequently the customs authorities themselves, which, if appealed, will be reviewed in a (non-criminal) court proceeding (Analysis and effects of the different Member States’ customs sanctioning systems, 2016, p. 26). Typically, the amount of evaded customs duties or the value of the goods subject to infringement constitutes a threshold which determines the type of sanctioning procedure. Furthermore, in some EU countries (for example in, Germany), the legislation does not recognize the terms “administrative offenses” and “administrative sanctions” as such, using other categories instead (Replies to Questionnaire on Administrative Sanctions, 2020).

Therefore, the mere fact that in some of the EU countries, the sanction for customs infringement is called criminal will not always mean that it is fundamentally different from the sanction that in Ukraine is called administrative. Moreover, in the already mentioned decision on the constitutional complaint of Barseghyan and Linenko, the Constitutional Court of Ukraine, citing the practice of the ECHR, recognized that the sanction of Article 485 UCC “in the form of a fine in the amount of 300% of the unpaid customs duties is comparable to a criminal punishment.” That is,
the amounts of administrative fines for customs infringements in Ukraine allow us to consider them identical to criminal penalties in the legislation of many other countries.

For example, the Customs Code of France, which does not provide any “administrative sanctions” at all, can serve as a classic example of the overlapping notions of “administrative” and “criminal” liability in different jurisdictions. The said Code establishes three types of criminal penalties for customs infringements: “contraventions,” “délits,” and “crimes.” Among these, the “contraventions,” which are very petty offenses punished only by fines (McKee, 2001, p. 13), are close to the Ukrainian understanding of administrative penalties. Such a conclusion is supported by virtue of thresholds between different types of sanctions for customs infringements. Due to the French legislation, the importation of goods omitting customs supervision or without submitting a declaration can be classified as a) “contraventions” if the goods are not prohibited for import or are not heavily taxed; or b) “délits” or “crimes,” if the relevant goods are prohibited for import or are highly taxed (Chatail, 2016).

At the same time, it appears that all Ukrainian plans to reform the national system of sanctioning customs infringements ignore long-going and complicated attempts to harmonize customs penalties in the EU member states. Those attempts can be traced back to 1998 and generate considerable debate (Lyons, 2018). Although the process in the European Parliament was put on hold, its legislative resolution of July 5 2017 provides a clue as to the basics of a possible Union legal framework for customs infringements and sanctions.

Firstly, the EU harmonization efforts appear to focus on ensuring the imposition of proportionate and dissuasive non-criminal sanctions for customs infringements, leaving the issue of criminal sanctions solely to member states’ discretion, subject to the nature and gravity of a particular violation.
Secondly, the backbone of the EU approach to customs sanctions is ensuring the liability of legal persons for customs infringements committed for their benefit as well as for lack of supervision or control, which has enabled the commission of such customs infringement.

Finally, sanctions should treat differently the acts or omissions that constitute customs infringements based on whether they are committed by negligence or intentionally. At the same time, clerical errors or mistakes should typically be excluded from liability.

Unfortunately, none of these basics can be found in Ukrainian customs legislation in force or proposals for its amendment. This again highlights the broader issue of preventing the effective harmonization of Ukrainian customs legislation with European standards. This problem consists of the unpreparedness of rule-makers and customs authorities to share certain concepts adopted at the EU or international level (Ostrikova, 2021, p. 83). Consequently, kinds of hybrid norms emerge that outwardly resemble international standards but, in practice, are ineffective or carry significant enforcement or corruption risks.

Conclusions

Several key positions can be distinguished when discussing further methods of developing Ukrainian legislation on administrative penalties for customs infringements. First, it is essential to finally overcome the soviet legacy approach to sanctions, which has proved outdated, disproportional, and ineffective. Second, a fairly obvious issue but one unfortunately overlooked by Ukrainian legislators in the main is that of ensuring compliance with trade facilitation obligations and providing a proper balance with the security of supply chains. Third, a thoughtful and careful approach to using foreign experiences of penalizing customs offenses is necessary. It should be remembered that today, this area is entirely unharmonized, and references to
the practice of other states should be made subject to a complete understanding of the features of the relevant legal systems. Finally, an important source is the ongoing process of creating the EU legal framework for customs infringements and sanctions. Developments in this process can help guide the direction of Ukrainian customs legislation reform. The latter is essential given the Ukrainian candidacy to join the EU.

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Ефективність правоохоронної діяльності є одним із актуальних питань митного законодавства України. Це пов’язано з акцентом на фіскальних функціях митниці та надмірно високою частиною державних доходів, що адмініструються митними органами. На відміну від інших частин українського митного законодавства, питання застосування санкцій за митні правопорушення залишається неузгодженим і містить норми, успадковані від радянського законодавства. Відсутність санкцій проти юридичних осіб, розмежування між недбалістю та умислом, непропорційність розміру санкцій негативно впливають на забезпечення застосування митного законодавства. Однак спроби реформувати цю сферу не вирішують зазначених проблем. У пропозиціях щодо наслідування досвіду країн-членів ЄС, як правило, не враховується робота, що проводиться зі створення правової бази Союзу щодо митних правопорушень і санкцій.

Ключові слова: митні порушення, санкції, адміністративні стягнення, гармонізація, ЄС, Україна.

Ківалов С. Административная ответственность за таможенные правонарушения в Украине: скитание по сторонам. – Статья.

Эффективность правоохранительной деятельности является одним из актуальных вопросов таможенного законодательства Украины. Это связано с акцентом на фискальные функции таможни и чрезмерно высокой долей государственных доходов, администрируемых таможенными органами. В отличие от других частей украинского таможенного законодательства,
вопрос о санкциях за таможенные правонарушения остается несогласованным и содержит нормы, унаследованные от советского законодательства. Отсутствие санкций в отношении юридических лиц, разграничение небрежности и умысла, а также несоразмерный размер санкций негативно сказываются на обеспечении применения таможенного законодательства. Однако попытки реформирования этой сферы не разрешили указанных проблем. В предложениях следовать опыту стран-членов ЕС, как правило, не учитывается работа по созданию союзной правовой базы для таможенных правонарушений и санкций.

**Ключевые слова:** таможенные правонарушения, санкции, административные взыскания, гармонизация, ЕС, Украина.