

Ukraine's Europeanization of Public Administration and Harmonizing Customs Legislation – Exploring a Pluralistic Approach

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ABSTRACT

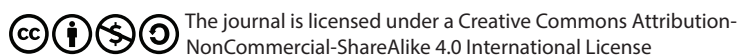
The article examines the application of the concept of legal pluralism to the interaction between the European Union (EU) administrative legal order and the administrative legal orders of associated or candidate States as part of the process of aligning national legislation with EU standards. This process involves multiple sources of integration obligations derived from the Association Agreement, accession negotiations, conditions for economic aid, administrative cooperation, and EU-funded modernization programs. The authors suggest that a pluralistic approach may provide associated or candidate States with a degree of flexibility in choosing specific scopes, models, and time frames to align their national legislation with EU laws. This can help to mitigate and offset the imbalance in States' relations with the EU resulting from the latter's normative dominance. At the same time, various sources can lead to conflicts between integration obligations and approaches to harmonizing national administrative rules and practices.

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Introduction

Between 2014 and 2024, Ukraine progressed from signing an Association Agreement (AA) with the EU to achieving the status of a candidate country. Although the AA emphasized the absence of accession prospects, effectively restricting Ukraine's association with the Deep and Comprehensive Free Trade Area (DCFTA), it imposed broad obligations on the public administration of the associated state. Article 14 of the AA outlines Ukraine's obligations to: (i) reinforce institutions at all levels, particularly in the areas of administration, law enforcement, and the administration of justice; (ii) strengthen the judiciary, improve its efficiency, and safeguard its independence and impartiality; and (iii) combat corruption (Association Agreement, 2014). That is, the AA/DCFTA contained numerous requirements for Ukraine to align its public administration with the rules and standards from various sources, within and outside EU law. For example, up to September 2020, Ukraine implemented 3,139 acts of different European organizations, comprising 21.3 % of the 14,712 acts of international organizations implemented into Ukrainian national

legislation (Radyshevskaya, 2020, p. 714). For Ukraine, the implementation of the AA/DCFTA has smoothly transitioned into the negotiation process for EU accession, meaning that the requirements for aligning Ukrainian public administration with EU administrative law are significantly expanding. Such alignment encompasses two major areas: core principles of good governance and the administrative procedures applied in individual policy areas (Cremona & Leino, 2017). This raises the traditional issue of the increasing complexity in legal life within European integration, characterized by the proliferation of normative orders, regimes, and systems, which are typically viewed through the optics of legal pluralism (Mac Amhlaigh, 2018). Regarding associate and candidate states, legal pluralism allows us to understand the interaction of the international legal order, the EU legal order, and the national legal order when Europeanizing national legislation. Furthermore, it enables asymmetric relationships between the EU and associate or candidate states to be explored. These relationships arise from the need to harmonize national legislation with sources of law that the state in question did not have a hand in creating.

Methodology

The paper utilizes the concept of EU legal pluralism to assess the potential conflicts and side effects that may arise when harmonizing general administrative law and laws that govern specific fields (as illustrated by customs legislation) during the process of an associated or candidate state fulfilling its European integration obligations. The first section explores the theoretical aspects of Europeanizing administrative law in connection with the concept of legal pluralism. The second section focuses on a case study of how Ukraine has implemented its obligations to harmonize customs legislation. This includes integrating the EU principles of good governance into the procedures of the national customs service.

1. Legal Pluralism and EU Administrative Law

The idea of legal pluralism being applied to the normative dimension of the EU is widely accepted. According to the original concept, legal pluralism occurs when people in a society recognize multiple sources of law within a particular social arena (Tamanaha, 2008, p. 396) or – which is more applicable to the EU case – the situation in which legal systems co-exist in the same geographical space (Twining, 2000, p. 228). In the EU, this theory is primarily focused on the resilience of the state as an autonomous juridical actor, complete with its own legal system, on the one side, and the finalité of the EU, with its increasingly state-like ‘constitutional’ credentials, on the other (Walker, 2018, p. 407). Thus, in the EU context, legal pluralism arises not only from the coexistence of multiple legal orders but also from their continuous interaction, which frequently leads to conflict. This implies that legal orders within the EU: (i) are interconnected, (ii) require some shared decision-making processes, and (iii) should have norms regulating the impact of one order’s norms and decisions on another (Kirchmair, 2018, p. 63). In other words, legal pluralism attempts to describe the coherence of those multiple legal orders within the EU due to the various bridging mechanisms established between the different legal and political institutions of these diverse sites of sovereign authority, as well as their capacity for harmonious mutual adjustment (Walker, 2005).

Furthermore, the concept of EU legal pluralism operates within the context of various global and international legal frameworks that bind both the EU and its member states. Therefore, EU legal pluralism is shaped by the concept of public law, which determines the boundaries of the EU legal order vis-à-vis the national legal order or vis-à-vis the international legal order (Zysset, 2015, p. 177). From a regulatory perspective, legal pluralism manifests in a multilevel system of rulemaking institutions that is networked due to the relations of coordination

and mutual arrangements. For example, Golia and Teubner (2021) observe such networks at the state, EU (regional), and global levels. Therefore, the pluralistic approach has proven to be well-suited to the complex interactions of global, regional, and national legal orders shaped by multiple entities at various levels with different jurisdictions and natures. Legal pluralism has also proven a reliable tool for mitigating potential tensions between global, supranational, and national legal systems, as well as between public and private rulemaking.

From the EU's perspective, pluralism can address numerous EU-specific issues, such as the EU's 'legal supremacy,' which is frequently criticized for distorting relations with the Member States and for the hierarchical and administrative bypassing of national democratic procedures (Bohman, 2004). It has also resulted in national resistance to EU law, which has been felt in national political and administrative processes (Cruz, 2008, p. 419). A pluralistic approach can also somewhat mitigate the asymmetric relations between the EU and associated states where the latter 'are excluded from the EU's decision-making sites, but not from the effects of the EU's decisions' (Eriksen, 2018, p. 991).

In the literature, two major pluralistic approaches are typically identified for understanding the relationship between different legal orders within the EU. The heterarchical approach recognizes the equal plausibility of claims to ultimate legal authority within their respective fields for both supranational and national legal orders. However, their autonomy is not complete as social systems cannot exist in isolation from their environment. On the other hand, the hierarchical approach views the relationship between the legal orders of the Member States and the supranational EU legal order as featuring the mutual recognition of the autonomy of both systems, subordinated to the overall rules and principles of international law, thus providing a solution to possible conflicts (Avbelj, 2006, p. 385). The pluralist approach to the EU law relies on a 'validation rule' or 'rule of recognition.' This rule establishes a specific source of law that applies to specific cases within a Member State's legal system and has the authority to override any other competing source of law. However, within the EU, these rules may vary on a case-by-case basis as courts may interpret the supremacy of particular sets of rules differently (Barber, 2006). The common aspect of any 'rule of recognition' involves the aforementioned mutual recognition of legal orders and their relationship (Dickson, 2012, p. 30–31).

In practice, the 'rule of recognition' is influenced by the general EU political values of diversity and pluralism. These values acknowledge that EU member states are interconnected while also maintaining their own unique identities (Wolthuis et al., 2023, p. 5). Hence, the concept of the 'rule of recognition' extends beyond legal documents and frequently involves arrangements within the political sphere. MacCormick (1995) proposed a general framework for applying the pluralistic approach to conflicts between different legal systems within the EU, which is based on the following four basic ideas:

- (i) The doctrine of supremacy of EU law does not universally subordinate Member State law to EU law.
- (ii) The legal systems of the Member States and the common EU legal system are separate but interconnected legal systems.
- (iii) Each legal system is a source of valid law within its context and relevant range of topics, superior to other sources recognized in a specific Member State.
- (iv) Criteria of validity in a 'rule of recognition' are inherently ranked in a hierarchical order.

Although the initial pluralist theory of EU law was initially constitutional in nature, it has since expanded to more effectively address contemporary issues. This includes addressing the chronic difficulties related to the concept of 'Unity in Diversity' by considering and reconciling all the various sources of the European legal order (Walker, 2018). The relationship between

EU administrative law and the Member States and Associated States' national administrative law can be viewed similarly. This also arises from the traditional perception of administrative law in European countries as a concretized constitutional law, which is a common feature of European administrative legal orders (Wollenschläger, 2017). Hence, the EU 'administrative' legal pluralism largely follows the 'constitutional' one.

The issue of conflicting sources of law is less apparent in the interaction between the EU's administrative legal orders and the administrative legal orders of its Member States. This is due to the limited presence of *acquis communautaire* in the public administration domain (Matei et al., 2010). However, close cooperation between different supranational and national authorities is constraining the administrative autonomy of the EU Member States (Trondal, 2020, p. 121). In addition, the entire composition of the EU administrative law mandates its interference with the administrative legal orders of the Member States. Whereas the EU administrative law builds on certain core principles of good administration included in the EU Treaties and the Court of Justice of the European Union (CJEU)'s case law, these provisions are supplemented by more current secondary legislation for specific issues and by older policy areas within which administrative procedural rules began to develop in the 1960s–1970s (Cremona & Leino, 2017). Consequently, many aspects of the implementation of EU policies involve the indirect application of EU administrative law by the national administrative authorities under the scheme known as the 'union of composite administration' (Handrlica, 2020, p. 102). In addition, EU secondary legislation must govern administrative pluralism to realize the common economic and legal area (De Lucia, 2012). This also results in significantly increased overlap of competences and mutual impact between governments and mutual impact between the EU and national level authorities (Schakel, 2020). To effectively implement EU policies, the national administrative laws of Member States must align with the core rules and principles of EU administrative law, such as good governance standards. However, there remains a pluralistic aspect as these common standards are less well-defined and straightforward than the provisions of EU legislation in exclusive competence areas. Therefore, these standards are considered 'semi-harmonized' (Chamon, 2012). In aggregate, the EU administrative law establishes standards for Union authorities and its Member States.

Furthermore, on multiple occasions EU administrative law makes explicit demands toward third countries, whether through EU external action, neighborhood policies, or procedures for candidate states. Similar standards toward the same subjects can simultaneously arise from international law and even from Member States' national laws within horizontal interactions. Therefore, the EU administrative space and its associated countries become an arena for relationships between principles of different legal orders (von Bogdandy, 2014).

At this point, pluralism plays an even more important role as the states involved in association with the EU or accession negotiations must clearly accept the hierarchical style of relations with the EU (Austers, 2016, p. 19). This includes taking on obligations to meet respective conditions, aligning national legislation with EU laws, and granting the EU authority to evaluate the fulfillment of these obligations.

A pluralistic approach can help to balance the asymmetric relationship between the EU and associated or candidate states. As noted earlier, these countries 'are excluded from the EU's decision-making sites but not from the effects of the EU's decisions' (Eriksen, 2018, p. 991). Associated or candidate states and their citizens have no representation in the EU rule-making process yet are subject to said rules. In this case, national rule-makers are a mere proxy between the EU and national legal orders. However, discretion is provided by the choice between different sources of law (e.g., various models for implementing EU rules) as well as varying priorities, volumes, and time frames of alignment to such sources. Pluralism,

manifested in the EU's concept of differentiated integration, involves utilizing a mix of incentives and consequences to advance its external policy. This approach accelerates efforts towards alignment with the EU through the promise of participating in advanced structural cooperation, seen as beneficial to a state, as well as the possibility of being excluded from a higher level of integration (Neve, 2007, p. 512). Diversity in this context allows an associated or candidate state to select specific sets and priorities for recognizing rules. This enables the state to specify the areas, extent, and particular sources of EU law applicable to its national legal system.

2. Ukraine's Administrative and Customs Reform: Legal Pluralism Unfolding

Ukraine submitted its application for EU membership on February 28, 2022. On June 23, 2022, the European Council decided to grant Ukraine the status of a candidate country (European Council, 2022). This, among other things, significantly shifted the issue of the relationship between different legal orders toward Ukraine since Article 49 of the Treaty on European Union (TEU) explicitly demands that candidate countries comply with the basic principles of Article 2 TEU. This demand has proven a catalyst for democratic reforms in all previous accession cases (von Bogdandy, 2014). In practice, this means going beyond the EU-Ukraine Association Agreement, including a Deep and Comprehensive Free Trade Area (AA/DCFTA) that has already captured a substantial part of the EU *acquis* (European Commission, 2022a). The EU-Ukraine Negotiation Framework (European Council, 2024) establishes three main areas, which are used to measure its progress:

- (i) Meeting the Copenhagen criteria for membership, which includes stable institutions that guarantee democracy, a functioning market economy, the ability to handle market forces within the Union, and the ability to take on the responsibilities of membership.
- (ii) Fulfilling Ukraine's obligations under the AA/DCFTA and making progress in addressing the key areas identified in the Commission's reports and relevant Council conclusions (Para 5).
- (iii) Maintaining Ukraine's commitment to maintaining good relations with neighboring EU Member States and other enlargement partners (Para 6).

In essence, the focus here is on three separate sets of norms and obligations that Ukraine must adhere to during the negotiations for joining the EU. These include the criteria established during the negotiations based on the Copenhagen criteria, those that currently exist or might emerge within the framework of the AA/DCFTA, and those that result from bilateral relations with neighboring EU countries. Due to the Negotiations Framework, the latter operates both through the accession negotiations process (Para 17) and through bilateral agreements (Para 40).

The issue is extremely relevant to administrative law. The AA/DCFTA has already cited the good governance principle among the general principles. The agreement includes a statement of commitment to common values, including respect for democratic principles, the rule of law, and good governance in the Preamble. Article 3 of the agreement stipulates that recognition of the rule of law and good governance is central to enhancing the relationship between the Parties. Indicatively, the Commission's opinion on Ukraine's application for membership included a specific section on public administration reform within the Political Criteria (European Commission, 2022a). This section emphasized Ukraine's achievements, including the strategic framework for such reform, public service delivery, e-government, public financial management, public service and HR management, policy development and coordination, and accountability. Similarly, public administration reform is mentioned among the fundamental commitments in Para 4 of the Negotiation Framework adopted by the EU regarding Ukraine's accession (European Council, 2024).

At the general level of public administration, referred to as 'fundamentals' by Annex II of the Negotiation Framework, the candidate state needs to align with 'principles' (i.e., make this level semi-harmonized). Notably, Ukraine is tasked with developing a transparent roadmap for public administration reform through meaningful consultations with all relevant stakeholders, including civil society (Para 41). This means that, on the one hand, Ukraine has broad discretion to determine how it aligns with basic EU principles in this area; but on the other hand, requiring 'meaningful consultations' involves a wider range of participants in determining the trajectory of such alignment.

However, the problem appears even more multifaceted when specific areas of public administration are considered. Specific areas are covered by negotiation clusters (Internal market; Competitiveness and inclusive growth; Green agenda and sustainable connectivity; Resources, agriculture, and cohesion) and require the implementation of EU substantive law, which includes specific procedures to ensure the proper application of this law by national authorities. As per the Negotiation Framework (Para 51), the Council will consider the enhancement of administrative capacity within the relevant clusters and their component chapters when making decisions to open clusters and close chapters. Hence, the reform of public administration in Ukraine is assessed within specific accession negotiation clusters and may be subject to more extensive requirements. These requirements could be expanded regarding sources of rules and subject areas.

Such a situation already exists within the framework of Ukraine's implementation of the AA/DCFTA. The most significant example is the harmonization of customs legislation as the Europeanization of administrative rules in this area is the most extensive due to the crucial role of the Customs Union in the Community's history.

One example is the establishment of fundamental principles of public administration in specific policy areas through the interaction of EU law and international legal standards. This typically occurs when Ukraine's obligations within the AA/DCFTA explicitly refer to other international legal instruments. For example, Article 79 of the AA provided that the customs valuation of goods in trade between the EU and Ukraine shall be governed by the Agreement on the Implementation of Article VII of GATT 1994 (Valuation agreement), whose provisions are part of the AA. However, it is important to note that the Valuation agreement includes various rules that outline the requirements for specific procedures. These rules cover the alignment of judicial decisions and administrative rulings with Article X of GATT 1994 (Art. 12) and importers' right to receive a written explanation from the customs administration regarding how the customs value of their goods was determined (Art. 16).

Another example are the additional commitments that emerged during the negotiations for implementing the AA/DCFTA but that extend beyond the scope of this agreement. For instance, the European Parliament (2021) Resolution on the AA implementation included several customs-related provisions (Para 131). It called for the full operationalization of the Authorized Economic Operator (AEO) system and New Computerized Transit System (NCTS), which were Ukraine's obligations under the AA. However, it also urged the Ukrainian authorities to promptly appoint new management for the State Customs Service of Ukraine (SCSU) through a transparent and unbiased public selection process and to criminalize the smuggling of all goods. The two latter requirements were clearly beyond the scope of the AA. It is possible the reform of SCSU management could be related to the alignment to the EU-level administrative and good governance standards or at least placed within the efforts to strengthen Ukraine's credentials as a natural customs partner on the EU's eastern frontier (Kormych et al., 2024). However, long running and complicated attempts to create the EU legal framework for customs infringements and sanctions have been on hold since 2017

(Kivalov, 2022). Furthermore, although the 2023 European Commission proposal to reform the Union Customs Code introduces some harmonization, it only establishes the minimum non-criminal sanctions applicable to customs infringements (Pickett & Wolfgang, 2024). Hence, the EU's demands toward Ukraine appear far outside the Union's competence. Nevertheless, Ukraine has changed the respective penalties from administrative to criminal within the AA implementation framework.

In addition, Ukraine is also involved in activities within several EU program documents, specifically focused on drafting future amendments to legislation, procedures, and practices. For example, in 2022, the EU signed two agreements with Ukraine on Ukraine's participation in the EU's 'Customs' and 'Fiscalis' programs (European Commission, 2022b). In particular, under the 'Customs' program (European Parliament and Council, 2021), Ukraine can take part and contribute to the goals of supporting the preparation and consistent implementation of customs legislation and policy, customs cooperation, and innovation in customs policy, 'unless Ukraine's participation is deemed inappropriate based on the nature or content of the activity.'

Finally, Ukraine's obligations toward the Europeanization of both general principles of public administration and specific areas may also originate from sources outside the EU–Ukraine arrangements. For example, the 2024 Memorandum between Ukraine and the International Monetary Fund (IMF) includes Ukraine's obligations to modernize its customs code regarding the 'alignment with EU legislation, continued subordination of SCSU to the Ministry of Finance, strengthening personnel integrity, and a merit-based and transparent process for leadership selection with integrity checks and with the meaningful participation of experts with international experience' (IMF, 2024, p. 17).

Furthermore, the Europeanization-related rulemaking processes in Ukraine can be influenced by different foreign and non-governmental actors who receive funding through grant programs from the EU and other donor countries. The EU specifically welcomes and endorses this type of 'EU-funded programs providing support for modernization.' They function 'both through sectoral grants and as conditions in EU macro-financial assistance programs.' (European Parliament, 2021). That is, in many cases, Ukrainian authorities must carry out reforms in collaboration with specific EU-funded programs as a condition for receiving EU financial aid. Hence, representatives of these programs have a direct impact on the development of Ukrainian laws and regulations.

For example, the Public Finance Management Support Programme for Ukraine (EU4PFM) is jointly financed by the EU, the Swedish International Development Cooperation Agency, the World Bank, and the IMF (Openaid, n.d.). The Central Project Management Agency from Lithuania implements the EU4PFM (CPVA, n.d.). Its partners in Ukraine include the Ministry of Finance, the Ministry of Economy, the State Tax Service (STSU), the SCSU, and the Accounting Chamber. In particular, the EU4PFM contains components such as 'revenue mobilization,' which focuses on modernizing the Ukrainian tax collection system, and 'horizontal functions and governance,' which aims to enhance the capabilities of public financial management institutions. The international experts hired by the Central Project Management Agency (CPVA) provided 'assistance with drafting, consultations and recommendations' on multiple amendments to Ukrainian customs legislation which partially aligned with the EU Customs Code, implementation of the Common Transit Procedure, NCTS, AEO, financial guarantees, etc. (EU4PFM, 2024). Currently, the Ministry of Finance has set up expert teams to draft the new Customs Code of Ukraine. These teams comprise representatives from the Ministry of Finance, the SCSU, and experts from EU-funded projects. Specifically, the EU4PFM and the Reform Support Teams (RST) of the Ministry of Finance and the SCSU are involved (Ministry of Finance, 2024).

The participation of representatives from such programs in drafting laws and regulations or making organizational decisions has been evident on multiple occasions. For instance, because the Lithuanian CPVA manages EU4PFM, the joint transit procedure was implemented using the NCTS software from the Lithuanian Customs, localized with support from EU4PFM (SCSU, n.d.). Overall, the adaption of Ukrainian customs legislation to the EU rules heavily relies on Lithuanian experience as most international experts involved in the CPVA possess this background.

In addition, in many cases, the logic of reforming Ukrainian legislation is replaced by the logic of the implementation of grant projects, affecting the former process's effectiveness and consistency. For example, the Law 'On amendments to the Customs Code of Ukraine and other laws of Ukraine regarding some issues of implementation of chapter 5 of section IV of the Association Agreement' No. 2510-IX dated July 15, 2022, introduced 32 new articles regarding decisions made by customs authorities and the appeal procedure. However, these changes did not consider that simultaneous to this, the parliament was finalizing the draft law 'On Administrative Procedure,' which set out general rules for all administrative authorities to follow when making administrative decisions. Hence, the issue of alignment between these two acts arose almost immediately. Moreover, the Commission viewed the 'Law on Administrative Procedure' as key to service delivery and essential for developing the right to good administration. The Commission urged Ukraine to avoid creating exceptions to the application of this law, particularly in the area of taxation (European Commission, 2023).

On August 22, 2024, the Parliament passed Law 'On making changes to the Customs Code of Ukraine regarding the implementation of some provisions of the Customs Code of the European Union,' a 140-page piece of legislation developed with the assistance of EU4PFM. This law introduces changes to over 250 articles of the current Customs Code. It will take effect six months after its publication, in the first half of 2025. Simultaneously, developing an entirely new Customs Code has already commenced following the roadmap established jointly with the same EU4PFM. This new Code is anticipated to be adopted by the end of 2025 (Ministry of Finance, 2024). Such a frequent change in customs legislation might raise some concerns as completely overhauling the Customs Code and related regulations twice within a short time frame appears questionable from a practical standpoint.

Conclusions

As this research has demonstrated, the expansion of Europeanization into public administration leads to more sources of obligations for aligning an associated or candidate state's legislation, as well as an increase in the number of subjects influencing the rule-making process. In the context of Europeanizing administrative law, pluralism arises not only from the various sources of applicable law within the EU, but the indirect application model of most EU administrative laws also affects associated or candidate states. This requires them to adopt specific procedures or best practices from individual EU Member States to establish a comprehensive set of rules for enacting and effectively applying national legislation that aligns with EU standards. The non-exhaustive list of such sources includes agreements signed within the framework of European integration, acts of EU law, international instruments, political arrangements within negotiation processes, norms and practices of the EU member states taken as a model for legislative approximation, and outcomes modernization assistance programs, etc. This results in a complex hierarchy of obligations, sources of law, and numerous rules of recognition that determine the choice of one source of law over another for a specific situation. Two key patterns can be identified in the Europeanization of the public administration of an associated or candidate state. In the realm of general administrative law,

the process is largely guided by shared principles and other soft law sources, allowing for less strict recognition requirements and the coexistence of multiple sources in most cases. However, in areas of public administration that implement specific policies, the requirements are more rigorous, mandating full compliance at the level of particular rules and procedures.

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Кормич А., Завальнюк В., Тодошак О., Ульянов О. Європеїзація державного управління в Україні та гармонізація митного законодавства – дослідження плюралістичного підходу. – Стаття.

У статті розглядається застосування концепції правового плюралізму до взаємодії між адміністративним правопорядком Європейського Союзу (ЄС) та адміністративно-правовими порядками асоційованих держав або держав-кандидатів у рамках процесу узгодження національного законодавства зі стандартами ЄС. Цей процес охоплює значну кількість джерел інтеграційних зобов'язань, що впливають з Угоди про асоціацію, переговорів про вступ, умов економічної допомоги, адміністративної співпраці та програм модернізації, що фінансуються ЄС. Автори припускають, що плюралістичний підхід може надати асоційованим державам або державам-кандидатам певну гнучкість у виборі конкретних сфер, моделей і часових рамок для приведення національного законодавства у відповідність до законодавства ЄС. Це може допомогти пом'якшити та компенсувати дисбаланс у відносинах держав з ЄС, що є наслідком нормативного домінування останнього. У той же час різні джерела можуть призвести до конфліктів між інтеграційними зобов'язаннями та підходами до гармонізації національних адміністративних правил і практик.

Ключові слова: правовий плюралізм, публічне адміністрування, євроінтеграція, політичні домовленості, адміністративне право, митне право, Україна.