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### **THE SMUGGLING OF TOBACCO PRODUCTS IN EUROPE: CRIMINOGENIC POTENTIAL CAPACITY**

**Stanislav Filippov**

**Associate Professor, Ph.D.; Lieutenant Colonel of Justice  
The National Academy of the State Border Guard Service of Ukraine (Ukraine)**

**Contact information**

Address: Shevchenko st. 46, Khmelnytsky, Ukraine

Phone: (+38) 0382 65 62 30

E-mail address: nadpsu@i.ua

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**ABSTRACT**

The article sets out the results of a research of the criminogenic potential capacity of cigarette smuggling. The article provides an analysis of the criminological connotation of the criminogenic potential capacity of tobacco products smuggling and presents the characteristics of the Ukrainian peculiarities of this pan-European problem. The article presents a view of the dynamics and geographical features of countering cigarette smuggling in Europe, regarding the use of FRONTEX (European Border and Coast Guard Agency) and the national border authorities. The article conveys the nature and consequences of the interrelation of cigarette smuggling and cross-border crime, and it identifies the ways to counteract this phenomenon in the context of the harmonization of the policies of different countries and the EU in the relevant sphere. Additionally, the article covers the reasons for the legislative trends in the criminalization of the excisable goods smuggling.

**KEYWORDS**

Cross-border crime, customs border, criminology, cigarettes, criminalization, tobacco smuggling

## INTRODUCTION

In the current situation, the illegal movement of tobacco products across the customs border is an extremely interesting type of shadow economic activity in terms of criminology. Of course, it entails (at least in Ukraine and some other states) not criminal, but administrative responsibility, provided for the violation of customs rules. However, according to the European Anti-Fraud Office (OLAF) estimates, the illicit trade in tobacco products leads to an annual financial loss of more than 10 billion euros in the budgets of the European Union and its member states. These are the losses from unpaid customs duties, taxes and excises. The illicit trade in tobacco is not only an economic problem. In addition to the significant damage to the incomes of EU member states, the illicit trade feeds the shadow economy and cross-border crime.

The illicit trade in tobacco covers various forms, which include:

- smuggling of tobacco products (of legal tobacco brands),
- smuggling of counterfeit cigarettes,
- shadow production and distribution of cigarettes within the EU (with delinquency in payment of customs duties, VAT and excise taxes).

The illicit trade in tobacco products, of course, is not exclusive to the EU – it is a global problem. Adoption of the Protocol to the WHO Framework Convention on Tobacco Control aimed at countering the problem of illicit trade in tobacco products by 176 States members of the World Health Organization is the proof of this fact.<sup>1</sup>

At the same time, the recognition of this type of activity is “the most profitable <for> international criminal groups ... having a global cross-border character, rapidly developing and adapting to new circumstances, using cheap and widely available new technologies,” testifies to its inclusion in the field of criminological policy.<sup>2</sup> Suppression of this offense is always one of the most important goals of the border and customs authorities of all European countries, the goal of joint international operations under the auspices of FRONTEX, as well as the daily operational and service activities of the national law enforcement agencies on the state border. We believe that this offense is underestimated (it, of course, concerns its consequences) and this is precisely why it periodically faces the expediency of economic smuggling criminalizing in the practical scope (at least in

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<sup>1</sup> *The Protocol to Eliminate Illicit Trade in Tobacco Products (the first protocol to the WHO Framework Convention on Tobacco Control (WHO FCTC)*, 12 November 2012 // [http://apps.who.int/iris/bitstream/10665/80873/1/9789241505246\\_eng.pdf?ua=1&ua=1](http://apps.who.int/iris/bitstream/10665/80873/1/9789241505246_eng.pdf?ua=1&ua=1) (‘FCTC Protocol’).

<sup>2</sup> *Strategy to counteract the illicit production and circulation of tobacco products for the period to 2021. Approved by the order of the Cabinet of Ministers of Ukraine, August 23, 2017, no 570-p // <https://www.kmu.gov.ua/ua/npas/250225276>.*

relation to excisable goods). A whole series of criminological issues become contemporary in this connection.

We were encouraged to include the smuggling of tobacco products (the term is used in the World Health Organization's Framework Convention on Tobacco Control and the Strategy for Countering the Illicit Production and Trafficking of Tobacco Products)<sup>3</sup> into the subject area of the research on cross-border crime by the publication of L. Shelley on this issue<sup>4</sup>. At the same time, this set of ideas, of course, is not new for researchers. In particular, the works concerning the research to any extent have recently been published by N. Passas, M. Maltz, H. Edelhertz, S. Carrera, L. Den Hertog, D. Merriman, L. Joosens, K. Cote-Boucher, J. Kagan, B. Golovkin, N. Orlovskaya, V. Shakun and many other scientists. The scientific statements developed by them form the theoretical basis of our research.

Attention should be drawn to the fact that the vector of the research on problems related to the illegality of moving tobacco products across the border is mainly aimed at reducing the economic harm from this illegal activity. We see in this a certain underestimation of the criminological potential capacity of this activity and believe that there are a number of other criminological aspects that deserve the focused attention of the research community.

Based on this, the research goal is to explain the tendencies that determine the linkage of the illegal movement of tobacco products across the border to cross-border crime, the consequences of such linkage, and the applied goal is to formulate ways to counteract this phenomenon. The associated theoretical goals of the article are to define the essence of such a criminologically significant phenomenon as "shadow' economic cluster genesis" and substantiate the concept of "polymorphism of cross-border crime".

We use those methods upon which the researchers reached consensus concerning their validity and reliability and which collectively constitute criminologically significant information, sufficient and necessary for the formulation of recommendations on countering cigarette smuggling. More specifically the methods are as follows: statistical method (the study of analytical reports of the subjects of countering crime, international organizations, such as FRONTEX and international audit organizations, such as KPMG), analysis of specific cases materials, expert rating, and structural and functional analysis in order to substantiate the concepts.

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<sup>3</sup> WHO framework convention on tobacco control, 2003 // [https://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](https://www.who.int/tobacco/framework/WHO_FCTC_english.pdf).

<sup>4</sup> Louise Shelley, "A Hazy Crisis: Illicit Cigarette Smuggling in the OSCE Region" (2017) // <https://www.csce.gov/sites/helsinkicommission.house.gov/files/CigaretteSmuggling.pdf>.

## 1. THE DYNAMICS AND GEOGRAPHICAL FEATURES OF COUNTERING CIGARETTE SMUGGLING IN EUROPE

Let us firstly set forth objective data illustrating the state of affairs concerning cigarette smuggling in Europe. According to the data provided by a comprehensive EU strategy, the main sources of smuggled tobacco products origin ranged in the order of the supply volumes are: China, the United Arab Emirates (UAE), Vietnam, Malaysia, the Russian Federation, Singapore, Belarus and Ukraine<sup>5</sup> (shown on the map – figure 1).

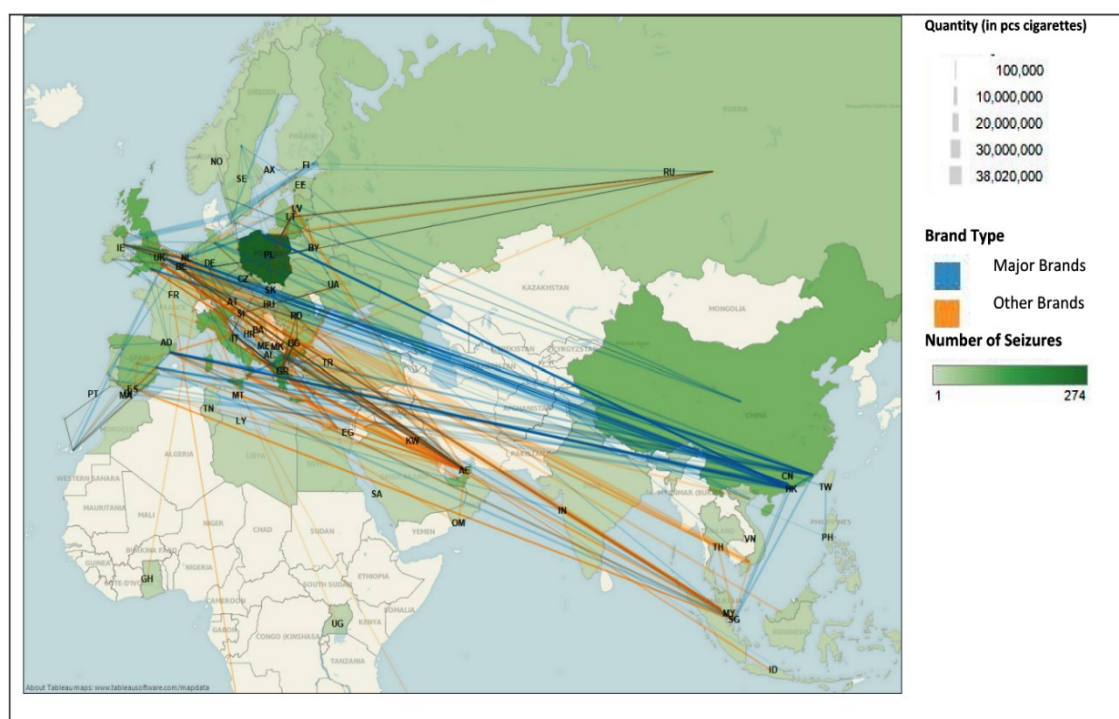


Figure 1. Tobacco smuggling routes. According to a comprehensive EU strategy

The results of a study conducted by L. Joossens (co-authored) are interesting in this regard. He studied the prevalence of illicit tobacco products in 18 European countries through a personal survey of 1,000 smokers in each of the countries. This clearly involves not only smuggled cigarettes, but also those bought from “shadow” sellers, without excise stamps, etc. On average, the share of such cigarettes was estimated at 6.5%. But this figure was significantly higher in some countries. For example, in Latvia it was 37.8%. The conclusion was that illicit tobacco products

<sup>5</sup> *Stepping up the fight against cigarette smuggling and other form of illicit trade in tobacco products - A comprehensive EU Strategy*, Commission to the Council and the European Parliament 11014/13, 14 June 2013.

are found much more often in the states bordering Ukraine, Russia, Moldova or Belarus, which is generally confirmed by other data.<sup>6</sup>

In summary, about half of all detections took place on the eastern land borders. According to the available EaP-RAN data (Eastern Partnership Risk Analysis Network) the movement of more than 18.8 million cigarettes was interdicted on the eastern border of the EU in 2016 in more than 400 cases.<sup>7</sup> A significant part of the cases was revealed in the course of maritime operations. Their modus operandi includes the use of shipping containers loaded in free trade zones with limited procedures of cargo control and accompanying documentation. Criminal activity with the use of various types of watercraft is thriving both on the high seas and in marine areas that are subject to national jurisdiction. Part of the offenses was suppressed during the maritime operations of FRONTEX (Table 1).

*Table 1. Detection results of smuggled cigarettes at the external borders of the EU in the course of multi-purpose Frontex operations*

Name of Frontex joint operation	Number of detections		Number of confiscated cigarettes (pcs.)	
	2016	2017	2016	2017
Indalo	4	7	323 452	64 330 000
Poseidon	6	10	13 985 980	42 425 600
Triton	3	2	150 000	680 000
Focal Points Sea	2	2	400	368
Minerva	2		159 520	11 400
<b>Total</b>	17	21	14 560 632	107 435 968

As shown in the table, the number of smuggled cigarettes confiscated and detained during the sea operations conducted in the Western, Central and Eastern Mediterranean in 2017 increased by 637% and 65% accordingly in comparison with 2016.<sup>8</sup>

Delivery methods for cigarette smuggling include both sea and river transport. A relatively small number of cigarettes transported by individuals through border crossing points was primitively hidden in their cars or buses, including the use of specially equipped compartments (hiding-places), as well as more elaborate enclosures in trains in order to hide goods in vehicles. A pointed reference should be made to the use of rafts, railway cars, small aircraft, gliders, hang gliders, and unmanned aerial vehicles.

<sup>6</sup> L. Joossens, *et al.*, Illicit cigarettes and hand-rolled tobacco in 18 European countries: a cross-sectional survey. *Tobacco Control* No. 23 (2014) // DOI: 10.1136/tobaccocontrol-2012-050644.  
<sup>7</sup> FRONTEX, *Eastern Partnership Annual Risk Analysis* (2017), 32.  
<sup>8</sup> FRONTEX, *Risk Analysis for 2018* (Warsaw, 2018), 54

Cases of use of freight trains heading to Latvia, Lithuania and Poland were also registered. Tobacco products transported by trains were placed, for example, in specially prepared cavities in the logs of transportable round timber. The option of freight rail transport use as a means of moving tobacco products is attractive for offenders because it makes it difficult to prove their connection with the goods.

Recently, such a method of illegal activity as the illegal movement of tobacco raw materials across the border with the subsequent manufacture of cigarettes in underground factories located in Europe has been spreading. In this case, transport costs and the risk of detection at the border are significantly reduced. As an example, we present successful operations in the end of 2017 and the beginning of 2018. The first case took place in the territory of Spain (the province of Granada) where the clandestine manufacture of cigarettes from smuggled raw materials with a capacity of 2 million pieces per day, organized by a Russian citizen, and employment of citizens of Ukraine was revealed. In the second case, a similar production was organized in the territory of Poland (in the city of Wloclawek, Kuyavian-Pomeranian Voivodeship).

It should be noted that the use of aircraft is growing every year as a relatively new way of smuggling cigarettes. Both manned aircraft and unmanned aerial vehicles (drones) are used.

At the same time, it is important that the cases of powered paragliders usage by offenders are becoming more frequent. This, among other things, is caused by the fact that motor-hang-gliders or gliders in most countries are subject to registration in the register of civil aircraft, and paragliders, powered paragliders, powered parachute or weight-shift control aircraft are exempted from these procedures. At the same time, these aerial vehicles are subject to rapid disassembly and assembly and have a load capacity of 30 to 100 kg of cargo. And the carrying capacity of modern motor-hang-gliders allows to transport up to 7 boxes of cigarettes (based on the weight of the box 17-20 kg), which makes every flight extremely profitable on the directions of the Romanian, Hungarian, Slovak and Polish state borders. Motor-hang-gliders are equipped with a device for cargo dropping which allows them not to land and minimize the possibility of the termination of the pilot's activities on the territory of a foreign state.

There are very dramatic examples of small aircraft usage for smuggling cigarettes. For example, according to the Romanian press, on May 9, 2019, a Ka-2 helicopter crashed near the village of Sapynca in Romania. It is noted that the helicopter crossed the airspace of Romania illegally while transporting smuggled cigarettes. According to the press, a 48-year-old citizen of Belarus piloted the aerial

vehicle. He arrived from Minsk to Ukraine by train specifically to pilot the helicopter and transport smuggled cigarettes to Romania.<sup>9</sup>

In general, the intensive development of drones usage requires not only technological counter measures, but also legal decisions to be taken in order to govern their use within special zones.<sup>10</sup> Such zones, according to a common understanding, are airports, military installations, the state border adjacent territories. Therefore, Aurelija Pūraitė (co-authored) pays attention to this fact in her work concerning the regulation of unmanned aerial systems and related privacy issues in Lithuania. She analyses the law establishing the right of border guards to prevent drones from flying within the border zone, which came into force on January 1, 2018 in Lithuania.<sup>11</sup>

## **2. THE THEORETICAL SUBSTANTIATION OF THE CONCEPTS OF "SHADOW' ECONOMIC CLUSTER GENESIS" AND THE "POLYMORPHISM OF CROSS-BORDER CRIME"**

It is obvious that the problem of smuggling cigarettes and related sales of illicit tobacco products have their own peculiarities in each of the European countries. In particular, one of the countries affected by this phenomenon to a lesser extent is the Czech Republic. Researchers (Petr Kupka, Kateřina Tvrdá) point out the reasons for this phenomenon, which is to say a high risk of smuggling detection and levelling the price for tobacco products with neighbouring countries.<sup>12</sup>

At the same time, this means not so much the elimination of the problem, as its modification named by us as the "polymorphism of cross-border crime". Fifteen years ago, the illicit trade consisted mainly of large-scale container smuggling of the most popular brands of famous cigarettes (Philip Morris International, Japan Tobacco International, British American Tobacco and Imperial Tobacco Limited).

Over the last years, the proportion of smuggling of these brands has decreased. On the other hand, production of legal cigarettes outside the EU is on the rise in quantities far exceeding the demand in these national markets, which gives reason to consider the EU as the planned market for them.

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<sup>9</sup> Simona Vasiac, "Cine este pilotul mort în accidentul aviatic din județul Maramureș: originar din Belarus, posibil implicat în operațiuni de contraband" (9 mai 2019) // [adev.ro/pr8zm1](http://adev.ro/pr8zm1).

<sup>10</sup> Luisa Marin and Kamila Krajčíková, "Deploying drones in policing European borders: constraints and challenges for data protection and human rights"; in: A. Završnik, ed., *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance* (Springer International Publishing, 2016) // DOI: 10.1007/978-3-319-23760-2\_6.

<sup>11</sup> Aurelija Pūraitė, Daiva Bereikienė, and Neringa Šilinskė, "Regulation of unmanned aerial systems and related privacy issues in Lithuania," *Baltic Journal of Law & Politics* 10:2 (2017): 107–132 // DOI: 10.1515/bjlp-2017-0014.

<sup>12</sup> Petr Kupka and Kateřina Tvrdá, "Cigarette smuggling for greenhorns»: Recent patterns of illegal tobacco trade in the Czech Republic," *Trends Organ Crim* No. 19 (2016) // DOI 10.1007/s12117-016-9276-1.



For example, there have been noticeable changes within the structure of the “shadow” tobacco business in the Czech Republic over the past fifteen years. In particular, smuggling (through trucks) of large volumes of cigarettes was replaced by small quantities of smuggling of counterfeit cigarettes and the legal importation of tax exempt tobacco raw materials (cut tobacco leaf), intended for the production (including illegal) of cigarettes.

Thus, this modification is a manifestation of the “polymorphism of cross-border crime”. The following is understood under this concept:

- in the interests of criminological taxonomy that is the presence, within a single type of crime, of heterogeneous on the grounds of the criminal-law features of crimes united according to the dominant system forming feature;
- in the interests of comparative and criminological approach that is, the presence within a single type of crime, of heterogeneous crimes under the laws of different countries, provided that they are united by the dominant system forming feature.

Smuggling (both of legal and counterfeit tobacco products) can take place in the following forms:

- illegal movement across the border and beyond the border crossing points with full non-payment of customs duties, taxes and fees,
- falsification of the declaration (with the wrong value, origin, recipient of the goods which entails a significant reduction in customs duties, taxes and fees),
- movement of tobacco products across the border crossing points, but with the concealment of goods inside legitimate goods or vehicles or on the body of passengers with full failure to pay customs duties, taxes and fees.

Polymorphism is manifested in the fact that each of these forms can be modified due to a change in the situation, routes can be changed, delivery methods can be modernized, etc. For example, we will show that over the last years drones have appeared among the means of moving across the border.

Structural and functional analysis, as well as the results of the study by John Spink (with co-authors) and our own research also allows us to highlight the concept of “shadow” economic cluster genesis as a process of concentrating interrelated economic activities that ensure its effectiveness and, in some cases, based on the commission of offenses which determine the criminogenic potential capacity of this activity.<sup>13</sup>

The criminogenic potential capacity of cluster genesis is formed through the activation of such components: establishing the delivery of raw materials for the

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<sup>13</sup> John Spink, Douglas C. Moyer, Hyeonho Park, and Justin A Heinonen, “Development of a product-counterfeiting incident cluster tool,” *Crime Science* No. 3 (2014) // DOI: 10.1186/s40163-014-0003-4.

production of "shadow" excisable goods, arranging production and maintaining its parameters at the level of economic feasibility, logistical support for moving products to the territory it can be smuggled from, its storage, setting up shadow export and import schemes or illegal movement of excisable goods across the state (customs) border.

Each of these components, depending on local specifics, may have an additional element to ensure criminogenic efficiency in the form of the creation and use of corrupt relations.

Let us illustrate this phenomenon with the example of the Czech Republic. Tobacco raw materials for cigarettes manufacturing (including counterfeit) comes to the Czech Republic from Poland today. This fact displaced the previously dominant trend of cigarette smuggling from the east. At the same time, the Asian route through the Balkans remained currently important for small contraband batches, and Ukraine was replaced by Belarus as the source country on the Eastern European route.<sup>14</sup> The distribution network of tobacco products on the black market in the Czech Republic is characterized by strong fragmentation and decentralization, with a large number of storage sites in the border area used for shadow large-scale and small-scale purchasing, mainly through cash. In other words, the "shadow" economic cluster genesis is aimed at ensuring the economic profitability of the shadow business, even if the level of prices for tobacco products is equalized with neighbouring countries.

### **3. THE UKRAINIAN COMPONENT OF THE PAN-EUROPEAN TOBACCO PRODUCTS SMUGGLING PROBLEM**

The pan-European problem of tobacco products smuggling is characterized by a strongly marked Ukrainian component. According to the World Customs Organization, Ukraine is among the countries from the territory of which a large number of smuggled cigarettes enters the EU<sup>15</sup>. Upon a legal agreement conclusion with the European Union, Philip Morris International (PMI) Tobacco Company orders an annual report on the illicit trade in cigarettes in Europe prepared by KPMG, a world-renowned auditing firm.<sup>16</sup> According to KPMG (one of the world's largest audit companies in the "big four") Ukraine became the largest source of smuggled cigarettes for the EU in 2016.<sup>17</sup> Analysis of the results of operational and service

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<sup>14</sup> *Ibid.*

<sup>15</sup> World Customs Organization, *Illicit Trade Report* (2015), 154.

<sup>16</sup> Anna B. Gilmore, Andy Rowell, Silvano Gallus, Alessandra Lugo, and Luk Joossens, Michelle Sims "Towards a greater understanding of the illicit tobacco trade in Europe: a review of the PMI funded 'Project Star' report," *Tobacco Control* No. 23 (2014) // DOI: 10.1136/tobaccocontrol-2013-051240.

<sup>17</sup> KPMG, *Project SUN: A study of the illicit cigarette market in the European Union, Norway and Switzerland* (2017), 15 //

activities of the State Border Guard Service of Ukraine on the state border shows the greatest intensity of attempts to smuggle cigarettes in Lviv, Volyn, Chernivtsi and Transcarpathian regions.<sup>18</sup> To a certain extent, the same conclusion is confirmed by reports on the departmental resource.<sup>19</sup>

Additionally, according to the results of the study outlined in the work of I. Tymets,<sup>20</sup> such illegal business can be considered historically established for this area. The characteristic feature of tobacco movement was not its export, as it is nowadays, but its import. In particular, from the end of the 18th century, during the period when Galicia was located within the Austrian Empire (name before 1867), the rules of the state's tobacco monopoly prohibited the individual cultivation of tobacco for one's own needs, its export and, of course, tobacco smuggling was strictly punished. Truly speaking the measures applied to smugglers (a fine, the size of which was extremely significant, and community service) there was of such, obviously ludicrous, measure as sending soldiers to serve in border units. Rural people residing within the border zone were predominantly involved in tobacco smuggling, from where it was spreading throughout the province.<sup>21</sup> For decades, the smuggling business from the Hungarian lands to Galicia was finished after raising the purchase prices for tobacco, which made the delivery unprofitable. However, the twentieth century was already characterized by the smuggling of finished products such as cigars and cigarettes instead of tobacco. Considering the extremely low level of support for border guards inspectors by the local population, the Polish Tobacco Company (the industrial monopoly in Galicia) financed recruitment and service payment of informers. Smugglers shipped tobacco products from the Czech Republic to the Ukrainian lands that were part of Poland after the collapse of Austro-Hungary. Economically, it was profitable, since the prices of Polish tobacco monopoly products were 300% higher than in the Czech Republic.<sup>22</sup>

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[https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/07/project\\_sun\\_executive\\_summary\\_2018.pdf](https://assets.kpmg/content/dam/kpmg/uk/pdf/2018/07/project_sun_executive_summary_2018.pdf).

<sup>18</sup> "Results of operative-service activity of the State Border Guard Service of Ukraine for 2017" // <https://dpsu.gov.ua/ua/photo/infografika-rezultati-operativno-sluzhbovoi-diyalnosti-za-2017-rik/>.

<sup>19</sup> "Bilya kordonu z Rumuniyeyu viys'kovosluzhbovti Derzhprykordonsluzhby zupynly 'tsyharkovyy karavan'" (At the border with Romania, servicemen of the State Border Guard Service stopped the 'cigarette caravan') (2018) // <https://dpsu.gov.ua/ua/news/Bilya-kordonu-z-Rumuniyu-viyskovosluzhbovti-Derzhprykordonsluzhbi-zupinili-cigarkoviy-karavan/>; „Na kordoni u Volyns'kiy oblasti vyluchly prychep z syharetamy na ponad 200 tysyach hryven'" (On the border in the Volyn region removed a trailer with cigarettes for more than 200 thousand hryvnia) (2018) // <https://dpsu.gov.ua/ua/news/%20VIDEO%20-Na-kordoni-u-Volynskiy-oblasti-viluchili-prichep-z-sigaretami-na-ponad-200-tisyach-griven/>; "Del'taplan z syharetamy ta kontrabandystamy prykordonnyky zatrymaly na Bukovyni" (The hangman with cigarettes and smugglers was arrested by border guards in Bukovina) (2018) // <https://dpsu.gov.ua/ua/news/deltaplan-z-sigaretami-ta-kontrabandistami-prikordonniki-zatrimali-na-bukovini/>.

<sup>20</sup> Igor Tymets', "Kontrabanda tyutyunu v Halychyni u XIX– XX st.ta peredumovy yiyi vynyknennya" (Smuggling of tobacco in Galicia in the nineteenth and twentieth centuries. The preconditions for its emergence), *Muzeynyy visnyk* No. 14 (2014).

<sup>21</sup> *Ibid.*: 193.

<sup>22</sup> *Ibid.*: 199.

The main vector of cigarettes movement in modern Europe is opposite i.e. from outside the European Union into countries within the EU country members. This is caused, of course, by a more than significant price difference. For example, prices for cigarettes in Poland are at least two to three times higher than in Ukraine. This gives rise to a supply corresponding to the demand, which can be easily verified by typing a query such as "papierosy z ukrainy" in the search bar. In turn, smuggled cigarettes come to France from Algeria, where tobacco products are three times more expensive (in street trading) or four times more (in a supermarket) than in Algeria. Therefore, France, Poland, Germany, as well as the Balkans, Ukraine, Algeria and Tunisia are most often mentioned in the context of tobacco products smuggling. It is not possible to universalize the cost of excisable goods even within the framework of the existing customs, tax and other interstate unions, whose members coordinate their fiscal policy. For example, the cost of cigarettes in Armenia and Kyrgyzstan is one half as high, and in Belarus and Kazakhstan one and a half times lower than in Russia, despite the existence of a common customs policy.<sup>23</sup> So, given that this product is light weight, compact and has a high selling price, the economic determination of cigarette smuggling is the most obvious. There is no sense to figure on any significant changes in the foreseeable future in reducing the value of its economic conditionality. Although, it should be noted that certain activities are carried out in Ukraine, which, sooner or later, should bridge the benefits of this business. There is talk of raising excise rates to the minimum level of the EU. According to the seven-year plan, approved by the Verkhovna Rada of Ukraine, the price of a conditional pack of cigarettes will rise from 29 to 88 hryvnias (from 0, 88 euros to 2, 75 euros) by 2025.<sup>24</sup>

Theoretically, this should not only reduce tobacco consumption, but also create a decrease in the profitability of activities related to the illegal movement of tobacco products across the border.

At the same time, it does not follow that the consequences of cigarette smuggling also lie exclusively in the economic sphere. Our assumption is that cigarette smuggling is a powerful factor contributing to the formation of the criminogenic potential capacity of border zone residents, as well as the formation of capital for the development of the scale and diversification of cross-border criminal activity.

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<sup>23</sup> Anna Skachko, *Kontrabanda i ukloneniye ot uplaty tamozhennykh platezhey: strategicheskiye napravleniya ugovolno-pravovoy politiki protivodeystviya im v sovremennoy Rossii* (Smuggling and evasion of customs duties: the strategic directions of criminal law policies to counter them in modern Russia) (Krasnodar, 2017).

<sup>24</sup> *The Law of Ukraine 'On Amendments to the Tax Code of Ukraine and Certain Legislative Acts of Ukraine on Balancing Budget Revenues in 2018'*, December 7, 2017, no. 2245-VIII // <http://zakon2.rada.gov.ua/laws/show/2245-19/print1520522429510622>.

Referring to the results of operational and service activities of the Ukrainian State Border Guard Service, we see an increase in the number of cases of detection of these products by 45%. The main direction of the illegal importation of tobacco products into Ukraine is the southern region and the western region is characterized by its export.<sup>25</sup> The results of operational and service activities of the State Border Guard Service of Ukraine concerning counteraction of tobacco products illegal movement across the border are shown in table 2.

Table 2. Interdiction results of cigarettes illegal movement across the border by the State Border Guard Service of Ukraine

Year	Specific share (%)							Number of confiscated packs of cigarettes
	entrance to Ukraine	exit from Ukraine	at BCPs	beyond BCPs	sector on			
					land	sea	air	
2016	54	46	20	80	98	2	-	5.8 million
2017	43	57	60	40	59	29	12	8.3 million
2018	42	58	33	67	52	48	-	10.2 million

For example, take the cases of detection of illegally transported cigarettes at border crossing points (BCP) across the state border of Ukraine named "Novye Yarilovichi" (500 boxes worth UAH 8 million) and "Gorodishche" (540 boxes). Detection was carried out on the border with the Republic of Belarus; cigarettes were transported from Russia to Serbia using freight motor transport by citizens of Serbia.

#### 4. ECONOMIC DETERMINATION OF TOBACCO SMUGGLING

Illicit trade in tobacco products and their smuggling are highly profitable and low-risk activities and are therefore particularly attractive to criminal groups.

The economic sphere is a parasitic environment for cross-border crime. Most of the cross-border offenses, including the smuggling of cigarettes, are due precisely to economic factors. In this context we use Nikos Passas scientific approach which looks like a contamination of criminological theories of rational choice and environmental theory.<sup>26</sup>

In particular, Nikos Passas concept is that the systemic and structural causes of cross-border offenses are due to the demand for goods and services:

<sup>25</sup> "Results of operative-service activity of the State Border Guard Service of Ukraine for 2016" // <http://dpsu.gov.ua/ua/photo/infografika-rezultati-operativno-sluzhbovoi-diyalnosti/>.

<sup>26</sup> Nikos Passas, "Cross-border crime and the interface between legal and illegal actors," *Security Journal* Vol. 16(1) (2003).

- which are out of legal circulation,
- or are scarce,
- or which do not have free access (in at least one of the adjacent countries),
- or (as in our case) the difference in prices for which is so weighty that it determines an extremely high profitability even in spite of the high degree of costs for the criminal mode of action.

Based on this logic, we investigate the degree of the determinative influence of just such criminogenic asymmetries.

The World Bank and the World Health Organization claim that the problem of smuggling cigarettes is most effectively solved by coordinated tax increases in different countries, including excise tax on tobacco products. The international tobacco industry, by contrast, claims that this rule is not so obvious.

According to Sophia Delipalla the size of a specific tax in total is close to the upper limit of the agreed range in the northern states within the European Union, and close to the lower limit in the southern states. According to this data, the total ad valorem customs tariff averaged 37.3% of the retail price of cigarettes in the northern countries and 66.7% in the southern states.<sup>27</sup>

As for smuggling, most countries with a high level of smuggling are located in the south of Europe, and most of them with a low level (less than 5% of total sales) are in the north. In fact, this data was cited already ten years ago. From then onward, the European Commission's policy has been aimed at harmonizing excise policies.

To comply with EU rules, most of the new member states have already significantly increased tax rates, and some of them had to change the tax structure as well. At the same time, although all EU member states accept a similar taxation system in relation to tobacco products, the price difference remains an unsolved problem that continues to determine not only smuggling, but also the growth of cross-border procurement in the border area of an adjacent state, allegedly for own consumption by the population in small wholesale sizes.

In particular, according to C. Lakhdar, who investigated the reasons for the sharp drop in cigarette sales in France after raising excise taxes and correspondingly prices for cigarettes, it was found that the volume of the shadow market of cigarettes is 20% of the legal market volume.<sup>28</sup>

In his study Lakhdar applied three approaches to assessing the volume of legitimate cross-border purchases and the illicit movement of cigarettes across the

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<sup>27</sup> Sophia Delipalla, "Tobacco Tax Structure and Smuggling," *Public Finance Analysis* Vol. 65, No. 19 (2009).

<sup>28</sup> Christian B. Lakhdar, "Quantitative and qualitative estimates of cross-border tobacco shopping and tobacco smuggling in France," *Tobacco Control* No. 17 (2008) // DOI: 10.1136/tc.2007.020891.

border (smuggling) upon an official increase in cigarette prices by 44.7% in France. He initially used a simulation model to predict cigarette sales in France over time (over a 7-year period). Predicted sales were compared to actual sales and the difference corresponded to tax evasion. The used sales data by region was provided by the tobacco industry. Secondly, he compared official sales volume figures with estimates from surveys in regions adjacent to the countries with lower cigarette prices than in France. Thirdly, the study involved counting cigarette packs at a waste disposal plant in the suburbs of Paris which determined the origin of cigarettes. According to the first method, the shadow market was estimated at 14–17% of the legal market, according to the second method it was 20% of the legal one, and according to the third it was 18.6% of the legal market.

The specific share of smuggling within this volume was not precisely established; however, it is clear that it was less than the volume of openly imported tobacco products (without paying taxes) from neighbouring countries.

At the same time, the author came to the conclusion that, in order to avoid the growth of such cross-border procurement, the European Union should consider closer harmonization of the national policies of the member states regarding taxation of tobacco sales.

D. Merriman used a similar method of counting packs of cigarettes (Warsaw, Poland) without Polish labelling. Packs with foreign labelling and excise stamps were taken into account to calculate the volume of illegally imported cigarettes, which turned out to be 15%.<sup>29</sup>

Using the example of a survey of 21,000 respondents in 7 countries in the Western Balkan region, which has long been known as a smuggling route to Western Europe, Vedran Recher found significant differences between countries in the demand for smuggled tobacco. In particular, the highest demand for it is in Montenegro, where 28 percent of smokers buy it. The lowest demand is in Slovenia, where it is bought by 3.5% of smokers.<sup>30</sup> He explains this demand by the availability of affordable supply and the lack of strict sanctions. Since the maximum demand for smuggled cigarettes seems to come mainly from socially disadvantaged people with a high level of dependence, Vedran Recher makes the conclusion that an increase in excise taxes and cigarette prices will be of little help in reducing the prevalence of smoking. It is more likely that further price increases will lead to more and more people turning to sources of cheaper cigarettes – that is, to the shadow market of smuggled products.

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<sup>29</sup> David Merriman, "The Micro-Geography of Tax Avoidance: Evidence from Littered Cigarette Packs in Chicago," *American Economic Journal: Economic Policy* Vol. 2, No.2 (2010) // DOI: 10.1257/pol.2.2.61.

<sup>30</sup> Vedran Recher, "Tobacco smuggling in the Western Balkan region: Exploring habits, attitudes, and predictors of illegal tobacco demand," *Radni materijali EIZ-a. EIZ Working Papers EIZ-WP-1901* (Zagreb, 2019) // <https://www.eizg.hr/publikacije/serijske-publikacije/radni-materijali-eiz-a/617>.

## 5. THE RELATIONSHIP OF CIGARETTE SMUGGLING AND CROSS-BORDER CRIME

Based on a summary of the analyzed data, including the results of operational and service activities of law enforcement agencies, FRONTEX, the trend factors determining the relationship between the illegal movement of tobacco products across the border and cross-border crime and negatively affecting the counteraction of crime, we will consider the following:

1) One independent factor is the underestimation of the fact that this phenomenon is the tip of the iceberg, which, in turn, includes tobacco factories, warehouses, shops in the border zones, counterfeit or unrecorded products in the production process, raw materials accounting system, and logistics system (transport facilities, transportation system, and accumulation bases). This huge shadow industry is directly related to cross-border crime, which is stated in the Strategy concerning countering the illegal production and trafficking of tobacco products (hereinafter referred to as the Strategy).<sup>31</sup> The illegal movement of cigarettes across the border often involves the smuggling of drugs, the manufacture and distribution of counterfeit goods. Cigarette smuggling channels and especially the proceeds from the sale of these cigarettes can be used for other illegal cross-border activities.

The sanctions for smuggling cigarettes vary considerably in EU member states. Responsibility may be administrative or criminal. The maximum penalty for the most serious cases of such crimes may be a fine in one member state, while it is imprisonment of up to ten years in another state. Such a difference in sanctions affects the choice of smuggling routes. Therefore, there is a proportionate increase in sanctions among the measures proposed for implementation in the EU.

2) The aforementioned document, among the main directions for the implementation of the Strategy, specifies "imposing criminal liability for the illegal movement of tobacco products across the customs border of Ukraine". Retaining administrative responsibility for this offense obviously creates an illusion of impunity in the public consciousness. In most cases, the actions of offenders are qualified under Part 1 of Article 483 of the Customs Code of Ukraine, which entails the imposition of a fine in the amount of 100% of the value of the goods i.e. the direct objects of violation of customs regulations with the confiscation of goods, as well as vehicles with specially manufactured hiding places.<sup>32</sup> Despite the rather significant sanctions imposed on the person for committing the offense, even

<sup>31</sup> *Strategy to counteract the illicit production and circulation of tobacco products for the period to 2021*, supra note 2.

<sup>32</sup> *Customs Code of Ukraine*, March 13, 2012, no. 4495-VI // <http://zakon3.rada.gov.ua/laws/show/4495-17/print1521041922740068>.



though there is an understanding in the public mind of the illegality of such an act, there is no clear perception of the severity of its consequences. The massiveness of the situation in which the offender pays a fine and continues his illegal activities once again puts on the agenda the question of criminalizing the smuggling of excisable goods, which resulted in the corresponding bill No. 2840. The draft proposed to supplement the list of smuggling articles stipulated by Article 201 of the Criminal Code of Ukraine with excisable goods in large quantities, i.e. if their value is two hundred fifty or more times exceeds the non-taxable minimum income of citizens.<sup>33</sup>

The "culture of impunity" following people over many years (according to the apt remark by L. Shelley) leads to strange results. For example, the head of the regional administration of the Transcarpathian region mentioned one of the residents of the Tyachiv district of Transcarpathia who was brought to administrative responsibility for cigarette smuggling 163 times. In fact, we are talking about the need to combat the illegal mentality, which is an independent element of the criminogenic potential capacity in the border zone.<sup>34</sup> To create public support one refers to the experience of neighboring states. For example, "criminal liability in neighboring Romania incurs for smuggling of just one pack of cigarettes across the green border, in Hungary for smuggling cigarettes worth more than 100 000 forints (the cost of as many as about 15 blocks of cigarettes), and in Slovakia it is for more than 8 blocks of cigarettes".<sup>35</sup>

Russia has also followed the way of the criminalization of "economic" smuggling as evidenced by the introduction of a norm in the Criminal Code providing responsibility for the smuggling of alcoholic beverages and (or) tobacco products (Article 200<sup>2</sup> of the Criminal Code of the Russian Federation) on a large scale (if their value exceeds 250 thousand rubles - 3 300 euros).<sup>36</sup> Describing the possible "zigzag of criminalization" of smuggling excisable goods, it should be noted that the arguments of his supporters look quite logical. However, the arguments in favor of decriminalization several years ago were quite logical. After that, some progress was made due to the decriminalization of the smuggling of goods.

<sup>33</sup> *Draft Law on Amendments to the Criminal Code of Ukraine concerning the criminalization of smuggling of excisable and counterfeit goods (products) in large quantities*, May 15, 2015, no. 2840 // [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?id=&pf3511=55114](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=55114).

<sup>34</sup> Stanislav Filippov, "Obyvatel' i transgranichnaya prestupnost'" (A Common man and Cross-border Crime), *Pravova derzhava (Constitutional State)* No. 28 (2017) // <http://pd.onu.edu.ua/issue/viewIssue/7102/2758>.

<sup>35</sup> "Moskal' vyrishyv posylyty pokarannya za kontrabandu, shcho v vyhlyadi zakonoproektu vzhe davno zaproponuvav prezidentovi Baloha" (30 July 2015) // <https://zakarpattya.net.ua/News/143188-Moskal-vyrishyv-posylyty-pokarannia-za-kontrabandu-shcho-v-vyhlyadi-zakonoproektu-vzhe-davno-zaproponuvav-prezydentovi-Baloha>.

<sup>36</sup> *Federal Law of the Russian Federation 'On Amendments to Certain Legislative Acts of the Russian Federation in regard to Strengthening Measures to Counteract the Trafficking in Counterfeit Products and Smuggling of Alcohol Products and Tobacco Products'*, December 31, 2014, no. 530-FZ.

Therefore, this issue is likely to be considered as a single set of such instrumental countermeasures which will be discussed below.

3) Illicit trade of smuggled tobacco products leads to the loss of tax revenues of billions of euros for the EU countries annually. For example, 27% of the cigarette market is in the shadow in France.<sup>37</sup>

4) Illegal movement of tobacco products across the customs border is directly related to multi-level international corruption.<sup>38</sup>

5) Clearly this illegal type of cross-border activity stimulates the creation and expansion of a network of participants in the course of its development, and includes not only people directly transferring and transporting tobacco products ("shuttle traders", "ants", "pilferers", "camels"), but as well as suppliers of raw materials, manufacturers of counterfeit products, employees of transport enterprises, corrupt officials, IT specialists, etc.

6) Many smugglers are psychologically prepared to defend the preservation of opportunities for their illegal earnings in a heavy-handed way. For instance, in November 2018 in Transcarpathia (region of Ukraine), a car driven by a smuggler hit a border guard officer who had identified the offense. The officer died as a result of the accident.

7) It is extremely important to take into account the possibilities of the wide use of social media and Internet instant messengers to stimulate the promotion of smuggling products. Facebook counteracts the use of its platform, for example, for recruitment to terrorist organizations, such as DAESH, but if it is widely used to organize the illegal cross-border movement of excisable goods, it is difficult to achieve this restriction.

## **6. THE ROLE OF RISK PROFILING IN COUNTERING CIGARETTE SMUGGLING AND INSTITUTIONAL ANTI-SMUGGLING SYSTEMS**

The World Customs Organization proclaimed 2019 as the year of «SMART Borders». Here SMART stands for "Secure, Measurable, Automated, Risk Management-based and Technology-driven". Among other things, this means that a system of forecast scenarios based on risk management should be applied to form countermeasures to smuggling cigarettes at the border. Since 2001, it has become a common practice for border and customs authorities in Europe to use the risk-profiling method during border and customs formalities at border crossing points.

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<sup>37</sup> "La France, championne d'Europe des cigarettes de contrebande" (8 June 2016) // [https://lexpansion.lexpress.fr/actualite-economique/la-france-championne-d-europe-des-cigarettes-de-contrebande\\_1800103.html](https://lexpansion.lexpress.fr/actualite-economique/la-france-championne-d-europe-des-cigarettes-de-contrebande_1800103.html).

<sup>38</sup> Michael D. Maltz, Herbert Edelhertz, and Harvey H. Chamberlain, *Combating Cigarette Smuggling*, Law enforcement guide (Washington, 1976).

Of course, this happens with the use of information technology in the course of correlating databases and electronic declarations of the goods being moved.

According to the results of the Karine Côté-Boucher study, the rhythmic work of the border crossing point basically assumes that 40 to 60 percent of all customs declarations automatically pass without the intervention of an employee. The system includes random checks i.e. about 2 percent of the total volume of movement across the border. Officials often formally have the authority to send each vehicle for thorough inspection, but in practice this discretionary authority is governed by the need of free movement and exclusion of low-risk vehicles from inspection.<sup>39</sup>

This algorithm in most countries is based on risk profiling. Risk profiles can be developed based on joint risk analysis. This means the involvement of representatives (customs officers) of adjacent foreign states or international organizations in the analysis. The overall risk profiling scheme looks as follows. Risk level is defined as a function of threat, vulnerability and impact. The basic algorithm of the function for determining the risk level is as follows:  $R = f(T, V, I)$ , where R is the risk level; T is the threat level; V is the level of vulnerability; I is the level of impact.<sup>40</sup>

Based on this algorithm, a risk profile is built by means of software environment, the elementary logical form of which is shown in the table.

Table 3. Risk profile form

Territorial Scope	
Effective as on _____ till _____	
Aggregate information on the threat	
Risk indicators	
Indicator name	Indicator value (by types)
	Definite
	Potential
	Preventive
Algorithm of actions (measures and forms of control in the case of the establishment of certain risk indicators)	

Thus, such transport companies, product groups, vehicles or certain drivers that are recommended for thorough inspection are determined based on an analysis of local-specific trends in criminal activity, security, and compliance with regulatory requirements.

<sup>39</sup> Karine Côté-Boucher, "The Paradox of Discretion: Customs and the Changing Occupational Identity of Canadian Border Officers," *The British Journal of Criminology* Vol. 56, Issue 1 (January 2016) // DOI: 10.1093/bjc/azv023.

<sup>40</sup> Stanislav Filippov, "Information support for counteraction to cross-border crime," *Visegrad Journal on Human Rights* Vol. 2, No. 4 (2018).

Targeting is not the only objective of this activity. An additional objective is the further accumulation of data on modifications of business, transport, economic activities, or the use of unusual routes that may indicate further modification of criminal activity (the phenomenon of polymorphism).

Based on the aforementioned, as well as taking into account the requirements of a comprehensive EU strategy,<sup>41</sup> we have developed a schematic structural model of the institutional system for countering the smuggling of tobacco products in the EU, which includes the main players of anti-smuggling activities and actions to be taken at different levels (figure 2). The main ones are reflected in the conclusions of this article.

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<sup>41</sup> *Stepping up the fight against cigarette smuggling and other form of illicit trade in tobacco products - A comprehensive EU Strategy, supra note 5.*

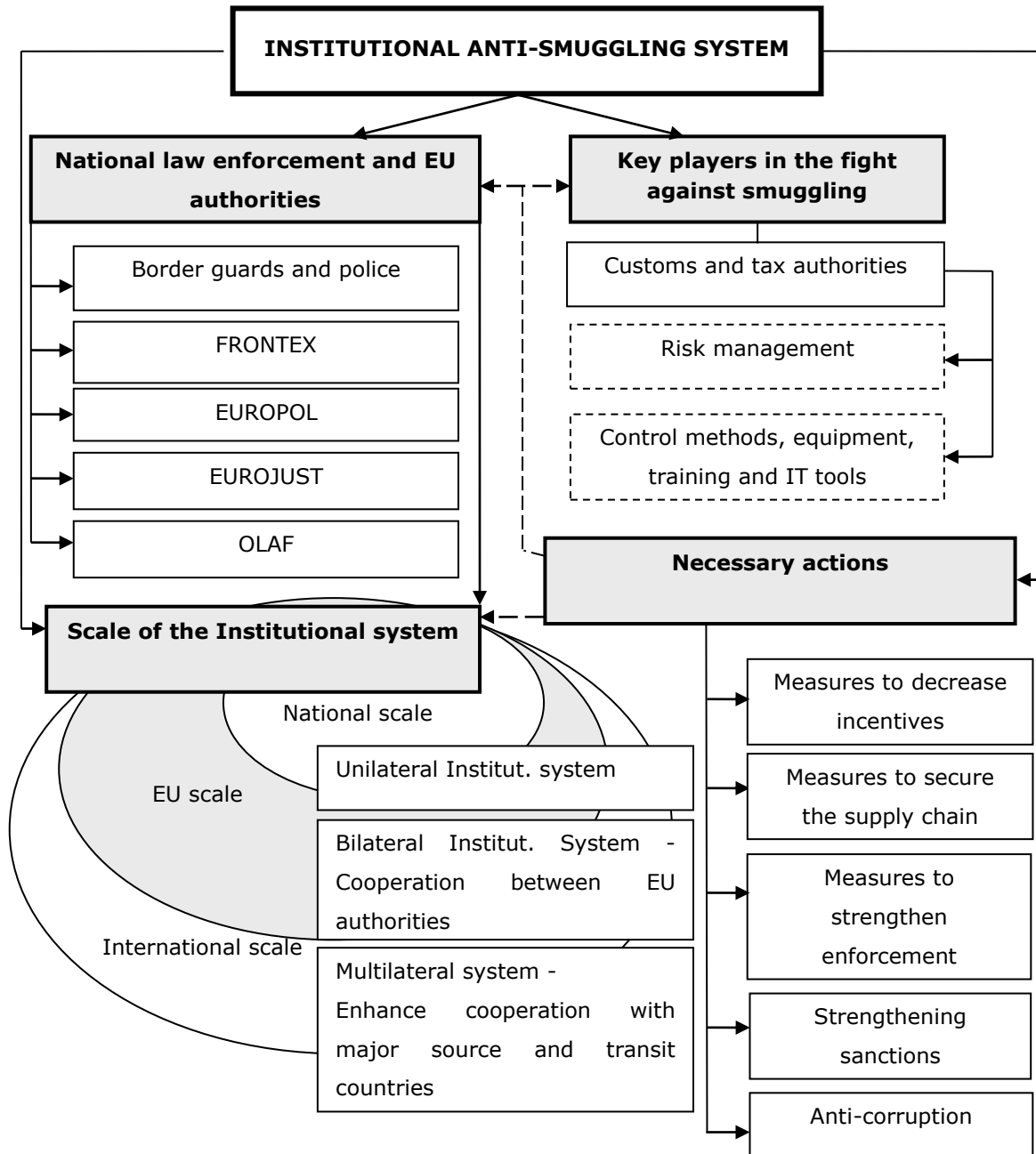


Figure 2. Schematic structural model of the institutional system of countering smuggling of tobacco products in the EU (compiled by the author)

### CONCLUSIONS

The various ways to counteract the illegal movement of tobacco products across the border should be considered in the context of the harmonization of the international policy in the relevant sphere(s). In particular, Article 352 of the Association Agreement between Ukraine and the EU ... states that "the Parties shall

develop cooperation and harmonize policies to counter and combat fraud and smuggling of excisable goods".<sup>42</sup>

In general, such a policy seems to be related to the following steps aimed at the destruction of the criminogenic potential capacity of cigarette smuggling:

1) Corruption, as the main factor in ensuring the sustainability of the system for the illegal trans-border movement of tobacco products, should be the main goal to counter this system. In this regard, the creation and development of objective control systems minimizing the significance of the human factor is progressive. In the context of the EU Tobacco Product Directive (2014/40 / EU) the creation of a tracking system for the entire European supply chain of tobacco products (Article 15), as well as security systems that help to identify illegal products (Article 16) is unquestionably important as well. A unique identifier code is generated and recorded within the system for each tobacco product package; with the help of this it is possible to track its delivery.<sup>43</sup> The Strategy makes provision for the creation of a system for monitoring and collecting data on domestic and cross-border trade in tobacco products, including illicit trade, which should include the exchange of information with the competent authorities of foreign countries (including law enforcement), primarily EU member states;

2) There is an obvious need for harmonization in the direction of gradual convergence of excise rates on tobacco products in the context of Article 352 of the Association Agreement between Ukraine and the EU, since their differences are an economically motivating criminogenic factor stimulating not only the illegal movement of tobacco products across the border, but the manufacture of counterfeit tobacco products, tax and other mandatory payments evasion.

3) It is necessary to take into account the factor of the active presence of participants of the "production – cross-border movement – sales" system in social media. Gradually, horizontal network structures for organizing the trans-border movement and marketing of tobacco products will prevail over the vertical ones due to their economic reasonability. Facebook and other social media contribute to minimizing personal contacts between members of the horizontal network (suppliers, carriers) and customers.

4) Efforts are needed to destroy the "culture of impunity", which is the basis of the criminogenic potential capacity of the local inhabitants in the border zones.

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<sup>42</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, May 29, 2014 // [https://eeas.europa.eu/sites/eeas/files/association\\_agreement\\_ukraine\\_2014\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/association_agreement_ukraine_2014_en.pdf).

<sup>43</sup> Directive 2014/40/Eu of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

Administrative (rather than criminal) liability for the analyzed offense, stipulated by the legislation, obviously complicates this task.

5) Under the stated reduction in the volume of illegal movement of tobacco products across the customs border among the expected results of the implementation of the strategy, there are not so many directions to achieve this result. However, among them is the introduction of criminal liability for the illegal movement of tobacco products across the customs border and the correction of the barrier level of the border.<sup>44</sup> The latter measure includes strengthening control over the movement of tobacco products at BCPs across the state border, seaports and in the process of railway transportation, and strengthening cooperation with customs and border authorities of foreign countries in the fight against illegal movement of tobacco products across the customs border. Forecasting the efficacy of these measures and expanding their list are promising directions for further research.

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<sup>44</sup> Stanislav Filippov, "The Borders Barrier Properties vs Cross-Border Criminality," *Law Rev. Kyiv UL*. No. 2 (2017).

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