



# Legal and Institutional Framework of Tobacco and Tobacco Products

## *The Issue of Smuggling and Illicit Trade of Tobacco Products*

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## 1. Scope of the study

In the present study we will look at the legal regulation of tobacco and tobacco products with the aim of highlighting the main legal and institutional challenges to the illicit trade and smuggling of tobacco products in the country. For this purpose, we monitor the tobacco from the planting stage as a plant until it becomes a ready-to-use and selling tobacco product, which is the main raw material for the production of a wide range of tobacco products.

The first part of the study analyzes the basic concepts of tobacco and tobacco products, the concepts of smuggling and illicit trade. In order to fully understand the process of cultivation, processing and sale of tobacco and tobacco products, we are also required to see which are the main actors - both from manufacturers and dealers, and from regulatory and controlling state institutions. Due to the serious financial and social interests that engender tobacco trade, in the third part of the analysis we also examine the state's capacity to control tobacco distribution.

The report was prepared on the basis of:

- ◆ study of legal texts,
- ◆ examining the practice of application and interpretative practice of the courts,
- ◆ interviews with representatives of the administration,
- ◆ interviews with employees of manufacturers and distributors of tobacco products,
- ◆ applications for access to public information.

### 1.1 Tobacco and tobacco products - legal definition

Tobacco and tobacco products are legally defined concepts - the Law on Tobacco, Tobacco and Related Products (LWTTRP) and the Excise Duties and Tax Warehouses Act (EDTWA). The introduction of a definition is entirely driven by the need for state institutions to be able first to control the production and distribution of tobacco and tobacco and second, for tax treatment purposes, to know what is subject to taxation in order to tax it with excise duty. Essential for the legal aspect of trade in tobacco products are the following:

- **"Raw Tobacco"** – these are tobacco leaves harvested in technical maturity, dried in the sun, in the shade or in warm air, grouped according to the harvest of uniform quality and normal moisture content in the manufacturer's packaging,
- **"Manipulated Tobacco"** is stored and grown raw tobacco which has been purchased and which has undergone sorting, removal of the veins, moisture stabilization, packaging and storage and is intended for the manufacture of tobacco products.

At the time when the tobacco has already been processed by the tobacco manufacturer but before it acquires the characteristic qualities of the tobacco products, it is in the intermediate state. Since the control bodies seek to exercise overall supervision and regulation over both the raw material and the products derived from it, a definition has been adopted for the purposes of tax legislation <sup>2</sup>to cover this intermediate state:

- **"Finally formed chopped tobacco blend"** is an intermediate product – a raw material for the production of tobacco products which has varying technological parameters and contains different types, origins and classes of tobacco, snuff and tobacco foil, sauces and aromas mixed in a strictly defined percentage, indicated in the formulation.

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See Art. 4, item 57, Art. 10 - 12a of the Excise Duties and Tax Warehouses Act.

- **"Tobacco products"** are products that can be consumed and that are made up even partially from tobacco. Among these products are cigarettes, cigars, cigarillos, pipe tobacco, tobacco for manual rolling of cigarettes, smokeless tobacco products, chewing tobacco, sniffing tobacco, and oral tobacco.

In principle, tobacco products, that is to say products which are ready for consumption, are subject to excise duty. Excise taxation creates the basic precondition for smuggling and illicit trade, which means that finished tobacco products are the most risky and should be carefully considered. At the same time, control over the raw material remains important, as it can be used to produce illicit tobacco products.

Object of the excise legislation in Bulgaria and potentially risky for smuggling and illicit trade are the following tobacco products:

- **"Cigars and cigarillos"** - tobacco cylindrical bodies exclusively designed and fit for smoking in view of their properties and the normal expectations of consumers. Cigars and cigarillos are wrapped in a natural tobacco wrapping or contain a mixture of tobacco blends and are wrapped in an outer tobacco leaf with the normal color of the cigar covering the product in its entirety, including, where appropriate, the filter, but not the mouthpiece, if there is any. Their single weight, without filter or mouthpiece, must be at least 2.3 grams and not more than 10 grams, and the circumference of at least one third of the length is not less than 34 mm. Also included are articles, which are distinguished from cigars and cigarillos but satisfy the requirements for cigars and cigarillos.
- **"Cigarettes"** - smoking tobacco tubular bodies which do not meet the requirements for cigars and cigarillos, as well as tobacco tubular bodies which, by simple non-industrial processing, are wrapped in cigarette paper.
- **"Smoking tobacco (for pipes and cigarettes)"** - tobacco which has been cut or otherwise crushed, twisted or pressed into tiles, and can be smoked without further industrial processing, including tobacco smoke, smoked and placed on the market, water pipe smoking (hookah) and other articles meeting the description of smoking tobacco.
- **"Heated Tobacco Product"** is a type of smokeless tobacco product in which the tobacco contained therein does not burn and the use is carried out by heating it, which results in an aerosol.

For fiscal purposes, following regulations have also been issued:

- **"Tobacco wastes"** for which the residues of tobacco leaves and by-products obtained from tobacco processing or the industrial production of tobacco products are considered.

According to Art. 2, item 2 of the EDTWA tobacco products are subject to excise duty. Producers and traders are taxable persons under Art. 3, para. of the EDTWA.

#### Practice

Surveys<sup>3</sup> on the tobacco market, excise policy and illicit trade in tobacco products reveal the following details:

- The vast majority of the tobacco products market is held by cigarettes - over 95% of tax revenues from excise duties on tobacco products in the state budget come from cigarettes;
- Revenues from illicit trade are also focused on cigarettes, and in recent years, according to official data, about 6-7% of cigarettes on the market are illicit;
- Tobacco for smoking, albeit with a much smaller market share, is extremely risky, with nearly 75% of the smoking tobacco market being illicit trade;
- Cigars and cigarillos have a very small market share and, in principle, have not been the

<sup>3</sup>See IME analysis on the topic: <http://ime.bg/bg/articles/doklad-na-ipi-prihodite-ot-nezakonnata-tyrgoviya-s-cigari-v-bylgariya-sa-v-ramkite-na-25-35-mlrd-lv-za-poslednite-10-godini-2007-2016/>

subject of illicit trade surveys;

- Other tobacco products - such as chewing tobacco or sniffing tobacco - are consumed in extremely small quantities and are also not subject to much market interest;
- Heated tobacco products are new tobacco products that were recently regulated in excise legislation. The data show growing interest in new products, but there is still no evidence of illicit smokeless products.

### Different treatment of some items

Tax legislation perceives and completes the terminology of The Law on Tobacco, Tobacco and Related Products.

EDTWA treats all tobacco products as excise duty. In a special section of EDTWA, the types of tobacco products are listed with a claim for comprehensiveness. These do not include specific items that are covered by the Tobacco Law, such as sniffing, chewing and oral use (the latter is forbidden for sale and use). In practice, this is a legal loophole that allows this type of product to be left unrelated to taxation. This normative solution can be explained in the following way - its use is so small that it does not impose its proclamation of excise goods.

### Conclusion

Despite the contradictions found, in Bulgaria the complexity of the legal regulation is a prerequisite for the institutions to exercise such control over tobacco and tobacco products, that in practice they do not produce raw materials and products that are not regulated by the legislation. There is no legislative gap due to the fact that EDTWA widens to the maximum extent the concepts introduced by LTTRP.

Based on the obligations on producers and traders and the statutory powers of the institutions, there should be no cases in which tobacco and tobacco products can not be classified as smuggling and / or illicit trade.

The main definitions show satisfactory regulation.

In order to explore the legal framework, it is necessary to know smuggling and illicit trade both as types of violations and as powers of the institutions “on the route if tobacco”.

### 1.2 Smuggling and Illicit Trade

The concept of smuggling is devoid of any legal definition. For the purposes of this study, we will use its broad understanding as ***the illicit shipment of goods across borders in violation of tax and customs laws***. Since the type of goods may include any goods subject to specific taxation, such as alcohol, fuel, cut tobacco, etc., the specific type of tax that is levied on these goods is called excise duty.

And since smuggling is inextricably linked to the subsequent sale of smuggled goods, the subject of investigation is also illicit trade.

Illicit trade is defined in the context of this study as ***selling excise goods in violation of tax law to avoid taxing traded goods***.

In practice, in order for illicit trade to be possible, an excise product such as tobacco should avoid taxation and then be sold to another person or company.

The approach to prosecuting smuggling can be seen from several points of view:

- as a means of collecting more tax revenue,
- as a means of limiting the use of tobacco products with unpatented content to consumers,

- as a means of preventing the use of illicit trade revenues from financing another type of crime.

According to Bulgarian law, smuggling and illicit trade are pursued in two ways:

- as an administrative violation imposed by the administration,
- as a crime - by condemning the smuggler, by a court, punishing the court and treating the perpetrator as being convicted by the state.

Their detailed examination is in *part 3* of the report.

## 2. The role of institutions, manufacturers and traders in the tobacco route - from planting it to becoming a product for use

Below we will trace the powers of the main institutions on the tobacco road - from its production, through its transformation into a tobacco product, to its end-users. We have chosen the current approach to examining the powers of the institutions as it is also adopted as a standard by the European Commission in Directive 2014/40 / EU of the European Parliament and of the Council of 3 April 2014 (Directive 2014/40) on the fundamental tobacco and tobacco products in the European Union.

The executive power in Bulgaria in the face of the Council of Ministers, the individual ministries and their subordinate agencies has a strong regulatory role with regard to the production, storage and distribution of tobacco and tobacco products, tax policy and control.

### 2.1 Strategic framework for tobacco

**The Council of Ministers** approves a national strategy for the development of tobacco production at the proposal of the Minister of Agriculture, Food and Forestry.

In essence, this strategic document is a timely one, applies for a period of 3 years, and sets out sector policy guidelines reflecting the views of stakeholders in the state, producers, tobacco buyers, and tobacco manufacturers. Its writing takes account of strategies at regional level. There is no current document from 2014.

On the request of the Institute for Market Economics dated April 17, 2018 about the availability of an updated strategy to the Ministry of Agriculture and Foods no answer has been received at the moment<sup>4</sup>.

After talks with tobacco growers, the lack of an up-to-date strategic document was confirmed. Thus, in practice, the state does not essentially fulfill its obligation to develop the industry. There is also a lack of willingness for transparency of interaction processes between stakeholders and the regulator in this sensitive sector.

### 2.2 Production, Purchase and Processing

Within the Executive, the Minister for Agriculture, Food and Forestry is responsible for regulating production, buying and processing conditions. It carries out state policy and exercises control over the production and industrial processing of tobacco.<sup>5</sup>

<sup>4</sup>29<sup>th</sup> of May, 2018 r.

<sup>5</sup> Art. 2 et seq. of the **Law on Tobacco, Tobacco and Related Products**.

The **essential functions** of the Ministry of Agriculture<sup>6</sup> in connection with the production and marketing of tobacco and tobacco products are:

- registration of tobacco producing persons, keeping a record of their data,
- Keeping a register of tobacco buyers,
- registration of experts assessing tobacco,
- maintaining a register of persons entitled to carry out industrial tobacco processing and tobacco products,
- issuing methodological guidelines for the cultivation and storage of tobacco,
- making subsidized payments to tobacco producers.

### **Tobacco production**

This stage includes several sub-steps:

- production of seedlings,
- transplanting,
- growing,
- picking,
- drying,
- Manufacturing manipulation.

Given that there is no evidence of illicit trade in seeds and seedlings, we will not explore this process in detail. In case of interest, state institutions are able to track the source of seed and planting material, as its producers are also listed<sup>7</sup>. More important is the already mature tobacco, known by the term "manipulated tobacco".

### **Purchasing of tobacco**

Purchased already dried, manipulated and packed by tobacco producers.

The powers of the ministry on the ground are carried out through the tobacco committees of the regional directorates of agriculture in the areas where tobacco is grown<sup>8</sup>. The Tobacco Committees carry out three essential tasks:

- Issue and withdraw licenses for buying raw tobacco (the registration of persons is maintained centrally by MAF);
- Quality assessment of tobacco,
- Subsequent arbitration between producer and trader regarding the quality of raw tobacco offered.

From the point of view of illicit trade and smuggling of tobacco and tobacco products, the chairperson of the respective district tobacco commission, who has control over the on-the-spot inspections of tobacco purchases, is essential. So he is the responsible official who can report a violation at the very lowest level. Given that all inspection documents are kept for a period of 5 years, this allows a subsequent verification and attempts to detect illicit trading at the lowest level,

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<sup>6</sup> See in details the site of MAF

<http://www.mzh.government.bg/MZH/bg/ShortLinks/SektorTutun.aspx>

<sup>7</sup>Trade in tobacco seeds is carried out in accordance with the **Seed and Propagating Material Act**.

<sup>8</sup> See the detailed description of the procedure in **Ordinance No 23 of 21 December 2016 on the Activities and Organization of the Work of the Tobacco Committees** (Official Gazette No. 1 of 3 January 2017)

as well as being taken into account by the Minister for the responsible ( or not) performance of these functions by district committees.

The established pattern of tobacco growing and purchasing permanently binds tobacco growers in the country with tobacco processors<sup>9</sup>. In this type of cooperation, however, it is easy to identify the sources of illicit trade and smuggling due to the fact that tobacco producers are obliged by virtue of Art. 3, para 1 of the LTTRP to submit their contracts in advance with the buyers of their production.

Manufacturers and traders of tobacco products use the broad term "cut tobacco", which is a collective name for all types of processed dried tobacco raw materials. In a survey of the anti-illicit trade initiative in 2016.<sup>10</sup>, backed up by the main manufacturers and traders of tobacco products, data show that the bulk of cut tobacco is of illicit origin. In this case, it is specifically about tobacco for manual contraction of cigarettes.

**74,6%** of total consumption  
of cut tobacco is from illegal trade

**86,2%** of the illegal smoked tobacco  
consumed in Bulgaria is of local origin

Almost **100%** of the illicit cut tobacco  
consumed in Bulgaria is bulk tobacco for  
cigarette rolling

With changes in the LTTRP from 2016 tobacco buyers, when acquiring a license to carry out the activity, are obliged to provide information about the object in which they will store the tobacco and this further facilitates the control. The Ministry of Agriculture and Food has the opportunity to monitor the quantities of tobacco in the warehouses of the buyers, as they report on the quantity of stored stocks of dried and raw tobacco after completing the buying campaign, as well as full details of the quantities resold and to whom (Article 16d of the LTTRP et al.). This legislative decision provides additional possibilities for controlling authorities to investigate suspicions of smuggling and smuggling because it ensures traceability from the tobacco production until it is sold to a processor and / or a tobacco producer. In this case, the problem is not in the legal texts but in the capacity of the institutions to apply them. Survey data excludes registered tobacco retailers as the source, as the engine of the process is "illicit raw tobacco retailers, not the producers themselves".<sup>11</sup> and registered resellers.

The authorization to buy raw tobacco is indefinite but the reseller's facilities are subject to inspection by the Tobacco Committees of the MAF and may be withdrawn in the presence of:

- a room that does not meet the required conditions,
- tobacco is used for the illicit manufacture of tobacco products,
- there is no contract with a tobacco grower.

<sup>9</sup>See the opinion of the National Tobacco Producers Association:<http://www.nat2010.bg/docs/%D0%94%D0%B5%D0%BA%D0%BB%D0%B0%D1%80%D0%B0%D1%86%D0%B8%D1%8F%20%D0%9D%D0%90%D0%A2-2010%20%D0%B8%20%D0%A1%D0%9F%D0%9E%D0%A2%20%D0%B4%D0%BE%20%D0%9D%D0%A1.pdf>

<sup>10</sup>The study was presented to the IME team for analysis purposes.

<sup>11</sup>Conclusion of the ""Anti-Illegal Trade Study" initiative in 2016.

## Practice

By the end of March 2018, on the website of the Ministry of Agriculture and Food, the register of tobacco growers and tobacco buyers was not publicly available despite the requirements of the Ordinance <sup>12</sup>for keeping the register.

After a series of inquiries from the IME, from 24.04.2018 the information from the register is public and the MAF is in fact fulfilling this statutory obligation.

After the interviews with manufacturers and traders of tobacco products, another major problem was highlighted. No institution in the country maintains a register of tobacco processing and tobacco products, in particular cigarettes. The lack of registration of the facilities is caused by a legal gap - the sphere is not regulated. Thus, even if confiscated, in the case of uncovered illicit proceedings, this confiscation act is not recorded in any register. After confiscation, they often fail to actually destroy them and they are sold on the free market. This actually makes it easier for them to be bought by potential offenders. A possible solution to the problem is:

- Obligation to register the production facilities and machinery on the territory of the country, with the registration giving a unique number to each machine,
- their subsequent sale should be done only to persons holding a license for the manufacture of tobacco products,
- In the absence of interest in purchasing the machine, it will be destroyed,
- Each resale is reflected in the register so as to allow the movement of each machine.

The proposed solutions are not foreign to the Bulgarian legislation. By way of example, it is possible to indicate how the alcohol production facilities are entered in a specific register at the Ministry of Economy.

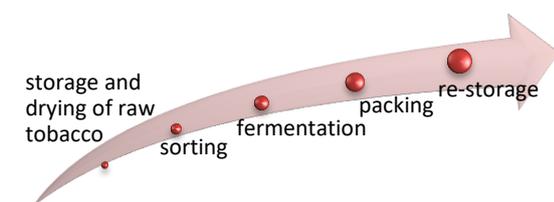
In order to verify the allegations of the interviewed parties about the lack of a register of the tobacco production facilities, IME sent a request to the MAF on April 10, 2018, but so far<sup>13</sup>we have not received a formal reply from the responsible ministry.

## 2.3 Industrial processing of tobacco

Any tobacco processing (except for maker's production) makes it the subject of taxation as an excise goods, whether it is fit or not for direct consumption.<sup>14</sup>

This also explains the focus of illicit trade and smuggling on the raw material. The industrial tobacco processing activity is carried out only after pre-registration and a permit issued by the Council of Ministers.<sup>15</sup>

### **Stages of industrial processing of tobacco**



At this stage of the "life" of tobacco and tobacco products, the powers of the Minister of Agriculture and Food and the Minister of Economy and of their subordinate administrations are met. Experts from both

<sup>12</sup>Art. 4 of Ordinance No. 22 of 21 December 2016 on the procedure for keeping a register of tobacco growers and a register of the persons who are authorized to buy raw tobacco, SG. No. 105 of 30 December 2016

<sup>13</sup> 29.05.2018 r.

<sup>14</sup>Case law treats the sale of chopped tobacco and its fitness for direct use in a different way from tax law. In a number of cases, the experts' reports show extremely poor quality raw material and unfit for its use as a tobacco product. This gives grounds for dropping of prosecution.

<sup>15</sup>See Detailed regulation see in the Ordinance on the Terms and Procedure for Issuance and Withdrawal of Permits for Industrial Tobacco Processing and Tobacco Manufacturing

ministries form an expert council for issuing and withdrawing tobacco processing permits. Given their legal competencies, there is no competition within their powers as they are exercised within the council itself.

The leading powers are the Minister of Agriculture and Food who:

- approves rules for the activity of the expert council and for the activity of control,
- submits a proposal for granting a permit to the Council of Ministers, which shall include an assessment of whether the proposal is for an authorization or a waiver,

The most important elements of the authorization procedure are two. The first is the tobacco buyout program and the production program for industrial processing and tobacco production by type. The second distinctive feature is the declaration of the size, origin and reason for the funds held to carry out the activity. An Expert Council of the Ministry of Agriculture and Food Control exercises control over the presence of these two preconditions both in the procedure for obtaining the permit and at a later stage in carrying out the processing activity. It is the program that guarantees the capacity of the processor, the type of tobacco and the grounds for control by the MAF. The program is followed by an annual implementation report.

Both the permission to buy tobacco and the processing permit is indefinite. Withdrawal is also a temporary measure over a period of 12 months in the following circumstances:

- The authenticity of the agreed types and origins has been violated, there are differences between the registered and the available production,
- The funds declared for carrying out the activity do not correspond to the actual financing,
- Buyers have failed to comply with their contracts with tobacco growers in respect of the agreed terms and conditions,
- There is a general violation of the Tobacco Act and its implementing rules,
- Upon termination of business due to insolvency or liquidation.

The revocation does not exempt persons from their obligations to tobacco growers and tobacco buyers. Renewal of the authorization is in the common order and is a type of re-issue.

**Produced tobacco with its slicing becomes an excisable product - "manipulated tobacco"**. From this stage, the **Minister of Economy** together with the Ministry of Finance carries out the state policy and exercises control over the tobacco and related products in order to implement the tax and excise policy of the state.

Processed domestically produced tobaccos are marketed only by persons licensed for processing.

## 2.4 Manufacture of tobacco products

The production of the articles implies a wide range of actions that convert tobacco into end-user-friendly products. This process includes the following activities:

Manufacture of cigarettes

Manufacture of cigars and cigarillos

Production of pipe tobacco

Manufacture of tobacco for the rolling of cigarettes

Manufacture of tobacco for chewing, sniffing and oral use

Production of water pipe tobacco

Production of a new tobacco product

The production is conducted under a strict authorization regime and an act of the **Council of Ministers** is needed for this purpose<sup>16</sup>.

Similar to obtaining the tobacco processing license and here it is necessary to prove the capacity and fulfillment of pre-legal conditions. Unlike the previous procedure, the proposal is made by the Minister of Economy, that is, the Ministry of Economy (MoE) is the leading one, once again the expert council assesses the suitability of the applicant. A representative of both the Ministry of the Interior and the Customs Agency participates in the expert council.

A condition for obtaining a license is the cumulative coverage of several requirements:

- good reputation, financial capacity and professional experience,
- technical resource and security of a complete production process,
- a number of entirely technical requirements for the facilities and production premises,
- the right to use the trademark for the respective tobacco product.

### Conclusion

Thus, the conditions for obtaining a manufacturing license are easy to judge both in the technical part and in the category of good repute and professional experience. Legislation provides for an example listing of conditions for their availability. This makes the evidentiary procedure clear and excludes subjective judgment about the existence or absence of licensing grounds.

Production licenses are indefinite. Until 1 June of the calendar year, manufacturers are required to report on the implementation of their production program for the past year, submit their program for the current year and confirm the programs with data in the profit and loss account and their balance sheet. The authorization shall be revoked if:

- the authenticity of the agreed types and origins is impaired; there are differences between recorded and available production,
- the funds declared for the implementation of the action do not correspond to the actual financing,
- there is a general violation of the Tobacco Law and its implementing regulations,
- a voluntary refusal of authorization has been made.

The measure to withdraw the license is also temporary - for a period of 1 to 3 years. Unlike the withdrawal of a tobacco processing license, the withdrawal of a license for the production of tobacco products has a greater weight as it affects reputation. A good reputation is the legally required conditions for obtaining a license for the production of tobacco products.

### Conclusion

The procedure for withdrawing a manufacturer's license has been imposed on the signatories to make their own assumptions, to make a description of the factual situation, to substantiate their allegations with facts and evidence. And if this is an understandable obligation for the controlling authorities, it is absolutely unjustified for ordinary citizens who suspect an abuse.

If complaints and alerts do not meet the statutory formal criteria, they are not even allowed to be considered. This entails the sole responsibility of the sender. The full justification for the nature and nature of the breach should be made entirely by the state institutions on the basis of an inspection carried out by them.

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<sup>16</sup>ibid.

In addition, before withdrawal of the license, manufacturers are entitled to a time limit for the removal of irregularities and damage. If the irregularities are remedied and the damage to the revocation of the license is not proceeded.

This makes the procedure itself difficult to exercise.

Licensed manufacturers are also entered in a public register of the Ministry of Economy. The persons with issued and revoked licenses for the production of tobacco products are subject to marking. The register shall be kept by year and by separate accounts for each person who has been authorized.

Only the register of new tobacco products, but not the manufacturers of tobacco products, can be found at the Ministry's website. Thus, the statutory public register does not actually exist, and the Ministry of Finance, like the Ministry of Agriculture, does not fulfill part of its statutory obligations.

## 2.5 Registration of new tobacco products

For their part, they are two types - smokeless and smoking articles.

In the Institutional Framework for Regulating the Tobacco Market, the Ministry of Economy has a leading role in the marketing of a particular tobacco product<sup>17</sup>. In fulfillment of their legal obligation, manufacturers and traders of tobacco products are obliged:

- notify the Ministry 6 months before the product reaches the free market,
- pass a product compliance procedure with the requirements of the legislation on smoking tobacco and smokeless tobacco products respectively.

In practice, the compliance procedure is under the control of the Ministry of Economy's administration, but the Ministry of Health and the Tobacco and Tobacco Institute have a significant role to play in providing additional opinions on the suitability of the product<sup>18</sup>.

The procedure is intended to verify that the product meets the toxicity, the danger of addiction and the accompanying documents giving an explanation of the use of the tobacco product.

## Conclusion

The very process of registration of new tobacco products is marked by a lengthy administrative procedure. Moreover, during the registration period of new tobacco products on the market, an environment for their illicit trade is created (in the opinion of the tobacco merchants).

After the new tobacco product has been placed on the market, other vendors may react at least six months later with a competing product.

As a positive point, we can point out that the data gathered during this procedure is provided to the European institutions and this helps to meet the conditions of Directive 2014/40 / EC introducing the obligation to trace each tobacco product from raw material until sale by a licensed trader.

## 2.6 Trade with Tobacco and Tobacco Products

The overall tax regulation of tobacco products is within the competence of the **Ministry of Finance** and its subordinate administration, in the form of the National Revenue Agency and the Customs

<sup>17</sup>Detailed arrangements for the procedure see in Art. 26 et seq. Of the Law on Tobacco, Tobacco and Related Products.

<sup>18</sup>Details see in Art. 26 and following articles of LTTRP

Agency, as tobacco products are shipped, transported, stored, offered or sold under the Excise Duty Act and tax warehouses. This is precisely what is required by their specific designation with a tax certificate, terminologically known as excise labels. This obligation exempts products destined for export to the EU and third countries.

### **Registration of a price**

The first step in marketing a tobacco or tobacco product is to make a price registration<sup>19</sup>. By its nature, this "notifiable" regime, as the law treats it is, in fact, entirely registrative. The reason for this statement is:

- the "notification" period,
- the administrative procedure for organizing the procedure,
- payment of a state fee,
- the trademark verification and the competence of the Customs Agency on its own initiative to require additional information.
- Issuance of a certificate of registration (Article 3 of the Ordinance for registration of a price).

The registration of the price at the Customs Agency is a condition for obtaining excise labels.

Excise stamp is a government security that proves the payment of the excise duty due for the tobacco products released for consumption. The excise labels show the sales price at which the tobacco products are sold to the retail consumer. Costs include production and sales costs, duties, fees, excise duties and value added tax.

The latter requirement is a key one because any change in the price of tobacco products (especially for cigarettes where the market is more competitive and dynamic) requires not just price registration but also the production of the relevant excise labels in advance. This removes the flexibility of market players to quickly change the cost of their products, giving potential competitors more time to react. At the same time, the availability of the excise sticker price gives consumers full information and does not allow traders to sell at a different price.

It is important to note that the possible lightening of this regime, for example by eliminating the price of excise labels, which would allow a faster price change without the need for new excise labels or through innovative electronic control solutions, is to a certain extent also tied to the capacity of public authorities to control traders. At present, the sale of tobacco products in our country is relatively liberalized, as such can be found in many different sites (lakes, shops, gas stations, etc.). Potential change in excise labels and the need for greater control of objects can also influence the tightening of the mode of the type of objects that can sell tobacco products.

In order to lighten the excise stamp mode by removing the price from it, without causing a tightening of the regime of the objects that can sell tobacco products, a solution can be sought as the price of the article to be printed on the box itself. This way, the excise label will perform its function, and the only distinctive feature is that it will no longer bear the price of the product, and it will be printed on the packaging itself (probably at the bottom of the pack). The latter will be the obligatory for the manufacturers and they will be responsible for this. Thus sellers will not be able to speculate, and the price will actually be more visible to consumers than its presence on the excise label.

### **Conclusion**

The requirement for the excise label to print the final price for the consumer, which includes all production and distribution costs, taxes and trade concessions, is made in order to maximize the

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<sup>19</sup>For details on the procedure, see Ordinance on the Terms and Procedure for Registration of Tobacco Products Prices, Prom. SG. no. 71 of August 13, 2004, am. and dop. SG. no. 22 of 22 March 2016

state's collection of taxes due and not to create conditions for illicit trade. Therefore, it can be considered that this regime is a means of curbing illicit trade.

A potential solution that preserves all the positive features of the excise label but also provides more flexibility to companies without endangering consumers is that the price of cigarettes is not present on the excise label which retains all other features but is printed on the packaging itself .

As a source of smuggling and illicit trade, cigarettes not marked with excise labels remain on export to the EU or third countries and under a sales regime under the Duty Free Trade Act. That is where the institutions should concentrate their control efforts.

After placing a tobacco product excise label, they are suitable for distribution in the consumer network. Their sale is done only by traders who have been registered for the sale of tobacco products. The free sale is forbidden on explicitly specified in the LTTRP places as a lens near crèches, schools, health institutions. A ban also exists for the sale of persons under 18 years of age<sup>20</sup>.

## SUMMARY CONCLUSIONS

- Institutions are "well armed" with the power to control at each stage of the tobacco growing cycle until it becomes an edible tobacco product,
- Legislation can easily be adapted to the latest European requirements for tobacco tracking at the different stages of its processing and sale,
- There are examples of denial of authority by the administration,
- The existence of preconditions for illicit trade and smuggling stems not from the legal regulation but from the capacity of the institutions to enforce the legislation.

## 3. Prosecution of the illicit trade and smuggling of tobacco products in Bulgaria

### 3.1 Administrative and criminal liability

Smuggling and illicit trade of tobacco products are acts (actions) that are reprehensible under Bulgarian law, that is, their conduct is determined to be dangerous to society because it damages public interests in various areas - healthcare, tax collection, etc. Therefore, the perpetrator of smuggling and illicit trade must be held accountable for his actions. Each of these violations can be different in degree of public danger - illicit import and sale of a stack of cigarettes is fundamentally different from illicit import and sale of a single container of cigarettes. This distinction also requires a different type of treatment for the perpetrator - the penalty being the violation committed. This type of division is introduced in Bulgarian legislation:

- The smoothed cases of smuggling and illicit trade are reported as administrative violations and are penalized administratively, administrative responsibility is assumed,
- The heavier are raised in crimes and are punished by condemning the perpetrator by the court, that is, criminal responsibility.

A leading criterion for determining the type of liability and the manner of punishment is **the public danger of the act**. *The public danger is expressed by the extent to which the violation damages the established public order in the country.*

<sup>20</sup>Detailed enumeration see in Art. 30 of LTTRP

**Example 1** - The transfer of 10 stacks of cigarettes across the border without being declared, with the alleged purpose of selling them, violates the legislation. But this act of a perpetrator does not have a major impact on the state budget, therefore there is no major public danger, so it should be pursued as an administrative violation.

**Example 2** - Carrying 10 containers of cigarettes across the border without being declared, obviously for sale, is significantly violating the legislation. Failure to pay large amounts of excise duty on these cigarettes is an important obstacle to the formation of government revenue. As a consequence, there is a risk of collecting funds to maintain budget areas such as defense, healthcare and social welfare and seriously damages the public interest, that is, a high social danger and should be treated as a crime. Separately, revenue from the sale can be used to fund another criminal activity.

Thus, the search for criminal responsibility is used as the last and ultimate possibility of reaction, ie. the infringement is of such a nature that only its prosecution is insufficient.

Not every offense for smuggling is raised in a crime, however. From a sensible point of view, an additional standard is adopted, justified by **the economic expediency**, which the legal logic follows: if for any violation the state authorities / customs officers, the police and the prosecutor's office / should place all the necessary resources for its investigation and proving the violator's fault, would commit too much administrative and financial resources. For this purpose, minor offenses are penalized more easily.

Therefore, minor offenses are called **administrative violations** and administrative penalties such as fines, confiscation of goods and belongings, withdrawal of a license to trade on a commercial site, etc. are imposed. Administrative offenses are imposed on **companies / legal entities / and citizens / individuals /**.

**Serious violations** come from the category of **crimes**, and the responsibility **always lies with an individual**. This person may be a specific smuggler, a person in a management position in a company that has commissioned or facilitated smuggling, and a person charged with monitoring compliance with customs and tax laws.

Smuggling is inextricably linked to illicit trade, as most of the illicitly crossed goods are the subject of sale and resale by and to third parties. Thus, what is legally produced in one country can be smuggled and trafficked into another. That is why we can talk about smuggling:

- goods in Bulgaria with another country source
- goods in a third country with a source from Bulgaria.

According to the public danger, smuggling is divided **into customs smuggling**, which is punishable by administrative order and **qualified smuggling**, which has been declared a **crime**.

**Illicit trading** is an **administrative violation** and is punishable by administrative procedure when it is an unimportant case. In other cases, the holding and sale of tobacco products without excise labels is qualified as a crime - **illicit trade, for which it is subject to criminal liability**.

Illicit trade is being pursued by local authorities when it is carried out on the territory of the country.

### 3.1.1 Smuggling as an administrative violation

In order to impose administrative responsibility, administrative controls should be carried out in order to establish an infringement. The administrative control is carried out by employees of the Customs Agency and covers the examination of the goods to be transported or transported. For there to be an administrative violation of "customs smuggling", there are two possibilities of doing so:

- when checking the goods carried at the border checkpoints a discrepancy is established between a lawful quantity or type of tobacco products and a transported or transported quantity and type of tobacco products,

- the goods are not declared at all.

Unlike the smuggling offense, the administrative violation of "customs smuggling" is present and is being prosecuted and experienced at the level of experience.

The sanctions in this case are a manifestation of a state criminal policy implemented by administrative order. Reduced in size and different types of penalties imposed by the administration itself are applied without the need for a court to determine the penalty. The most common penalty is a fine, as in qualifying circumstances such as repetition or use of funds impediment to control (secrets or concealment of goods in other items), the fine is increased many times.

The vehicle that has helped to commit the smuggling is forfeited in favor of the state. This measure has been taken to motivate carriers to exercise internal supervision over their employees and to cross the customs smuggling into the embryo.

The violation is established by an act establishing the administrative violation issued by the Customs Agency. As a next step, on the basis of the act, a penalty decree is made, in which individualization of the administrative punishment is made. The appeal is filed before the district court, the cassation instance of the decision of the district court is the relevant administrative court in the district<sup>21</sup>.

### 3.1.2 "The crime "qualified smuggling"

In criminal law smuggling is regulated as a crime against the economy and in particular as a crime against the customs regime. The offense is carried out through the "transfer" of goods across the border of the country without the knowledge and permission of the customs authorities. The offense is completed as soon as the goods are actually transported across the state border.

In order for the smuggling offense to be committed with regard to tobacco products, they must be transported or transported across the border. Without mentioning explicitly, tobacco products fall under the hypothesis of Art. 242, para. 1, b. E of the Criminal Code (CC) - goods and articles for commercial or production purposes in large proportions. That is, unlike the administrative offense of "customs smuggling," in the case of crime, tobacco products must be valued at a **large amount** of money. In interpreting the concept of large sizes, the Supreme Court has in mind the monetary value of goods, not so much their volume<sup>22</sup>. Under "large sizes," the practice adopts a value that exceeds 70 minimum wages.

Unlike the administrative offense, the perpetrator always acts deliberately in the offense whereas in part of the cases of the administrative offense "customs smuggling" the person may not have known his obligation to carry less tobacco (10 instead of 2 stacks of cigarettes to overloading). Considering this criterion, it is the law that introduces the concept of "large-scale" because one person in several journeys due to distraction and inattention can commit the violation without really having a high degree of public danger. Separately, criminal smuggling of the border with goods, in this case tobacco products, is a crime with a high degree of public danger. It undermines the ability of the state to fulfill its inherited functions and undermine the effectiveness of the tax system.

Unlike the administrative offense "customs smuggling", smuggling of tobacco products is potentially possible in five separate hypotheses:

- systematic - that is, more than three times. A person or a group of persons who have committed and established three administrative violations of the transport or transfer of tobacco products fall within the category of a committed crime. Thus, the administrative breach of repeatability is a prerequisite for a crime,

<sup>21</sup>Art. 63 of the LAVP in relation to Art. 208 of the APC.

<sup>22</sup>See Interpretative Decision No 6 dated 15.11.1973 on General Affairs No. 2/1973, General Assembly of the Supreme Court Criminal Code and Interpretative Decision No 1 of 30.10.1978 on No 1 / 1998, General Assembly of the Criminal Court of the Supreme Court of Cassation.

- when a misrepresenting document or a foreign, false or forged document is used - instead of declaring tobacco products, the offender has declared other types of goods or has redrafted the contents of the document describing the articles,
- the smuggling is done by a person with specific functions - an official of the customs administration for example,
- if there are two requirements relating to the subject of smuggling at the same time - tobacco products of particularly large proportions which are not for personal consumption but for production or trade,
- by two or more people who have previously consented. This type is also known as smuggling smuggling.

**The preparation** for smuggling is punishable only in two cases:

- In the case of smuggling in particularly large sizes and particularly severe cases<sup>23</sup>,
- when smuggling is done by two or more persons, one of whom is a customs officer.

Penalties for qualified smuggling are imprisonment of 5 to 15 years, depending on the specific circumstances of the offense committed. This penalty is also accompanied by the imposition of a fine. Interesting from a practical point of view is the question whether there is a qualified smuggling as a crime, given that smuggling takes place when the Bulgarian border crosses with and with an EU country. The issue is the subject of the Interpretative Activity of the Supreme Court of Cassation (SCC)<sup>24</sup>. According to the interpretation of the SCC, the guiding criterion should be the origin of the commodity. Two solutions are outlined:

- the existence of an internal EU border after January 1, 2007 does not exclude the possibility of the smuggling of the goods being transported through it only when the product is non-Community, that is to say *originating from a non-EU country*. The unlawful introduction and movement of non-Community goods into the customs territory of the EU violates the procedure established in the customs legislation. It also avoids paying the customs debt and thus affects the financial interests of the EU. There is a real risk that goods will be allowed to go uncontrolled to economic circulation, which risks affecting the entire territory of the Union.
- Where the product originates from the EU, this excludes the possibility of transiting goods through the Bulgarian border to commit a crime of qualified smuggling because of the lack of border customs control between the Republic of Bulgaria and EU Member States. The control carried out by the customs authorities is not customs within the meaning of the customs legislation, but the control of the revenue authorities under the Excise Duties and Tax Warehouses Act. Where it is found that the offense should not be prosecuted, the case shall be forwarded to the Customs Agency for the imposition of an administrative penalty.

### 3.1.3 Illicit trading as an administrative violation

The definition of illicit trade proposed in this analysis is the sale of excise goods in breach of tax law in order to avoid taxation of traded goods.

Bulgarian legislation has adopted a regulatory approach to prevent as much as possible from reaching the market for goods intended for illicit trade.<sup>25</sup>

<sup>23</sup>A particularly serious case is the one in which the crime committed in view of the harmful consequences and other aggravating circumstances reveals an extremely high degree of public danger of the act and the perpetrator, Additional Provisions of the Criminal code.

<sup>24</sup>See Interpretative Decision No. 1 of January 21, 2015 of the SCC Criminal Collegium.

<sup>25</sup>See Art. 123 et seq. Of the Excise Duties and Tax Warehouses Act.

An administrative offense, other than offering, also includes the holding, transporting and transferring of excise goods such as tobacco products, where they are without excise labels, the band is false, forged or expired.

Control is the competence of the Customs Agency. The punishment is again fine and the removal of the goods. The distinction of the punishment is made according to the type of perpetrator - whether it is a natural or legal person, and the legal persons are punished more severely.

### 3.1.4 Illicit trading as a crime

The major difference between the administrative offense and the offense is reversed on the basis of public danger.

Under the offense, illicit trade is an unimportant case where the perpetrator sells or holds excise goods without excise labels. In this case, the state authorities are not concerned whether it is transport or transfer. It is important to establish a lasting factual knowledge of the goods. The operation threatens, on the one hand, the financial interests of the State to a large extent due to the danger of placing excise goods on the market without paying tax and, on the other hand, the normal functioning of the market, ie the interests of producers, importers and consumers of such goods, in violation of the principles of free trade and competition.

The punishment is imprisonment and payment of a fine.

### 3.1.5 Smuggling and Illicit Trade - Links and Relationships

The question posed by the practice is whether there is an ideal aggregation of offenses between smuggling and illicit trade. In other words, when crossing the border with smuggled goods, a person with one act carries out two crimes?

The practical difficulty comes from the fact that once a person may have transported or transferred tobacco products across the border of the Republic of Bulgaria, it becomes inevitably a holder of these goods. Art. Article 234 of the Criminal Code declares the criminal possession of excise goods without excise labels when it is not a matter of no importance.<sup>26</sup> That is, there is no need for the person to trade in the tobacco products owned and there is no need to have a criminal outcome as a result of the sale. Even possession is already a crime.

In order to clarify the issue in law enforcement, the Supreme Court of Cassation issued an interpretative decision<sup>27</sup>, accepting **that there was no ideal aggregation and no two separate crimes, but only one.**

From an analytical point of view, the reason for this is as follows:

- The opening by the customs authorities at the border point of excise goods without a excise band excludes the factual power exercised over them on the perpetrator and the danger of them being imported into the economy without paying the excise duty due,
- It follows that the holding of the excise goods without the necessary excise band as a form of the act of execution of the offense under Art. 234 of the Penalty Code is swallowed by their actual transfer across the border of the country. **When this is done without the knowledge and permission of the customs authorities and there are other signs of the offense of qualified smuggling, only the composition of the smuggled trafficking is carried out, so that the ideal combination of the two crimes can not be accepted.**

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<sup>26</sup>According to the Supplementary Provisions of the Criminal Code, it is of little importance that the offense committed in view of the absence or negligence of the harmful effects or other attenuating circumstances represents a lower degree of public danger than ordinary offenses of the respective type. So keeping a box of cigarettes without banderol does not make you a criminal.

<sup>27</sup>See Interpretative Decision No. 1 of January 21, 2015 of the SCC Criminal Collegium

### 3.1.6 Practical clarification of the issue of administrative and criminal liability in cases of smuggling

Customs and skilled smuggling are not a novelty for Bulgarian society or a problem of recent decades. They have their deep grounds and duration in time, being subject to a study of the Supreme Court's practice, which also led to the court's interpretative activity in 1978.<sup>28</sup>

It is assumed that when the act affects two different objects of protection, one of which is guarded by an administrative norm and the other by a penal norm, then there will be both an administrative violation and a crime for each of whom the perpetrator will have an administrative and accordingly criminal liability. For example, if a person purchases for the purpose of selling and selling the goods bought for that purpose, which he knows or circumstances should supposedly have been imported in contraband with reduced or duty-free amounts, then the act is committed as an administrative offense, as well as a crime. And that is so, according to the interpretation at the time, because two different objects of protection are harmed by the act - in the first case the regime of the import of foreign goods, and in the second - the regime of domestic trade.

Such a type of understanding, however, is an exception to the general principle of inadmissibility of simultaneous liability - criminal and administrative penal when a crime and an administrative violation are committed in one act.

As it is known, in law there is the principle that for one act the perpetrator cannot bear two separate punishments in the presence of a first punishment already imposed.

#### Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Art. 4, § 1 No one shall be tried or punished by the courts of the same State for an offense for which he has already been acquitted or finally convicted under the law and criminal proceedings of that State.

It is, however, that customs and qualified smuggling have given grounds under Bulgarian law to apply this principle for many years to an exception.

The disintegration of totalitarian government and the accession of Bulgaria to the European Convention on Human Rights create conditions for the real implementation of the principle. However, for years there has been controversial practice and neglect of a leading legal principle. In 2015, again through the interpretative activity of the Supreme Court of Cassation<sup>29</sup>, clarification of cases where there is a competition between criminal liability and administrative punishment of one and the same person for the same act is reached.

To clarify what type of responsibility the perpetrator will bear, the "Engel" test<sup>30</sup>, adopted by the European Court of Human Rights (ECHR), also known as the Engel Criteria, is introduced. These include three steps:

- 1) the classification of the act under national law;
- 2) nature and character of the offense;
- 3) the type and severity of the punishment provided (severity of the possible punishment).

<sup>28</sup>See Interpretative Decision No 51 of 29.12.1978, General Assembly of the Criminal Collegium (OSC) of the SC.

<sup>29</sup>See Interpretative Decision No 3 of 22.12.2015 on interpretation. Case No 3/2015, Supreme Administrative Court of the Supreme Court of Cassation. The explanations and conclusions have been reaffirmed as undisputed by Interpretative Decision No. 4/2018, SCC of the Supreme Court of Cassation

<sup>30</sup>See Engel and Others v. Netherland

The **first criterion** is formal, it does not determine on an independent basis the nature of the **proceedings** - administrative or criminal, but only relevant to the "point of reference" in its assessment. The systematic location and classification of the offense and proceedings under the domestic law of the States is not decisive for the conclusions regarding their criminal nature and nature. The proceedings may, however, be classified as criminal and, if they are not classified as such under domestic law, if the examination of the other criteria leads to the conviction of the criminal prosecution and / or the sanction envisaged.

The **second criterion**, the nature and character of the **violation**, examines the type of protected public relations that is the subject of the violation. In determining the nature of the infringement, the circle of addressees of the relevant provision is considered, since the characteristic feature of the criminal charge is the direction of the rule of law towards an unlimited circle of addressees rather than a special status group.

The **third criterion** - the type and severity of the penalty provided by the relevant applicable rule. The severity of the **penalty** is determined according to the maximum possible punishment provided by the law.

Following the "Engel" criteria, the ECtHR has repeatedly qualified as criminal procedures and violations which, under domestic law, have been qualified differently, for example administrative.

When the act affects the same circle of public relations, the correct and correct application of the law presupposes the realization of liability for either administrative violation or crime, **but not both**, while the administrative criminal liability should be committed only if the act does not constitute a crime.

The norm of Art. 33 of the Administrative Violations and Penalties Act embodies the legislator's idea of **the priority of criminal responsibility over the administrative**, and does not allow competition between them at all. If a criminal act is initiated for an act, administrative penal proceedings are not initiated and the proceedings are terminated. **The rule is an advantage of the criminal over administrative-liability liability. No administrative penalty proceedings shall be instituted if the act constitutes a crime and if proceedings are instituted, the same shall be terminated** and the materials shall be sent to the prosecutor.

### Conclusion

Following the principle set in the ECHR and Protocol 7, the SCC asserts that criminal proceedings brought against a person in respect of which the same act has ended with an enforceable measure of criminal procedure within the meaning of the ECHR is subject to termination. The argument is that since the responsibility has already been realized by virtue of the enacted act. The first-time administrative-criminal liability excludes the exercise of criminal liability, as long as the administrative punishment is "criminal" in the Engel test - for example, the fine for smuggling of tobacco products is high enough.

It is noteworthy that judgment is made for each individual case on the basis of the algorithm built.

### 3.1.7 Joint criminal activity

Despite the detailed regulation of the types of responsibility, it is often implemented on specific perpetrators, over which there is a far longer chain of ideological leaders, participants and patrons of crime. Such a convict is the driver carrying a smuggled commodity, but the real people undoubtedly continue the development of smuggling channels and illicit trade. For these cases, the concept of "organized crime group" was adopted as a form of widely popular organized crime.

According to the current version of Art. 93, item 20 of the Criminal Code, organized crime group (OCG) is a "structured, lasting association of three or more persons with the purpose of coordinating

in the country or abroad crimes for which the punishment for deprivation of liberty has been provided for more than three years. The association is structured without a formal division of functions between participants, length of participation or developed structure. "

At the same time, the nature of the crimes objectively implies exceptional difficulties in revealing the participants in the criminal group and proving the circumstance of a particular case. In practice, the following prerequisites for the existence of an OCG are highlighted:

- establish a lasting connection with the accused and the accused with any content - that is, the durability of the relations, the mutual trust and the high degree of organization are the hallmarks,
- performance of tasks against payment, presence of elements of subordination in the execution of tasks,
- taking independent decisions to commit a crime is one to two leaders,
- voluntary participation in the actual execution of the committed criminal activities by the other participants in the criminal group.

The formation of a criminal group takes place not with a one-off action but with a sequence of actions united by the common goal and resulting in the conciliation of the will of a certain number of persons to participate in a criminal association for committing a certain category of crimes (two or more crimes of a kind ).

Executives of the decision become subject to detection and prosecution. The true leaders and guarantors of the group remain hidden because they do not participate directly. While they contribute directly to the formation of a high level of conspiracy and durability of relationships, a role distribution, where each participant objectively contributes less to the conduct of a long chain of crimes, the real guarantors remain hidden.

Capture of the criminal group is done in a way that does not allow tracking of the link to which market the products are intended for. Thus, the perpetrator is punished, but not the criminal activity. The punishment shall be borne by the full-fledged persons, discontinuing the relationship with the initiators.

### 3.2 On the traces of smuggling - the EU's attempt to curb smuggling and smuggling

The implementation of Directive 2014/40 / EU of the European Parliament and of the Council <sup>31</sup>provides for a new obligation for tobacco manufacturers and traders. The aim is to build a **traceable trail** for the cut tobacco from the time of its primary processing to the smallest trader before selling the final customer. This will substantially change the conditions for smuggling tobacco and tobacco products.

The model of implementation of the Directive implies:

- All tobacco products marketed in the EU, regardless of the country of manufacture, should be marked with a unique non-removable identifier,
- The identifier will provide information on who the manufacturer is and at which day, hour, and in which factory the product is manufactured, the targeted end-market and, most importantly, the intended shipping route.

Once the transport route is provided, it is possible to trace the actual route from the production site to the first retail outlet, including all used warehouses, as well as the date of dispatch, destination, point of departure and destination.

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<sup>31</sup>See full text of the directive here:<http://eur-lex.europa.eu/legal-content/BG/TXT/HTML/?uri=CELEX:32014L0040&from=BG>

Data security is guaranteed by the special storage mode of a third party. The criteria for third parties are yet to be established.

The rules should apply to cigarettes and tobacco for manual contraction of cigarettes from 20 May 2019 and for tobacco products other than cigarettes and tobacco for manual contraction of cigarettes from 20 May 2024.

The positive expectations associated with this regulatory solution are:

- reduction of the volume of tobacco products subject to illicit trade,
- reducing smuggling and illicit trade in EU tobacco products from sources other than the EU,
- depriving producers of legal justification that their tobacco brands are manufactured by other manufacturers' factories. In the strongest sense, the hypothesis that legitimate producers release their production for the illicit market will be confirmed.

One of the most controversial points in the directive is whether these rules will also cover tobacco products produced in the EU but sold outside the Union. The argument that they remain out of reach was that different rules exist in third countries (be it for similar codes, health texts, frightening pictures, etc.) and accordingly the EU can not intervene with an explicit requirement for goods that are not to sell within the EU. In the end, however, these considerations have been dropped and the regulation will cover all tobacco products within the EU, intended for export to third countries.

The case of Bulgaria in this regard is interesting. Our country is a traditional manufacturer of tobacco products, specifically cigarettes, which are destined for third countries. Also, data from non-EU countries, such as Turkey, show that Bulgarian illicit cigarettes are on the local market. The new directive, which will enter into force on 20 May 2019, will mean that cigarettes manufactured in Bulgaria for third countries will be marked with a unique identifier to ensure traceability. This means that if illicitly packed cigarettes are found on a third country market, such as Turkey, they could potentially be traced to Bulgaria.

### 3.3 Weaknesses in the control system. Legal deficits

The main weaknesses in the system are found in the analysis of the qualified smuggling, which is also a crime within the meaning of Art. 242 of the Criminal code.<sup>32</sup>

In order to condemn a person for his smuggling, a good synergy between the different institutions is needed. Often, behind the successful completion of a convicting case, it is necessary that the smugglers (investigating customs inspectors) have proceeded to the correct and timely collection of the evidence of the offense committed. The activity of proper collection of evidence also includes the initial involvement of the monitoring prosecutor. Well-prepared evidence contributes to the next stage - the pre-trial proceedings, the prosecutor's office to properly criminalize the offense and persuasively persuade the perpetrator. The full examination of the facts and circumstances takes place during the final court stage.



Often, a number of violations do not at all reach the stage of the trial in a criminal trial, but they end:

- refusing the prosecution to institute pre - trial proceedings; or
- Termination of criminal proceedings.

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<sup>32</sup>This part of the analysis examines data from an inspection of the Inspectorate to the Supreme Judicial Council, carried out in 2016 at the district and military-district prosecution offices in the country. The full text of the review available here: <http://www.inspectoratvss.bg/acts/1494338530.pdf>

## Refusal to initiate criminal proceedings

It is important to note that in most cases the violation does not meet the "very large size" criterion, equivalent to 70 Minimum Wages, according to the practice of the Supreme Court of Cassation. I.e. the violation can then be defined only as an administrative violation, but it does not constitute a crime. This is a ground for refusing to initiate the pre-trial proceedings.

Another problem is that even if the act meets the criterion of particularly large size, it can not be proved that it was committed deliberately because the goods are most often not loaded in the presence of the drivers (which excludes its intentional conduct). It follows that they were not aware that they carried goods for commercial or production purposes and that their transfer was done without the knowledge and permission of the customs authorities.

A particularly interesting and problematic case study of the practice exists when smuggling not of tobacco products, but of a tobacco product excise label. In this case, it is valued, which often meets the criterion of particularly large size, but since the excise label is a special type of security and not a commodity - a tobacco product which, according to the prosecution, "can not be the subject of a subsequent transaction" .

### Conclusion

Reasons for the refusal to prosecute are the lack of the legal requirements required:

- particularly large amounts of smuggled goods,
- contraband for commercial and production purposes,
- the presence of incomplete proceedings before a foreign court.

## Termination of criminal proceedings

**Proceedings can be terminated in the following cases:**

- condemning the person from a foreign country - applying the principle "no one can be judged twice for the same thing,"
- the expiration of the statutory limitation period which has occurred due to the cessation of proceedings against an unknown perpetrator,
- after a re-examination, a smuggling commodity is found that does not meet the "particularly large size" criterion.

When analyzing the pre-trial proceedings and files on the cases of qualified smuggling conducted by the Prosecutor's Office, the following findings are established:

- problems in the application of the law - after the refusal to initiate criminal proceedings, the prosecution does not notify the relevant customs office. As a consequence, administrative and criminal liability is not realized,
- the person responsible for verifying the work of the regular prosecutors Inspectorate to the SCC has not motivated the inspection of the selection of prosecution offices in the border regions of the country. Thus, in practice, prosecutors in border areas where there is a potential risk of smuggling and illicit trade are not checked. Including the District Prosecutor's Offices in Haskovo and Blagoevgrad are not subject to investigation.

## 4. Conclusion and recommendations

Material law in the field of tobacco and tobacco products provides a good and fairly detailed regulation of the sector. There are well developed and comprehensive definitions of tobacco products and tobacco-derived products. This allows the state authorities to apply the law in an easy and unambiguous manner both in their relations with the producers and in fulfilling their assigned registration and control functions with regard to the traders of tobacco products. The forthcoming implementation of newly adopted EU regulations in an easy way can be transposed into national law.

Despite the good legal framework, there is either a delay in fulfilling the institutions' obligations or a complete denial of enforcing the law.

Punishment of smuggling and illicit trade in Bulgaria is also settled in a good way and provides a broad tool for prosecuting them both in administrative and judicial proceedings. The rich jurisprudence and interpretative affairs of the Supreme Court, subsequently the Supreme Court of Cassation, have cleared the controversial issues of law enforcement.

So a key issue to solve is whether institutions have the capacity to enforce laws.

In view of this, we make the following recommendations:

- ◆ Strengthening control over tobacco producers in order to limit the illegal supply of smoking tobacco (for pipes and cigarettes) - this is the so-called cut tobacco, which is mainly of local origin. In fact, the smoking tobacco market is dominated by illegal products, which means that there is a huge scope for the control authorities to work;
- ◆ Closer cooperation with control and judiciary authorities in other countries, especially neighboring Bulgaria - the data indicate that Bulgarian illicit cigarettes can be found on foreign markets and in particular those in Turkey;
- ◆ The control exercised by the state authorities (the Ministry of Interior and the Customs Agency) in the factories in the country should be strong as it could achieve results and prevent the possibility of Bulgarian tobacco products to enter illegally on the domestic and international markets;
- ◆ Entry into force of the system for identification and tracking of all EU cigarette cases, those intended for export to third countries will further contribute to identifying the origin of Bulgarian illicit boxes found on foreign markets;
- ◆ Looking for opportunities for better control of tobacco-processing and tobacco-producing machinery – here it is recommended to create a register of the machines as well as rules on the sale of such machines, incl. of the already confiscated by the control authorities;
- ◆ The possibility of dropping the price of the cigarettes sticker is also open, the latter being written and printed on the box itself by the manufacturers – so the consumer will be protected from any possible speculation by the traders while at the same time it will lighten the excise stamp printing – which is currently limiting the market flexibility.