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Articles

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Tobacco Smuggling: Legal Response to the Eastern European Inflow*

Przemyt wyrobów tytoniowych. Reakcja prawna na napływ z Europy Wschodniej

ABSTRACT

Cigarette smuggling is an important part of the illicit cigarette trade in the European Union. The most frequently cited reason for smuggling is a significant difference in cigarette prices resulting from the large share of customs and taxes (primarily the excise tax) in cigarette prices. The magnitude of this phenomenon in a given country depends, among other things, on its geopolitical location and its legal, economic and social conditions. Poland, taking into account its geopolitical location, is one of the EU countries that are crossed by "transit routes" for cigarette smuggling, including the route across the EU's internal border between Poland and Lithuania. At the same time, it is a country where smuggling detection rates are high. Customs control by customs administration bodies based on risk analysis, supported by international exchange of information, and their cooperation with other

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* The article was prepared in early 2022 and therefore does not cover the impact of the Russian invasion of Ukraine on smuggling dynamics at the Polish borders.

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entities on the national, European, and international level are of particular importance in this regard. The main objectives of the article are to identify the legal arrangements for customs control as the primary guarantor of compliance with the prohibitions and restrictions on international trade in goods and to assess its impact on the rates of detection of cigarette smuggling.

Keywords: tobacco smuggling; customs control; illicit cigarette trade; rates of detection of cigarette smuggling; international trade in goods

INTRODUCTION

Cigarette smuggling in the EU is widespread and well organized. According to the European Commission, Russia (especially the Kaliningrad Region[1]), Belarus, and Ukraine are among the main countries from which tobacco products are smuggled into the EU.[2] These countries are Poland's immediate neighbors. I. Joossens and M. Raw have for years been pointing out the wide range of this phenomenon, while emphasizing that it is a serious threat to public health and state budgets.[3] Illicit tobacco trade is not only an economic and health problem, it also feeds the shadow economy and cross-border crime.[4] Cigarette smuggling is mainly due to the large price differences between EU countries and third countries that are the source of these smuggled goods. This is confirmed by the fact that on the EU's eastern border, including Poland's border, the smuggled goods have for years been mainly cheap cigarettes from countries with lower taxes.

A feature of modern smuggling is high polymorphism, which is confirmed by the studies presented in the literature on this topic.[5] Depending on the type of border and its location, the "multiplicity" of forms of smuggling is different. This is particularly evident in the case of smuggling tobacco products into Poland. There are two forms of smuggling: at the external EU border and at the internal EU border between Poland and Lithuania. These forms of smuggling vary considerably in scope and manner. This is largely due to the geopolitical location and, consequently,

[1] Europol, *OCTA 2011: EU Organised Crime Threat Assessment*, 2011, https://www.europol.europa.eu/cms/sites/default/files/documents/octa_2011_1.pdf (access: 16.10.2022), p. 32.

[2] Next to China, the United Arab Emirates, Vietnam, Malaysia, and Singapore. See Communication from the Commission to the Council and the European Parliament: Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – A comprehensive EU Strategy, COM/2013/0324 final, p. 7; Europol, *op. cit.*, p. 32; K. von Lampe, M.K. Kurti, A. Shen, G.A. Antonopoulos, *The Changing Role of China in the Global Illegal Cigarette Trade*, "International Criminal Justice Review" 2012, vol. 22(1), pp. 43–67.

[3] I. Joossens, M. Raw, *Cigarette Smuggling in Europe: Who Really Benefits?*, "Tobacco Control" 1998, vol. 7(1), pp. 66–71.

[4] P. Filippov, *The Smuggling of Tobacco Products in Europe: Criminogenic Potential Capacity*, "Baltic Journal of Law & Politics" 2019, vol. 12(1), pp. 35–61.

[5] *Ibidem*.

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the presence of sections of a different status within the eastern border of Poland, the internal and external EU borders. There are no border controls on internal border. Movement of goods is controlled in specific situations on public roads leading to/from the border. It should be noted that this is a unique situation in the EU: in no other place is there a short internal EU border between two external EU borders, which, according to the authors, constitutes a gap that facilitates smuggling. In addition, Poland is a "transit country" for tobacco products transported to countries in the western parts of the EU which are brought in through the EU's both external and internal borders.

Two research methods were used in the study: non-reactive research and reactive research. Non-reactive research was used to perform quantitative research in the form of the desk research method and the statistical method. As part of the desk research method, an analysis was performed of the literature on the subject and the legal acts in force: international, European, and national. As part of the statistical method, a secondary analysis of data provided by the National Tax Administration (NTA) was performed. Under Polish law, three services are competent to disclose smuggling: the NTA, the Border Guard, and the Police. The NTA, and mainly its customs and tax offices, detect the vast majority of smuggling and illegal production of cigarettes on the basis of their statutory powers. Therefore, in this article, the data provided by the NTA was the basis for further analyses. The indicated number of cigarettes disclosed by the NTA in different years concerns the total number of cigarettes smuggled into Poland, as well as the number of those illegally manufactured in Poland. Only the data obtained at the request of the authors from the Tax Administration Chamber in Bialystok made it possible to specify separately the number of cigarettes at the section Lithuanian and Belarusian sections of the borders which are in the Chamber's jurisdiction. The data specifies the smuggled cigarettes disclosed with reference to the different sections of the border located in the jurisdiction of the Chamber (the section of the border with Belarus does not cover the entire section of the Polish-Belarusian border). In the course of the analysis of the NTA data, time series from the years 2005–2021 were analyzed. Unfortunately, no international institution (EU, OLAF, World Customs Organization, or Interpol) provides statistical data on the volume of cigarette smuggling into the EU. This made it impossible to compare the data that was available with data for the entire EU. Within the framework of the reactive research, individual in-depth interviews were conducted with officers of the NTA who are directly involved in combating illegal production and smuggling of cigarettes. The purpose of the interviews was to obtain expert knowledge about the problem, which is not available in official reports or scientific studies.

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RELATION BETWEEN THE CONCEPTS OF ILLICIT CIGARETTE TRADE AND CIGARETTE SMUGGLING

Although the WHO Framework Convention on Tobacco Control (2003) clearly defines illicit trade in tobacco as "any practice or conduct prohibited by law and which relates to production, shipment, receipt, possession, distribution, sale or purchase including any practice or conduct intended to facilitate such activity",[6] the analysis in this paper requires clarification of the terms used. It should be emphasized that most authors refer to the definition formulated by the WHO as a basis, and this is undeniable.[7] In the literature on the subject, different approaches to the scope of the term "illegal trade" can be indicated. For example, E. Allen points out that illicit trade manifests itself in three major and interrelated ways: smuggled, counterfeit, and local tax evaded products.[8] A similar scope is presented by S. Filippov, who indicates that 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).[9] A similar scope of the term "illicit trade" is indicated in the Comprehensive EU Strategy – different types of (international) smuggling of genuine and counterfeit tobacco products (mainly cigarettes), as well as illicit production and distribution in the EU.[10]

A broader approach to the subject matter is presented by G.J. Fooks, S. Peeters and K. Evans-Reeves: illicit trade covers smuggling, counterfeiting, cheap or illicit whites, unbranded tobacco, bootlegging, and illegal manufacturing.[11]

In this respect, it should be pointed out that, irrespective of the indicated material scope of the illicit trade in cigarettes, smuggling is always indicated explicitly as one of its components. However, the Union Customs Code does not use the

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[6] A. Cooper, D. Witt, *The Linkage between Tax Burden and Illicit Trade of Excisable Products: The Example of Tobacco*, "World Customs Journal" 2012, vol. 6(2), p. 41.

[7] L. Joossens, M. Raw, *From Cigarette Smuggling to Illicit Tobacco Trade*, "Tobacco Control" 2012, vol. 21(2), pp. 230–234; A. Rowell, K. Evans-Reeves, A.B. Gilmore, *Tobacco Industry Manipulation of Data on and Press Coverage of the Illicit Tobacco Trade in the UK*, "Tobacco Control" 2014, no. 23, pp. 35–43.

[8] E. Allen, *The Illicit Trade in Tobacco Products and How to Tackle It*, "World Customs Journal" 2012, vol. 6(2), pp. 121–129.

[9] P. Filippov, *op. cit.*, p. 37.

[10] Communication from the Commission to the Council and the European Parliament: Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – A comprehensive EU Strategy, COM/2013/0324 final.

[11] G.J. Fooks, P. Peeters, K. Evans-Reeves, *Illicit Trade, Tobacco Industry-Funded Studies and Policy Influence in the EU and UK*, "Tobacco Control" 2014, vol. 23(1), pp. 81–83.

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term "smuggling". The term "illegal entry (exit) of goods into (from) the customs territory" is used.

World Customs Organization defines "customs offence" as consisting in the movement of goods across a customs frontier in any clandestine manner, thereby evading customs control.[12] This term may also cover certain violations of customs legislation relating to the possession and movement of goods within the customs territory. This is a general definition, but clearly indicates the two most important characteristics of smuggling: (1) crossing the border of a customs territory and (2) illegal crossing – no customs control.

The World Health Organization distinguishes between two types of smuggling and defines their characteristics: 1) bootlegging – performed by persons who illegally import small quantities of products. In the case of cigarettes, price differences are particularly important. It very often involves the purchase of cigarettes and other tobacco products in low tax jurisdictions in amounts that exceed the limits set by customs regulations for resale in high tax jurisdictions; 2) large-scale organized smuggling (or container smuggling), in contrast, involves the illegal transportation, distribution, and sale of large consignments of cigarettes and other tobacco products, generally avoiding all taxes.[13] This large-scale organized smuggling is the major problem and is not caused by differences in the price of tobacco products. The WHO explains the essence of smuggling by identifying two important types of smuggling that exist in each customs territory. By distinguishing between these two types, it indicates their characteristic features: size, rationale for taking up, and manner of smuggling.

The Court of Justice of the European Union indicates that the definition of smuggling also includes a situation where goods presented to customs authorities, for which a summary declaration has been lodged and an external Community transit document has been validated, are not lawfully brought into the customs territory because the goods are not entered under a correct name in the declaration presented to the customs authorities.[14]

In the scientific literature smuggling is defined as the illegal crossing of borders between jurisdictions, the illegal trading of products across borders,[15] the evasion

[12] World Customs Organization, *Glossary of International Customs Terms*, December 2018, http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/glossary-of-international-customs-terms/glossary-of-international-customs-terms.pdf (access: 29.1.2023).

[13] World Health Organization, *The Cigarette "Transit" Road to the Islamic Republic of Iran and Iraq: Illicit Tobacco Trade in the Middle East*, 2008, http://www.emro.who.int/images/stories/tfi/documents/wntd-2008/tobacco_trade_middle_east.pdf (access: 11.5.2024), pp. 5–6.

[14] Judgment of the Court (Sixth Chamber) of 3 March 2005 in case C-195/03, *Ministerie van Financiën v Merabi Papismedov and Others*, ECLI:EU:C:2005:131.

[15] L. Joossens, M. Raw, *From Cigarette Smuggling…*, pp. 230–234.

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of excise taxes on goods by circumvention of border controls,[16] or clandestine transport across borders without paying taxes and customs duties.[17]

After having revised different definitions authors propose the following definition: entry of goods into a customs territory or, in certain cases, exit of goods from a customs territory without presentation to customs authorities and in violation of the basic rules on trade in goods. The criteria for occurrence of smuggling are physical crossing of the goods across a national border (this is a key characteristic/feature of smuggling), failure to present the goods to the customs authorities and to make a customs declaration, failure to place the goods under customs supervision (all goods entering a given customs territory are placed under customs supervision), loss of due customs duties and, as a consequence, due taxes, and failure to meet non-economic conditions specified in the law. Meeting all of the criteria is not required to classify an act as smuggling. It should be noted that the obligation to pay taxes is a consequence of customs obligations (a close relationship between customs and tax obligations). Therefore, it is incorrect to link smuggling only with failure to pay taxes.[18]

FIGHT AGAINST CIGARETTE SMUGGLING – CREATING AND ENFORCING REGULATIONS

The liberalization of trade and the development of global marketing have contributed to the development of cigarette smuggling not only in Europe but also on a global scale.[19] The first international document to be reflected in the activities of individual countries is the WHO Framework Convention on Tobacco Control.[20]

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[16] D. Merriman, *Economics of Tobacco Toolkit, Tool 7: Understand, Measure, and Combat Tobacco Smuggling*, 2013, https://openknowledge.worldbank.org/handle/10986/16267 (access: 11.5.2024), p. 3.

[17] K. von Lampe, *The Illegal Cigarette Trade*, [in:] *International Criminal Justice*, ed. M. Natarajan, New York 2011, pp. 148–154.

[18] D. Merriman, *op. cit.*, p. 3.

[19] This phenomenon is also visible in Poland, where the largest part of illegal tobacco products are smuggled products, which also come from Belarus, Ukraine, Russia and, in very small quantities, Moldova. Poland's location between the source countries to the east – in particular Russia (Kaliningrad), Lithuania, Ukraine, and Belarus – and the target markets to the west makes it an important transit country. See KPMG, *Project SUN: A Study of the Illicit Cigarette Market in the European Union, Norway and Switzerland. 2015 Results*, 2016, https://assets.kpmg.com/content/dam/kpmg/pdf/2016/06/project-sun-report.pdf (access: 12.5.2024), p. 132; K. Stasiak, *Occupation: Petty Smuggler. On the Effectiveness of Carrying Out Selected Non-Custodial Penalties against Smugglers*, "Białostockie Studia Prawnicze" 2023, vol. 28(1), p. 228.

[20] 21 May 2003, 42 I.L.M. 518 (2003). See also G. Sou, R. Preece, *Reducing the Illicit Trade in Tobacco Products in the ASEAN Region: A Review of the Protocol to Eliminate Illicit Trade in Tobacco Products*, "World Customs Journal" 2013, vol. 7(2), pp. 65–91; World Bank Group, World Bank Group, *Confronting Illicit Tobacco Trade: A Global Review of Country Experiences*,

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Of particular importance to the fight against cigarette smuggling are the measures taken by border services that control international trade in goods. Many publications emphasize that international cooperation and exchange of information are the most important components of the effective fight against smuggling,[21] but it should be stressed that even the most intensive cooperation without effective customs control will not bring the expected results.

Taking into account the objective of the article, the analysis will concern Poland because it became part of the customs union and the common market and joined the Schengen area, and its eastern border became both an external and an internal EU border. In the context of smuggling, the above changes led to two significant problems: free movement of goods without customs controls at the internal borders of the Member States may result in free movement of goods illegally brought into the EU customs territory and the need arose to intensify controls at the external borders of the EU, which are the main point of detention of goods imported illegally.

The comprehensive EU Strategy to combat cigarette smuggling[22] indicates that illicit trade in cigarettes causes annual financial losses of more than EUR 10 billion to the EU budget and the budgets of member states. These losses result from unpaid duties and taxes, including the value added tax and the excise tax. Cigarettes are the largest part of illicit trade. The Strategy also identifies the main drivers of illicit trade in cigarettes: the complexity (ambiguity) of law and legal loopholes; supply chain control measures that do not fully reflect the scale of the threat; enforcement difficulties; few disincentives (e.g. low sanctions).[23] The drivers indicated refer to both law making and law enforcement.

In terms of law enforcement, customs authorities play a key role in the fight against smuggling. Customs control is, therefore, an important action in the fight against cigarette smuggling and, consequently, it is important for the protection of the financial interests of the EU and member states, as well as the health of citizens. International cooperation is a great support for customs controls.

The customs law doctrine distinguishes between many types of customs controls, but they do not refer to controls of goods that have been illegally imported.

2019, http://documents.worldbank.org/curated/en/677451548260528135/Confronting-Illicit-Tobacco-Trade-a-Global-Review-of-Country-Experiences (access: 11.5.2024), pp. 1–2. These are a licensing system for all tobacco industry entities, control of customs-free zones, identifiable means of payment at all stages of the supply chain, and strict procedures for controlling contractors' products during the supply process. See L. Joossens, M. Raw, *From Cigarette Smuggling…*, pp. 230–234.

[21] J. Nagy, *Tackling Cigarette Smuggling with Enforcement: Case Studies Reviewing the Experience in Hungary, Romania and the United Kingdom*, "World Customs Journal" 2012, vol. 6(2), pp. 29–39; L. Joossens, M. Raw, *From Cigarette Smuggling…*, pp. 230–234; World Bank Group, *op. cit.*, pp. 1–657.

[22] Communication from the Commission to the Council and the European Parliament: Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – A comprehensive EU Strategy, COM/2013/0324 final.

[23] *Ibidem*, pp. 4–9.

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Taking into account such criteria as the customs situation of the goods, the time of the control activities, and the purpose of the control, a new type of control should be distinguished, i.e. control of goods unlawfully brought into a customs territory.[24] The characteristic feature of this control is unlimited range of activities that can lead to detection of smuggled goods,[25] unlimited territorial range of these activities,[26] and undefined timeframe for the controls. Of key importance is the objective of the control – detection of smuggled goods.[27]

Given the fact that there has been a significant change in the conditions for international trade in goods over the last few decades, risk analysis is increasingly important in customs control. The International Convention on the Simplification and Harmonisation of Customs Procedures[28] clearly states that customs control should be carried out using risk management techniques. One of its elements is risk analysis. The "security and facilitation" paradigm in international trade has made risk analysis increasingly important what is underlined by both the World Trade Organization[29] and the World Customs Organization.[30] They put a clear emphasis on increasing the role of post-import controls and thus on increasing the importance of risk analysis. However, in the case of smuggling, post-import customs control is pointless. In this situation, checks should be carried out immediately after crossing the border, as early as possible. These can be either risk-based or random checks.

[24] M. Laszuk, *Uwarunkowania kontroli celnej w multicentrycznym systemie prawa*, Warszawa 2019, pp. 299–301.

[25] Examples include the following activities: examination of the goods; verification of the correctness and completeness of the information given in the declaration or the summary declaration; verification of the existence, authenticity, correctness, and validity of the documents; inspection of the accounts and other documentation; inspection of the inventory and stock of the goods; inspection of the means of transport; any other activity carried out to detect goods that have been unlawfully brought into the EU customs territory.

[26] This type of control is not limited only to border crossings and customs offices, but may also take place at the premises of traders making trading goods with foreign countries or in any other place where there is a suspicion of illegally imported goods. Given the above, it is also not possible to set a timeframe for the controls. Of key importance is the objective of the control – detection of smuggled goods – the achievement of which allows the scope of activities to be freely determined without setting a time frame.

[27] M. Laszuk, *op. cit.*, pp. 299–301.

[28] International Convention on the simplification and harmonisation of customs procedures (the WCO Kyoto Convention), adopted in 1973.

[29] Trade Facilitation Agreement – TFA, WTO, WT/L/940. The Agreement entered into force on 22 February 2017.

[30] See International Convention on the simplification and harmonisation of customs procedures; WCO Framework of Standards to Secure and Facilitate Global Trade – SAFE Framework; M. Laszuk, D. Šramková, *Challenges of Customs Law during the Paradigm of "Facility and Security" in International Trade*, "Białostockie Studia Prawnicze" 2021, vol. 26(5), pp. 9–21.

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The provisions of the Union Customs Code[31] indicate the development on the EU level of common risk criteria and standards of a binding nature to ensure uniform application of customs controls, defining the priority control areas, as basic principles on which the risk management system is based.[32] In Poland, priority control areas are determined on the basis of the Central Risk Register, the control strategies in force, and the consultations carried out.

Considering the frequency of risk, the effectiveness, and the financial effects of actions taken, cigarette smuggling is indicated as a priority risk area in Poland. This is particularly characteristic of countries with borders that are external EU borders, especially as unique as the eastern border.[33] This qualifies cigarette smuggling as an area for systematic checks. Although the sources of origin of illegal cigarettes brought into the EU changed, the problem of cigarette smuggling is still current and important, and the risks in this area remain high.[34] The high risk of cigarette smuggling at the EU's eastern external border has caused Poland to establish positive control levels for cigarette smuggling since 2009.[35] The levels are determined taking into account, among others, the number of staff in the specific office and the volume of cross-border movement of goods.

It should also be noted that due to the high risk of cigarette smuggling it faces, in 2012 Poland introduced mandatory checks of excise goods entering and leaving its customs territory. The specific rules for carrying out these customs controls are defined in the individual tax administration chambers, depending on the volume of movement of goods at individual border crossing points. For smaller border crossing points, there is an obligation to carry out and document customs checks for all imports or exports, while at border crossing points where there is a high volume of freight traffic, operators are selected for checks.

For risk management, it is important to exchange information on risks. With regard to risk information exchange, the EU legislator has clearly indicated that it is mandatory when customs authorities assess risks as significant and requiring customs controls, and the results of the controls confirm the occurrence of a risk event. The range of information sources used for risk analysis varies greatly. In the case of cigarette smuggling, the effectiveness of risk analysis depends largely on

[31] Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269/1, 10.10.2013).

[32] They are subject to reinforced customs controls, carried out in a coordinated manner on the basis of common risk criteria, and include cigarettes.

[33] Cigarette smuggling is indicated as the priority risk area also by Lithuania, Hungary, and Romania.

[34] In the strategic control plans, the "cigarette smuggling" risk area is indicated as a high-risk area and is in the first place in the hierarchy of Central Risk Register areas.

[35] Ministerstwo Finansów, *Strategia Działania Służby Celnej w zakresie zwalczania przemytu wyrobów tytoniowych w latach 2009–2011*, Warszawa 2009, https://www.e-clo.gov.pl/documents/764034/928139/strategiatab_wer2_9_12_08.pdf (access: 23.1.2023).

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the scope and quality of information and on the intelligence obtained by customs authorities. In this case, there is a need for reliable, complete, and up-to-date information and the possibility to use it. It is therefore important to cooperate with entities with similar powers so as to make the information obtained available. Such actions should be taken on the national, EU, and international (other countries' customs authorities) level. The Regulation on mutual administrative assistance in customs matters was amended in 2015,[36] which allows investigators to compare the physical movement of containers with data on imports and transit, as well as with data on exports of goods that are subject to the excise tax, especially cigarettes.

Checking certain types of smuggling, such as illegal smuggling of cigarettes hidden in legal loads or vehicles, is particularly difficult as the goods are being hidden ever more professionally. Therefore, for such checks, appropriate aids are required, such as scanners and specially trained dogs. Supervisors are also used at passenger border crossing points.[37] In these cases, the level and quality of knowledge and training is particularly important.

Effective risk management in the area of cigarette smuggling is not possible without the cooperation of the OLAF with the customs administrations of EU member states. OLAF's investigations are carried out on a broad (EU) level and, therefore, provide an opportunity to observe certain phenomena and abuses that have recently emerged in some member states and other states may face the risk of their occurrence in the future. OLAF's investigations enable examination of areas and mechanisms that cannot be checked in as a part of customs control and the scope of OLAF's information on which risk analysis is based is much wider than that of individual Member States, due to the possibility to obtain information from all member states, as well as to the use of commercial databases.

Tobacco products are highly taxed in the EU. The total share of duties and taxes ranges from 70.12% of the retail price of cigarettes with the weighted average price in Luxembourg to 88.97% for such cigarettes in the UK. As many of these factors vary from country to country, the differences in the price of tobacco products, both within the EU and in comparison with neighboring countries, are significant.[38] It should be indicated that the EU has a high tariff on cigarette imports, which is equal to 57.6%,

[36] Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015 amending Council Regulation (EC) No. 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matter (OJ L 243/1, 18.9.2015).

[37] Supervisors check car registration numbers and how frequent they cross the border, as well as violations of regulations applicable to international movement of goods.

[38] Communication from the Commission to the Council and the European Parliament: Stepping up the fight against cigarette smuggling and other forms of illicit trade in tobacco products – A comprehensive EU Strategy, COM/2013/0324 final.

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in comparison to the average tariff[39] of 4%. Excise duty on tobacco products is also rising steadily, resulting in an increase in cigarette smuggling. The value of excise duty on cigarettes must be within the range defined by EU Directives. The latest EU Directive[40] introduced the principle that the specific component of the excise duty is in the range of 7.5% to 76.5% and that the total excise duty on cigarettes is at least 60% of the weighted average retail price of cigarettes authorized for consumption. Such excise duty is not less than EUR 90 per 1,000 cigarettes, irrespective of the weighted average retail price. There is no specific upper limit for the excise duty rate. Due to the transition period, the above rules in Poland have been in force since 1 March 2017. However, it should be noted that excise duty rates in Poland and other EU countries are constantly rising and are one of the factors behind cigarette smuggling.[41]

Table 1. Evolution of excise tax rates in Poland and of the minimum rate in the EU

Item	2004	2006	2008	2010	2012	2014	2016	2018	2020	Increase 2004–2020 (%)
Specific rate in (PLN per 1,000 pcs)	64.00	75.10	91.00	146.80	170.97	206.76	206.76	206.76	228.10	356,40
Ad valorem rate (%)	26.67	31.30	37.92	31.41	31.41	31.41	31.41	31.41	32.05	5,38
Minimum excise tax rate on cigarettes (in PLN/1,000 pcs); weighted average	115.80	150.00	181.72	271.68	328.13	592.49	664.16	687.95	705.63	609,35

Source: own elaboration based on the information provided on the website of the Polish Ministry of Finance.

CIGARETTE SMUGGLING IN POLAND – ANALYSIS OF THE PROBLEM

A surge in the illicit manufacturing of cigarettes within the EU has been observed over the past few years. It has partly replaced smuggling activities across the external border of the EU. Poland is one of the EU countries with the highest quantities of smuggled cigarettes detected.[42] Several hundred million illegal cigarettes

[39] Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256/1, 7.9.1987). The Common Customs Tariff is amended each year.

[40] Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ L 176/24, 5.7.2011).

[41] K. von Lampe, *The Trafficking in Untaxed Cigarettes in Germany: A Case Study of the Social Embeddedness of Illegal Markets*, [in:] *Upper Worlds and Underworld in Cross-Border Crime*, eds. P.C. van Duyne, K. von Lampe, N. Passas, Nijmegen 2002, pp. 141–161.

[42] European Anti-Fraud Office, *The OLAF Report 2021: Twenty-Second Report of the European Anti-Fraud Office, 1 January to 31 December 2021*, Luxembourg 2022, https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021_en.pdf (access: 14.5.2024), p. 25.

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are disclosed every year in Poland. The number of disclosed cigarettes showed an upward trend until 2009, when it reached over 600,000,000 pcs, and then a downward trend took place. Another significant increase was recorded in 2016 (Figure 1) and again in 2021 a significant growth. Figure 1 shows the number of cigarettes disclosed by the NTA in different years, the total number of cigarettes smuggled into Poland, as well as the number of those illegally manufactured in Poland.

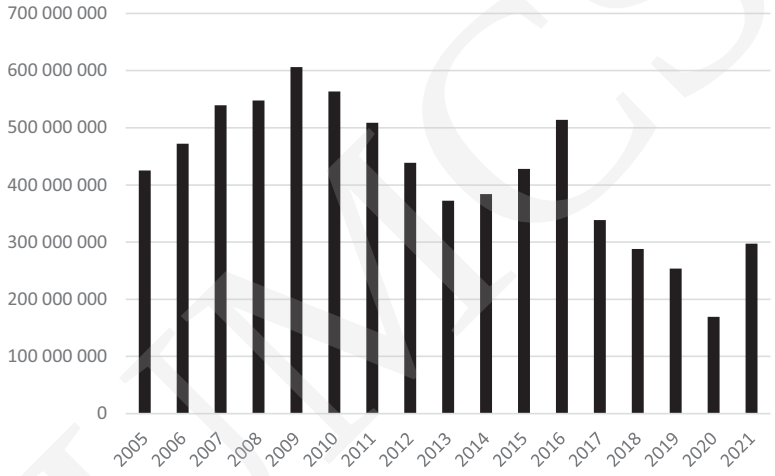


Figure 1. Disclosed illegal tobacco products in Poland in the years 2005–2021 (pcs of cigarettes)

Source: Ministry of Finance (National Tax Administration).

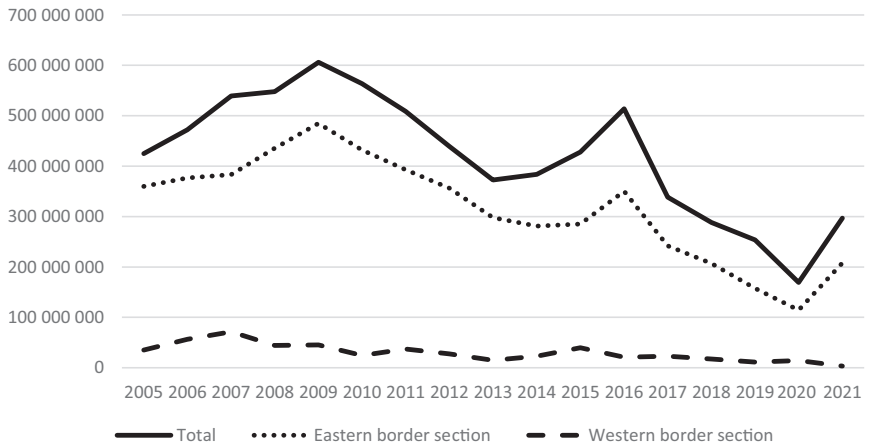


Figure 2. Disclosed illegal tobacco products in Poland in the years 2005–2021 according to the section of the national border (pcs of cigarettes)

Source: Ministry of Finance (National Tax Administration).

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If data from customs and tax offices located along the eastern border and the western border are compared, it is clear that criminal activity related to illegal cigarettes takes place in the eastern regions of Poland. This may indicate that smuggling is more significant than illegal production of cigarettes in Poland. In the analyzed period, 76% of cigarettes from illegal sources were disclosed by the offices located along the eastern border and only 7% by those located along the western border. This analysis raises the question about the origin of illegal cigarettes, i.e. whether it is domestic production or the effect of smuggling. To illustrate this problem, data from the Tax Administration Chamber in Bialystok was used (Figure 3).

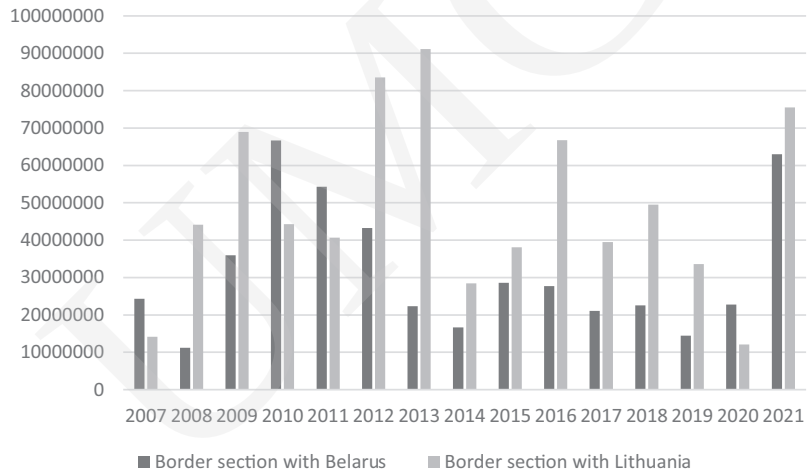


Figure 3. Disclosed illegal tobacco products on the border sections with Lithuania and Belarus border in the years 2007–2021 (cigarettes in pcs)

Source: Tax Administration Chamber in Bialystok.

In the years 2007–2018, the Tax Administration Chamber in Bialystok disclosed 999,804,835 cigarettes from illegal sources, including 983,858,360 smuggled cigarettes (i.e. 98%). An analysis of Figure 3 shows that in general since 2008 more smuggled cigarettes have been disclosed on the Lithuanian border than on the Belorussian border (there were only three exceptions in 2010, 2011 and 2020). This may be surprising, as the section of the border with Lithuania is shorter, just 104.28 km long, while the section of the border with Belarus is 236.3 km long. The reason, however, is the status of these two borders. The border with Lithuania has been a section of the EU's internal border while the border with Belarus is a section of the EU's external border. Checks at border crossing points significantly contribute to detection of smuggling and, consequently, perpetrators try to find other smuggling routes. The border with Lithuania has become such a "facilita-

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tion",[43] as it is currently a bottleneck for smuggling and illegal border crossing. In the years 2008–2021, the majority of smuggled cigarettes (62%) disclosed by the customs administration in Bialystok were disclosed on the Lithuanian border. This confirms the shift of the cigarette transfer channel from the eastern border to Poland and then to Western Europe through the territory of Lithuania (and other Baltic States).[44] Most of the cigarettes detained by the NTA at the Lithuanian border are illicit whites[45] originating in Belarus, mostly with Belorussian excise duty marks, and therefore presumed to be legally manufactured.[46]

This raises the issue of securing the Lithuanian-Belarusian border, which is also a section of the EU's external border. According to the information provided by the Border Guard, this section of the border is less secure in terms of infrastructure, and the corruption that takes place there also encourages smuggling.[47]

An important determinant of cigarette smuggling through Poland to the EU is the situation related to cigarette production in Belarus. The two largest cigarette factories in Belarus, located in Grodno[48] produce more cigarettes than the demand of the Belarusian market.[49] The proximity of the national border is a factor that undoubtedly encourages smuggling. Despite the control of the national authorities over the volume of production and its maximum annual limits, factories may produce quantities that exceed the limits set by the government for export. Poland has been one of the largest recipients of illegal cigarettes from Belarus for years.[50] According to the KPMG report, in 2019, the largest recipients of this overproduction were

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[43] See also K. Buczkowski, P. Dziekański, *Legal and Practical Challenges of Combating Illicit Trade of Tobacco in Poland*, [in:] *Combatting Illicit Trade on the EU Border: A Comparative Perspective*, ed. C. Nowak, Cham 2021, pp. 153–212.

[44] C. Jeffray, *On Tap Europe: Organised Crime and Illicit Trade in Poland. Country Report*, 22.8.2016, https://static.rusi.org/201608_op_on_tap_europe_poland.pdf (access: 11.5.2024), pp. 1–51; Europol, *op. cit.*; A. Gutauskas, *Economic Crisis and Organized Crime in Lithuania*, "Jurisprudencija" 2011, vol. 18(1), pp. 303–326.

[45] H. Ross, N. Vellios, K. Clegg Smith, J. Ferguson, J.E. Cohen, *A Closer Look at 'Cheap White' Cigarettes*, "Tobacco Control" 2016, vol. 25(5), pp. 527–531.

[46] Information collected on the basis of the news of the Tax Administration Chamber in Bialystok available at https://www.podlaskie.kap.gov.pl/izba-administracji-skarbowej-w-bialymstoku/wiadomosci/aktualnosci (access: 10.9.2022).

[47] Information received during interviews conducted as part of the project "SIC – Modular multi-task Foreigner Identification System with a module for analysis of human trafficking crime victims". See also C. Jeffray, *op. cit.*, pp. 1–51; L. Joossens, M. Raw, *From Cigarette Smuggling…*, pp. 230–234.

[48] Grodno is located 25 km from the border with Poland and 40 km from the border with Lithuania.

[49] N. Johnston, W. Kegö, C. Wenngren, *Cigarette Smuggling: Poland to Sweden*, 2016, https://isdp.eu/wp-content/uploads/2016/10/Cigarette-Smuggling-Report-2016.pdf (access: 11.5.2024), p. 15.

[50] F. Calderoni, A. Brener, M. Karayotova, M. Rotondi, M. Zorc, *The Belarusian Hub for Illicit Tobacco*, 2016, https://www.transcrime.it/wp-content/uploads/2016/06/The-Belarusian-Hub-for-Illicit-Tobacco.pdf (access: 11.5.2024), p. 13, 29.

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Poland (1.08 billion pcs), Lithuania (0.49 billion pcs), Latvia (0.26 billion pcs),[51] as well as other EU countries, although this trend is decreasing.

In 2019, illicit whites did have country-specific labeling, nearly half the flow was from Belarus.[52] Cigarettes from Belarus, as well as those illegally manufactured in Poland, continue to go to Germany and the UK.[53] This is extremely profitable. In legal trade, a pack of cigarettes costs EUR 0.72 in Belarus, EUR 3.26 in Poland, and EUR 5.74 in Germany.[54] The price of a pack of cigarettes directly from the Belarusian factory is EUR 0.15,[55] while in Poland it is sold for EUR 2–2.5 in the illegal market. The profit is therefore enormous, at about 1,600%.

Cigarette production in Poland is also a significant factor affecting the illegal cigarette market in the EU. According to KPMG data, flows of illicit whites and counterfeit remain an issue, accounting for 85% of counterfeit and contraband cigarettes in 2019 in Poland. The highest levels of counterfeit and contraband cigarettes were recorded in the Podlaskie Region bordering Belarus.[56] Every year, the Central Bureau of Investigation of the Police, in cooperation with customs and tax offices, eliminates about 20 factories that produce illegal cigarettes and the same number of factories that produce sliced tobacco in Poland.[57] The factories are located in different parts of Poland. Their employees are most often foreigners who work there illegally. The production equipment is often smuggled in parts from across Poland's eastern border and assembled in Poland, and cigarettes are produced mainly for the German market.[58]

CONCLUSIONS

Fighting illegal trade and manufacture of tobacco products is one of the priority areas in the activities of the Polish customs administration. These efforts are in line with EU policy, which puts great emphasis on combating and preventing import of cigarettes from illegal sources into the member states. The Polish administration,

[51] KPMG, *Illicit Cigarette Consumption in the EU, UK, Norway and Switzerland: 2019 Results*, 18.6.2020, https://www.pmi.com/resources/docs/default-source/stop-illegal-blogs/kpmg-report-illicit-cigarette-consumption-in-the-eu-uk-norway-and-switzerland-2019-results.pdf (access: 10.5.2024), p. 18.

[52] *Ibidem*.

[53] *Ibidem*, p. 76, 132, 172; F. Calderoni, A. Brener, M. Karayotova, M. Rotondi, M. Zorc, *op. cit.*, p. 21; K. von Lampe, *The Trafficking…*, pp. 141–161.

[54] KPMG, *Illicit Cigarette Consumption…*, p. 132.

[55] N. Johnston, W. Kegö, C. Wenngren, *op. cit.*, p. 15.

[56] KPMG, *Illicit Cigarette Consumption…*, pp. 132–133.

[57] Centralne Biuro Śledcze Policji, *Sprawozdanie z działalności Centralnego Biura Śledczego Policji za 2020 rok (w ujęciu statystycznym)*, 2021, https://cbsp.policja.pl/download/3/382090/Raportstatystyczny2021.pdf (access: 11.5.2024), p. 7.

[58] Europol, *op. cit*.

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along with the UK administration, is among the most effective in Europe in terms of combating smuggling and illicit trade in tobacco products.

The main reason for smuggling is price differences. In the case of Poland, the price differences between the domestic market and the markets of the countries located beyond the eastern border are significant, but so are the differences in retail prices for these products in different EU member states. This is due to the large share of customs duties and taxes, in particular excise duties, on cigarette prices. The steady increase in excise duties on cigarettes and high customs tariffs in the EU are the main reason for illegal import of cigarettes into Poland and their subsequent smuggling into other member states. Not without significance is the policy of the EU's neighboring countries, where the level of corruption is high, which undoubtedly encourages both overproduction and smuggling.

The increase in the detection of smuggled cigarettes at Poland's eastern border (both internal and external) between 2005 and 2009 was primarily due to its accession to the EU, the significant sealing of external border by increasing staffing levels at border crossings and also purchase of modern detection equipment.[59] At the same time, there has been an increase in checks that were risk-based checks and thus more targeted at the illicit trade in cigarettes. The main objective was to concentrate security controls at the point of entry of goods into the EU customs territory. Despite this, there has also been an increase in the number of preventive checks carried out in places where illicit tobacco products are traded.

Poland's transit location and the presence of the EU's internal border on its eastern, southern, and western borders have led to the creation of a "corridor" that is conducive to smuggling, which required introduction of profiled checks on public roads within the country, with particular emphasis on the roads leading from Lithuania and those leading to the border with Germany and the Czech Republic, and to ferry terminals (leading to Sweden and Norway), which limited the illegal carriage of illegally imported cigarettes through Poland's territory. The increase in the detection rate of cigarette smuggling also at the Lithuanian border was possible thanks to the mobile groups which carried out checks on Polish roads leading from Lithuania to Western European countries.

In 2006, priorities were defined for the fight against crime, which focused mainly on the fight against organized crime, in particular in the area of illegal trade in excise goods and drugs. These control activities were possible thanks to the development of risk management rules. As a result, a downward trend in the number of detections has been observed since 2008, with a simultaneous increase in the quantities of goods disclosed each time, as can be seen in the data for the years 2008–2009.[60]

[59] Between 2008 and 2010, ten pieces of X-ray equipment were purchased with EU funds.

[60] Ministerstwo Finansów, Departament Kontroli Celnej i Akcyzowej oraz Kontroli Gier Hazardowych, *Nielegalny obrót i nielegalne wytwarzanie wyrobów tytoniowych*, "Wiadomości Celne" 2009, no. 9, p. 3.

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The decrease in the detection of smuggled cigarettes after 2009 was not due to a reduction in the number of checks or a change in their rules, but mainly to the shift of the main stream of smuggled cigarettes originating from CIS countries and sent illegally to Western European markets to the south of Europe (mainly the Balkan countries – Romania, Bulgaria, and Greece). The second factor was the increase in popularity of tobacco products other than factory-made cigarettes.[61] Deregulation of the tobacco trade in Poland[62] has resulted in a sharp increase in the supply (including illegal trade) of raw, non-taxable tobacco and counterfeit tobacco for self-made cigarettes. This situation has reduced interest in smuggled cigarettes throughout the EU.

Another increase in the detection of illegal cigarettes occurred between 2013 and 2016. To a large extent, this was due to the introduction of an obligation to control excise goods during both their export and their import. The level of positive controls on cigarette smuggling has continuously increased, which resulted in more controls carried out and thus more cigarettes detected. The Polish customs administration acquired new powers which allow it to supplement the information obtained with data allowing for comprehensive implementation activities. The improved cooperation with other and national and EU authorities operating in this area should also be highlighted.

Effective risk analysis, and thus high rates of detection of smuggled cigarettes and mandatory checks of excise goods make smuggling of cigarettes more difficult. Unfortunately, the illegal market abhors a vacuum: the effective fight against smuggling has not only caused a shift in the smuggling routes, but also has increased the activity of illegal cigarette "factories" (there were 36 such factories in Poland in 2016, 38 in 2017, 39 in 2019; also, 86 illegal tobacco production factories). Interest in illegal tobacco has also increased.

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[61] *Ibidem*.

[62] Council Regulation (EC) No. 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No. 1290/2005, (EC) No. 247/2006, (EC) No. 378/2007 and repealing Regulation (EC) No. 1782/2003 (OJ L 30/16, 31.1.2009).

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ABSTRAKT

Przemyt papierosów stanowi istotną część nielegalnego handlu papierosami w Unii Europejskiej. Najczęściej wskazywaną przyczyną dokonywania przemytu jest znacząca różnica w cenach papierosów, wynikająca z dużego udziału cła i podatków (przede wszystkim podatku akcyzowego) w cenie papierosów. Wielkość tego zjawiska w danym państwie zależy m.in. od położenia geopolitycznego oraz uwarunkowań prawnych, ekonomicznych i społecznych. Polska, uwzględniając jej położenie geopolityczne, jest jednym z państw Unii Europejskiej, w którym przebiegają „szlaki tranzytowe" przemytu papierosów, w tym szlak prowadzący przez wewnętrzną granicę z Litwą. Jednocześnie jest państwem, w którym wskaźniki wykrycia przemytu są wysokie. Istotne znaczenie ma tu przede wszystkim przeprowadzana przez administrację celną kontrola celna oparta na analizie ryzyka, wspierana międzynarodową wymianą informacji, a także współpraca tej administracji z innymi podmiotami na szczeblu krajowym, europejskim i międzynarodowym. Głównym celem artykułu jest identyfikacja rozwiązań prawnych w zakresie kontroli celnej jako podstawowego gwaranta przestrzegania zakazów i ograniczeń w międzynarodowym obrocie towarowym oraz ocena jej wpływu na wskaźniki wykrycia przemytu papierosów.

Słowa kluczowe: przemyt papierosów; kontrola celna; nielegalny handel papierosami; wskaźniki wykrycia przemytu papierosów; międzynarodowy obrót towarowy