

# Chapter 10

## The EU's Eastern Neighbourhood Policies in Combatting Illicit Tobacco Trade



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**Abstract** The EU's membership enlargement in 2004 has generated narratives that problematise its new Eastern neighbourhood as part of the EU's security threats. Included in such perceived threats is illicit tobacco trade, which is the focus of this chapter and edited volume. Within the framework of the European Neighbourhood Policy, the EU has devised a voluminous number of political, legal, and financial instruments, aiming to facilitate the improvement of customs and border management to combat illicit tobacco trade. One of the most iconic in this regard is the EU's Border Assistance Mission to Moldova and Ukraine (EUBAM) established in 2005. EUBAM has provided legislative and administrative support to Moldova and Ukraine's authorities and conducted joint operations in combatting illicit tobacco trade. By providing an overview of some of the instruments to tackle the perceived security threat, the chapter sheds light on a fundamental ambivalence underlying the EU's approaches to its eastern neighbourhood, which may, in the long run, affect the effectiveness of the initiatives to combat illicit tobacco trade.

### 10.1 Introduction

Illicit trade in tobacco products often takes advantage of economic and social disparities that exist across borders. While such gaps no doubt persist among EU member states, the differences in economic and social conditions may be more discernible when it comes to the comparison between the EU and its eastern neighbourhood. The economic gap became especially visible when the EU extended its membership in 2004 and 2007, which altered the faces of the eastern proximity of the EU. It has started sharing its eastern borders with Belarus, Ukraine, and Moldova, whose economic situations undeniably vary from those of many EU members. In 2017, for instance, the gross domestic product (GDP) per capita of these countries

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amounted to \$ 5733.3 (Belarus), 2639.8 (Ukraine), and 2290.2 (Moldova), as contrasted with the EU-wide GDP per capita of \$ 33,836.4 in the same year.<sup>1</sup> Needless to say, the GDP per capita serves merely as one of the overall economic indicators of each state. The gaps that cannot be captured by the GDP per capita persist at legal, political, and sociological levels.

Disparities in economic, political, and sociological conditions have created a lucrative space for illicit trade, including that of tobacco products. According to Joossens et al. (2014), who surveyed 18 European countries between January and July 2010, illicit tobacco trade was indeed found to have been more frequent in countries with a land or sea border with Ukraine, Russia, Moldova, or Belarus.<sup>2</sup> As clearly acknowledged by the European Commission in its 2016 progress report on customs cooperation with the Eastern neighbouring countries, '[t]he fight against cigarette-smuggling and other forms of illicit trade in tobacco products' was regarded as 'a high priority for the EU in relation to the Eastern neighbours'.<sup>3</sup>

Against this background, this chapter aims to analyse the EU's external relations with its eastern neighbours in countering illicit trade in tobacco products. The chapter will be guided by the following overall research question: *how does the EU exercise its influence over the conduct of state authorities outside its eastern borders in combatting illicit tobacco trade?* The aim of the chapter is to understand, on a qualitative basis, the *types of instruments* that the EU has devised in order to directly or indirectly facilitate its eastern neighbours' policies and operations to counter illicit tobacco trade. By analysing the types of instruments that the EU has delivered, the chapter intends to offer broader insights and critiques into the EU's eastern neighbourhood policies—in which its strategy to counter illicit tobacco trade has been constructed.

The EU's strategy to counter illicit trade has been shaped within the framework of the European Neighbourhood Policy (ENP) (Sect. 10.3). The ENP governs the EU's external relations with 16 Eastern and Southern neighbouring countries. The ENP took shape against the background of the 2004 EU membership enlargement, which, importantly, transformed the Union's narratives towards its (new) eastern neighbours. Under the overall framework of the ENP, the EU has devised a number of political, legal, and financial mechanisms which aim to facilitate the 'modernisation' of customs and border management.

One of the iconic initiatives that the EU devised in this regard is the European Union Border Assistance Mission to Moldova and Ukraine (EUBAM) (Sect. 10.4). EUBAM has provided administrative and legislative assistance to Ukraine and Moldova and facilitated a series of joint border operations to combat cigarette smuggling. The analysis of EUBAM is crucial for the sake of this chapter, precisely because the Mission's incremental approach epitomises the EU's eastern engagement in combatting illicit tobacco trade. The EU's engagement with Ukraine and Moldova has also been combined with the deployment of a wide range of other

<sup>1</sup>The World Bank (2019) GDP per capita (current US\$).

<sup>2</sup>Joossens et al. (2014); See further Sect. 10.2 of this chapter.

<sup>3</sup>European Commission (2016), p. 7 (original emphasis omitted).

instruments, including association agreements signed in 2014, which aimed at facilitating reforms on custom and tax systems (Sects. 10.5–10.6). Given the extent to which the EU focused on Ukraine and Moldova through the deployment of EUBAM, this chapter will focus its attention primarily on these two countries. While Belarus—another important eastern neighbour of the EU—will be referred to in the general context, the country is not the primary focus of the present chapter.<sup>4</sup>

One must acknowledge at the outset that it is beyond the scope of this chapter to quantitatively measure the effectiveness of the EU's multiple apparatuses in countering illicit tobacco trade. What can still be observed from the analysis of different instruments is that the EU's relations with Ukraine and Moldova—and possibly other Eastern neighbours within the ENP—are fraught with multiple levels of ambivalence. The EU's initiative for Ukraine and Moldova in preventing flows of contraband cigarettes is illustrative of such ambivalence. By investigating the external engagement on this front, this chapter highlights the uncertainties in the EU's eastern partnership, which, in the long run, might undermine the effectiveness of the EU's external action to combat illicit tobacco trade.

## 10.2 Illicit Tobacco Trade Involving the EU's Eastern Borders

### 10.2.1 *The Scale of the EU's Eastern Borders as Origins*

As elucidated by Oude Breuil et al. ([this volume](#)) in this edited volume, there are three interrelated modalities through which tobacco trade becomes illegal: the smuggling of cigarettes, the counterfeiting of existing brands, and the illegal production of excise goods.<sup>5</sup> Available data give us some indication of the scale of illicit tobacco trade involving the EU's eastern borders. For example, according to Transcrime's (2019) data on 'illicit cigarettes of known origin consumed in the EU in 2017', Ukraine accounted for 11.9% of illicit consumption in the EU; Moldova amounted to 2.4% and Belarus accounted for 11% of illicit consumption in the EU.<sup>6</sup>

The KPMG's reports (2018, 2020) provide additional information regarding 'source countries' concerning illicit tobacco consumption in the EU in 2013–2019 (Table 10.1 and Fig. 10.1).<sup>7</sup> In 2017, Ukraine as a source country accounted for 4.8 billion cigarettes (equivalent to 10.7% of illicit consumption in the EU); Moldova amounted to 1.1 billion (2.4%) and Belarus accounted for 4.3 billion (9.6%). In 2019, 2.4 billion cigarettes (equivalent to 6.2% of illicit consumption in the EU)

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<sup>4</sup>With regard to Belarus, see, in particular: Calderoni et al. (2016).

<sup>5</sup>Oude Breuil et al. ([this volume](#)), Sect. 3.1.3.

<sup>6</sup>Transcrime (2019), p. 42.

<sup>7</sup>KPMG (2018), p. 12; KPMG (2020), p. 15.

**Table 10.1** Sources of counterfeit, illicit whites, and other counterfeit and contraband cigarettes in the EU between 2013 and 2019 (billion cigarettes; and percentages in illicit consumption in the EU) (Based on: KPMG 2018, p. 12; KPMG 2020, p. 15)

| Year | Ukraine     | Moldova    | Belarus     |
|------|-------------|------------|-------------|
| 2013 | 1.3 (2.2%)  | 0.9 (1.5%) | 6.9 (11.8%) |
| 2014 | 0.5 (0.9%)  | 0.9 (1.6%) | 7.7 (13.6%) |
| 2015 | 3.2 (6.0%)  | 1.1 (2.1%) | 6.2 (11.7%) |
| 2016 | 5.8 (12.0%) | 0.9 (1.9%) | 4.8 (9.9%)  |
| 2017 | 4.8 (10.7%) | 1.1 (2.5%) | 4.3 (9.6%)  |
| 2018 | 4.2 (9.6%)  | 1.5 (3.4%) | 3.6 (8.3%)  |
| 2019 | 2.4 (6.2%)  | 0.8 (2.1%) | 2.4 (6.2%)  |

originated from Ukraine, 0.8 billion cigarettes (2.1%) from Moldova, and 2.4 billion (6.2%) cigarettes from Belarus. On average, according to the KPMG's reports, in 2013–2019, 19.1% of counterfeit, illicit whites, and other counterfeit and contraband cigarettes, originated from Ukraine, Moldova, and Belarus.<sup>8</sup>

According to the KPMG's reports (2018, 2020), Ukraine is at the top of the list of identifiable source countries in 2016–2018 (Fig. 10.1). Given such data, in the EU's political deliberation, Ukraine has sometimes been narrated as being part of the major problems regarding illicit tobacco trade. This is illustrated, for instance, by the following question raised by a member of the European Parliament on 4 December 2019:

The EU Member States lose EUR 10 billion in tax revenues each year due to illegal trade in tobacco products. Ukraine is the *number one country of origin* for illicit cigarettes trafficked into the EU market. In 2018 alone, inflows from Ukraine accounted for over 4 billion cigarettes. (...) Commissioner Oettinger confirmed that Ukraine has committed itself to criminalising smuggling, which would be an important step towards sharpening Ukraine's regulatory tools for countering illicit trade. (...) <sup>9</sup>

In this Parliamentary question, Ukraine is clearly 'problematised' in connection to illicit tobacco trade and the resulting loss of tax revenues.

While the aforementioned Parliamentary question may have rightly referred to Ukraine as the number one origin,<sup>10</sup> it must be noted that there are, of course, numerous other source countries, including EU member states themselves, that contribute to illicit consumption in the EU (see Fig. 10.1). The KPMG's report (2020) further observes that a 'significant proportion' of illicit whites with no country-specific labelling and counterfeit may be illegally manufactured 'within the EU'.<sup>11</sup>

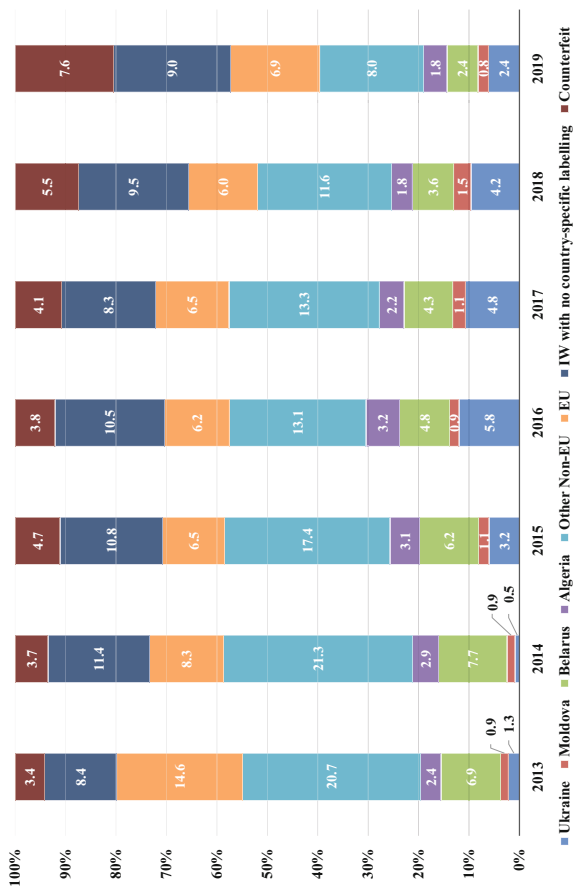
In addition to Ukraine, Moldova is also one of the countries that are often problematised in the EU's discourse on illicit tobacco trade, although inflows from Moldova to the EU are much smaller compared to Ukraine (Table 10.1 and

<sup>8</sup>Calculated based on the data presented in: KPMG (2018), p. 12; KPMG (2020), p. 15.

<sup>9</sup>Parliamentary Questions, 'Tobacco Smuggling from Ukraine', by Tomislav Sokol (PPE), Question for Written Answer E-004196/2019 to the Commission (emphasis added).

<sup>10</sup>Parliamentary Questions, 'Tobacco Smuggling from Ukraine', by Tomislav Sokol (PPE), Question for Written Answer E-004196/2019 to the Commission.

<sup>11</sup>KPMG (2020), p. 15.



**Fig. 10.1** Sources of counterfeit, illicit whites, and other counterfeit and contraband cigarettes in the EU between 2013 and 2019 (billion cigarettes) shown in 100% stacked column chart (Based on: KPMG 2018, p. 12; KPMG 2020, p. 15)

Fig. 10.1). According to Transcrime (2015), Moldova is listed as the sixth largest starting point in 2010–2013 for illegal tobacco products within the EU borders.<sup>12</sup> Moldova’s relevance as a source country differs depending on EU states. In Italy, Moldova was the top starting point for illegal products recorded in 2010–2013.<sup>13</sup> Likewise, during the same period, Moldova was the top starting point for illegal tobacco products intended for the Romanian market.<sup>14</sup> Building on the KPMG studies, Krasovsky (2016) observed that ‘cigarette smuggling out of the Republic of Moldova increased significantly during 2009–2010 to at least 3 billion cigarettes a year, and then declined to a relatively stable level in 2014–15’.<sup>15</sup> According to Krasovsky (2016), the smuggling of cigarettes into Moldova is limited, given that Romania and Ukraine have been raising their excise rates.<sup>16</sup>

Turning our attention to the volume of cigarette seizures, Frontex’s risk analysis report (2017) records that more than 18.8 million cigarettes were found, in 2016, at the EU’s eastern borders.<sup>17</sup> According to Frontex, in 2016, cargo trains were a frequently used means for illegally transporting cigarettes at the EU’s eastern borders.<sup>18</sup> The analysis of Oude Breuil et al. in this volume further adds relevant data on cigarette seizures. Based on the confiscation data in 2017, 59% of the seizures in Latvia originated from Belarus and 29.7% were from Russia.<sup>19</sup> Ukraine was the origin of confiscations in 18.4% and 18.2% in Italy and the Netherlands, respectively.<sup>20</sup>

## 10.2.2 Differences in Price and Criminalisation

Not surprisingly, cigarette smuggling from the EU’s eastern borders takes advantage of price differences. According to the KPMG report (2018), as of January 2018, the weighted average prices for a pack of 20 cigarettes were as low as € 0.52 in Ukraine

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<sup>12</sup>Transcrime (2015), p. 44.

<sup>13</sup>Ibid, pp. 177–178.

<sup>14</sup>Ibid, pp. 235–237.

<sup>15</sup>Krasovsky (2016), p. 13.

<sup>16</sup>Ibid, p. 18.

<sup>17</sup>European Border and Coast Guard Agency (2017), p. 14.

<sup>18</sup>Ibid, p. 14; There are a number of other delivery methods through which cigarettes can be smuggled into the EU; cigarettes may be hidden, for instance, in vehicles, or they can be transported by small aircraft, gliders, or drones. Small-scale smuggling can take place by way of, for instance, hiding cigarettes in a vehicle’s tires, but large-scale smuggling can be done via container full of cigarettes and moderated by the network of criminal groups in charge of various logistics, including storage, distribution, and bookkeeping. See Oude Breuil et al. (this volume), Sect. 3.3.2; Filippov (2019), pp. 40–42.

<sup>19</sup>Oude Breuil et al. (this volume), Sect. 3.3.4 and Fig. 3.4.

<sup>20</sup>Ibid.

and € 0.43 in Belarus.<sup>21</sup> These prices show a stark contrast to the prices in EU member states. The lowest one among them was € 2.55 in Bulgaria, which was still five times higher than the Ukrainian counterpart.<sup>22</sup> The prices in Poland, Slovakia, Hungary, and Romania were € 3.19, € 3.13, € 3.62, and € 3.31, respectively. In Germany, the cost was € 5.64, and the prices in the UK and Ireland were as high as € 8.83 and € 10.07, respectively.<sup>23</sup> The price differences of the UK and Ireland compared to non-EU countries were greater than € 8 per pack, which presumably led to the growth of the consumption of counterfeit and contraband cigarettes in the UK and Ireland.<sup>24</sup>

Furthermore, one of the categories of illicit tobacco products in the EU is cheap white cigarettes produced legally outside the EU and smuggled in the EU. This takes advantage of the significant price difference among the origin and destination countries. For example, according to the interview conducted by Oude Breuil et al., cheap whites, which cost € 1.20 in Ukraine, were illegally sold for € 2.50 on the streets of Naples in Italy, which resulted in a profit of approximately € 1.30.<sup>25</sup> The illicit market of cheap whites appears sizable in Italy, based on the finding that cheap whites constituted 60% of all illegal cigarettes found.<sup>26</sup>

The fact that illicit trade thrives through the 'flexible network structure' involving 'both EU and non-EU'<sup>27</sup> countries complicates law enforcement efforts. The complexity stems, not only from gaps in law enforcement capacities, but also through differences in criminal liability for certain conduct. For example, in Ukraine, controversy persists regarding the criminalisation of smuggling cigarettes. In 2016, the Ukrainian parliament could not adopt a bill to reintroduce criminal liability for tobacco and alcohol smuggling.<sup>28</sup> The EU has been urging Ukraine to criminalise tobacco smuggling<sup>29</sup> and the Mission of Ukraine to the EU reportedly anticipated criminalisation to occur in early 2020.<sup>30</sup> As of October 2020, the bill has not yet been submitted to the parliament.<sup>31</sup> While Ukraine is party to the Framework Convention on Tobacco Control (FCTC),<sup>32</sup> the country has not joined the Protocol to Eliminate

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<sup>21</sup> KPMG (2018), p. 13.

<sup>22</sup> Ibid, p. 13.

<sup>23</sup> Ibid, p. 13.

<sup>24</sup> Ibid, p. 6.

<sup>25</sup> Oude Breuil et al. (this volume), Sect. 3.3.1 (based on the Italian respondents, I18/IT).

<sup>26</sup> Oude Breuil et al. (this volume), Sect. 3.3.1 (based on the Italian respondents, I18/IT).

<sup>27</sup> Oude Breuil et al. (this volume), Sect. 3.2.8.

<sup>28</sup> Interfax-Ukraine (2016).

<sup>29</sup> Michalopoulos (2019b).

<sup>30</sup> Michalopoulos (2019a).

<sup>31</sup> See, e.g., Економічна правда (2020) 'Контрабанда з високою маржею: який вплив на неї матиме кримінальне покарання'; NV (2020) 'Криміналізація контрабанди: чи є шанс вивести на світло тінювий ринок'

<sup>32</sup> WHO Framework Convention on Tobacco Control, 21 May 2003, 2302 UNTS 166 (entered into force 27 February 2005).

Illicit Trade in Tobacco Products<sup>33</sup> which expects parties to consider the criminalisation of cigarette smuggling.<sup>34</sup>

## 10.3 The ENP as an Overarching Framework for Countering Illicit Tobacco Trade

### 10.3.1 *Development of the ENP as a Response to ‘Security Threats’*

As noted in the introductory section of this chapter, it is crucial to consider the ENP first as an overall framework for the EU’s external action to combat illicit trade. The EU’s engagement with Ukraine, Moldova, and Belarus became deeper and more strategic alongside the process of the enlargement of EU membership in 2004 and 2007. In essence, the then scheduled enlargement generated the political sentiment within the EU that it would be imperative for the Union to respond to new ‘security threats’, including transnational organised crimes and customs and taxation fraud. The EU’s external action to counter illicit tobacco trade at the eastern borders takes shape through the EU’s security-led responses.

Such political sentiment of urgency is best captured by the British Foreign Secretary’s letter in January 2002. In his letter addressed to the President of the Council of the EU, the British Foreign Secretary voiced his concern regarding the EU’s new external borders. In his view, to share borders with Ukraine, Belarus, and, eventually, Moldova, would entail ‘all the attendant problems of cross-border crime, trafficking and illegal immigration’.<sup>35</sup> ‘We have a direct stake’, observed the Foreign Secretary, ‘in helping address the challenges posed by and within these three countries’, namely, Ukraine, Belarus, and Moldova.<sup>36</sup> He made it clear that the engagement with them ‘does not hold out the prospect of EU membership’ but offers ‘clear and practical incentives in return for progress’.<sup>37</sup> Such incentive-based engagement, without the prospect of membership, was described as “a kind of ‘special neighbour status’ rooted in a commitment to democratic and free market principles”.<sup>38</sup>

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<sup>33</sup>Protocol to Eliminate Illicit Trade in Tobacco Products, 12 November 2012 (entered into force 25 February 2018).

<sup>34</sup>*Ibid.*, Art. 14(2).

<sup>35</sup>Letter from Mr Jack Straw, Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom, to Mr Josep Piqué i Campus, Minister for Foreign Affairs of the Kingdom of Spain, President in Office of the Council of the EU, ‘EU’s Relationship with its Future Neighbours following Enlargement (Ukraine, Belarus and Moldova)’, 28 January 2002.

<sup>36</sup>*Ibid.*

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*



A type of special neighbourhood status soon took shape at the institutional level. In March 2003, the European Commission first outlined the framework of the ENP in its Communication to the Council and Parliament. In the communication entitled 'Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours',<sup>39</sup> the Commission observed that '[c]loser geographical proximity' would generate 'shared interests' in working together to tackle 'trans-boundary threats'.<sup>40</sup> Having regarded the neighbouring countries as the EU's essential partners, the Commission made it clear that the EU has 'a duty' towards its present and future neighbours to 'ensure continuing social cohesion and economic dynamism'.<sup>41</sup> The EU 'must act', the Commission articulated, to promote regional and sub-regional cooperation and integration.<sup>42</sup>

What is striking in the political narrative surrounding the development of the ENP is the emphasis on 'security' threats. They were invoked as one of the key justifications for establishing the EU's unique relations with the new neighbourhood.<sup>43</sup> In the aforementioned Communication of March 2003, the European Commission saw the merit of joint approaches in tackling 'threats to mutual security'.<sup>44</sup> On the basis of this security narrative, the Commission reiterated that one of the incentives for establishing the neighbourhood policy would be to intensify cooperation to 'prevent and combat common security threats'.<sup>45</sup> More specifically, the Commission proposed to prioritise '[c]ooperation, joint work and assistance to combat security threats such as terrorism, trans-national organised crime, customs and taxation fraud, nuclear and environmental hazards and communicable diseases'.<sup>46</sup> While illicit tobacco trade is necessarily intertwined with some of these threats, such as transnational organised crime and customs fraud, cigarette trade was not specifically referred to in the March 2003 Communication. As the ENP is given more concrete form, however, illicit tobacco trade starts to occupy a much more visible space in the EU's external engagement, as will be elaborated upon in Sect. 10.4 of this chapter below.

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<sup>39</sup>European Commission (2003).

<sup>40</sup>Ibid, p. 3.

<sup>41</sup>Ibid, p. 3.

<sup>42</sup>Ibid, p. 3.

<sup>43</sup>For critical analysis, see Jeandesboz (2009), pp. 35–48.

<sup>44</sup>European Commission (2003), p. 6.

<sup>45</sup>Ibid, p. 11.

<sup>46</sup>Ibid, p. 11.

### 10.3.2 *Connection to an Area of Freedom, Security and Justice*

By addressing these mutual ‘security threats’, the ENP situated itself—not only within the EU’s Common Foreign and Security Policy (CFSP) and its external dimensions—but also in the development of the external dimension of an area of freedom, security and justice (AFSJ).<sup>47</sup> Under the Hague Programme for strengthening freedom, security and justice in the EU as approved in November 2004, the European Council observed that the security of the EU and its member states has reached the level of ‘a new urgency’ following the September 11 terrorist attacks and those which occurred in Madrid in March 2004.<sup>48</sup> On the basis of the urgency narrative, the European Council concluded that the ‘citizens of Europe rightly expect’ the EU to take a ‘more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime’.<sup>49</sup> The European Council put an emphasis on the importance of the ‘coordination and coherence between the internal and the external dimension’ in the field of security.<sup>50</sup>

This was followed by the Commission’s Communication presented in October 2005, entitled ‘A Strategy on the External Dimension’, which outlined the main external challenges in the AFSJ domain as well as the EU’s approaches to address them.<sup>51</sup> The document aimed to demonstrate how the external dimension of justice and home affairs contributes to *both* the internal AFSJ and the EU’s external relations.<sup>52</sup> In other words, the Communication demonstrated the linkage between the internal *and* external dimensions of AFSJ. In the words of the Commission, the ‘ever-growing sophistication in organised crime’ was featured as one of the key challenges, which led the Commission to stress the need for improved law enforcement and judicial cooperation ‘both within the EU *and* externally’, and through ‘support for capacity-building in *third countries*’.<sup>53</sup> In the view of the Commission, given that ‘weak states and troublespots’ can be a hotbed of organised crime, what the EU does is to support the ‘transformation of weak or non-existing law enforcement institutions in certain third countries’ into ‘properly functioning bodies’.<sup>54</sup> The formulation of the ENP was therefore coincided with the EU’s greater emphasis on

<sup>47</sup> Jeandesboz (2007), pp. 388, 405.

<sup>48</sup> Council of the European Union (2004), p. 3.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> European Commission (2005b); On the background of the emergence of the external dimension of the AFSJ, see Wessel et al. (2011), pp. 278–286.

<sup>52</sup> European Commission (2005b), p. 4.

<sup>53</sup> Ibid (original emphasis omitted; current emphasis added).

<sup>54</sup> Ibid.

the external dimension of the AFSJ. Such a policy focus to extend the AFJS facilitated the EU in assisting the eastern neighbours' 'border management'.<sup>55</sup>

In the process of externalising the AFSJ and prioritising border management, some of the EU's new eastern neighbouring countries were labelled as 'troublespots'. Having articulated that '[e]fficient border management' is vital to fight 'threats such as terrorism and organised crime',<sup>56</sup> the Commission, in its Communication of October 2005, praised the establishment of EUBAM for Ukraine and Moldova. In the words of the Commission, EUBAM was set up 'to help the Ukrainian and Moldovan authorities stamp out smuggling and trafficking across their common border'.<sup>57</sup> While the Commission's October 2005 document did not explicitly refer to illicit tobacco trade, EUBAM's border management initiatives have been developed in such a manner that anti-cigarette smuggling efforts became an integral part of the Mission—as will be explained in the following section.

## 10.4 The EU's Border Assistance in Ukraine and Moldova

### 10.4.1 *Establishment and 'Technical' Functions of EUBAM*

EUBAM was established in November 2005 with the aim of helping Moldova and Ukraine improve their capacity to prevent smuggling, trafficking, and customs fraud.<sup>58</sup> Formally speaking, EUBAM was formed at the request of the Ukrainian and Moldovan governments on 2 June 2005. They requested that the EU provide assistance to customs control and border surveillance with respect to the Transnistrian part of the two countries' border. The two governments' request was soon followed by a joint Council Secretariat/Commission fact-finding mission sent to Ukraine and Moldova in August 2005, which duly recommended the creation of a border assistance mission. On 20 September 2005, the Political and Security Committee approved the establishment of a Mission. The Memorandum of Understanding (MoU), which defined the Mission's mandate, was signed on 7 October 2005 between the European Commission and the Moldovan and Ukrainian governments.<sup>59</sup>

The Mission was created initially as part of the EU's emergency responses. In part due to the lack of available funds in the CFSP budget, the Mission was financed by the Commission's funds from its Rapid Reaction Mechanism as an emergency

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<sup>55</sup> Jeandesboz (2015), p. 453.

<sup>56</sup> European Commission (2005b), p. 4.

<sup>57</sup> Ibid, pp. 5–6.

<sup>58</sup> European Commission (2005a).

<sup>59</sup> Memorandum of Understanding between the European Commission, the Government of the Republic of Moldova and the Government of Ukraine on the European Commission Border Assistance Mission to the Republic of Moldova and to Ukraine (7 October 2005).

response to the conflict surrounding the region of Transnistria.<sup>60</sup> The Rapid Reaction Mechanism was a scheme created in 2011 designed to allow the Community to respond to ‘situations of urgency or crisis or to the emergence of crisis’.<sup>61</sup> The resolution of the Transnistrian conflict, accompanied by the request from the two countries, justified the opportunity for the Commission’s directorate-general for external relations to deploy an emergency response.

According to the 2005 MoU, the Mission is mandated to promote the coordinated action of the two governments ‘in areas involving border, customs and fiscal matters’.<sup>62</sup> In terms of *how* EUBAM promotes such coordination, it is important to bear in mind that EUBAM has been predominantly explained as a ‘technical’—and thus not political—mission to provide advice to border guards and customs authorities. As a EUBAM official reportedly observed, the Mission tries to ‘keep it neutral’ away from policy considerations.<sup>63</sup> Also, the Mission’s authority is, at least formally, limited to assisting the countries’ decision-making processes, as opposed to replacing them. The Mission made it clear that it is an ‘advisory technical body’ without any executive powers to render decisions directly.<sup>64</sup>

EUBAM has started its action in 2005 with 69 EU experts and 40 local staff with € 4 million funding from the Rapid Reaction Mechanism.<sup>65</sup> After the expiry of the first 6 months, the second phase of the mission (18 months) was financed by the TACIS programme, with an additional € 16 million and more than 100 experts.<sup>66</sup> By the end of 2007, the Mission accommodated 119 experts from EU member states and 111 local personnel.<sup>67</sup> Having started as an emergency response for the duration of 2 years, the Mission has been renewed multiple times (in 2007, 2009, 2011, 2015, and 2017).<sup>68</sup> The indicative budget for the period between December 2017 and November 2020 is € 15 million.<sup>69</sup>

As shown in Fig. 10.2, the Mission is headquartered in Odesa (Ukraine) and has two country offices (in Chisinau in Moldova and in Odesa in Ukraine). There are also six field offices in Otaci, Podilsk, Chisinau, Kuchurhan, Odesa and Chornomorsk Ports, and Giurgiulesti. There are 67 border crossing points along the Moldovan-Ukrainian border of 1222 km long, including 25 at the Transnistrian

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<sup>60</sup> Kurowska and Tallis (2009), pp. 50–51.

<sup>61</sup> Council Regulation (EC) No. 381/2001, OJ L57/5, Art. 1.

<sup>62</sup> Memorandum of Understanding between the European Commission, the Government of the Republic of Moldova and the Government of Ukraine on the European Commission Border Assistance Mission to the Republic of Moldova and to Ukraine (7 October 2005), Art. I(1).

<sup>63</sup> Jeandesboz (2015), p. 460 (based on the interview conducted by Jeandesboz).

<sup>64</sup> EUBAM (2006), p. 4.

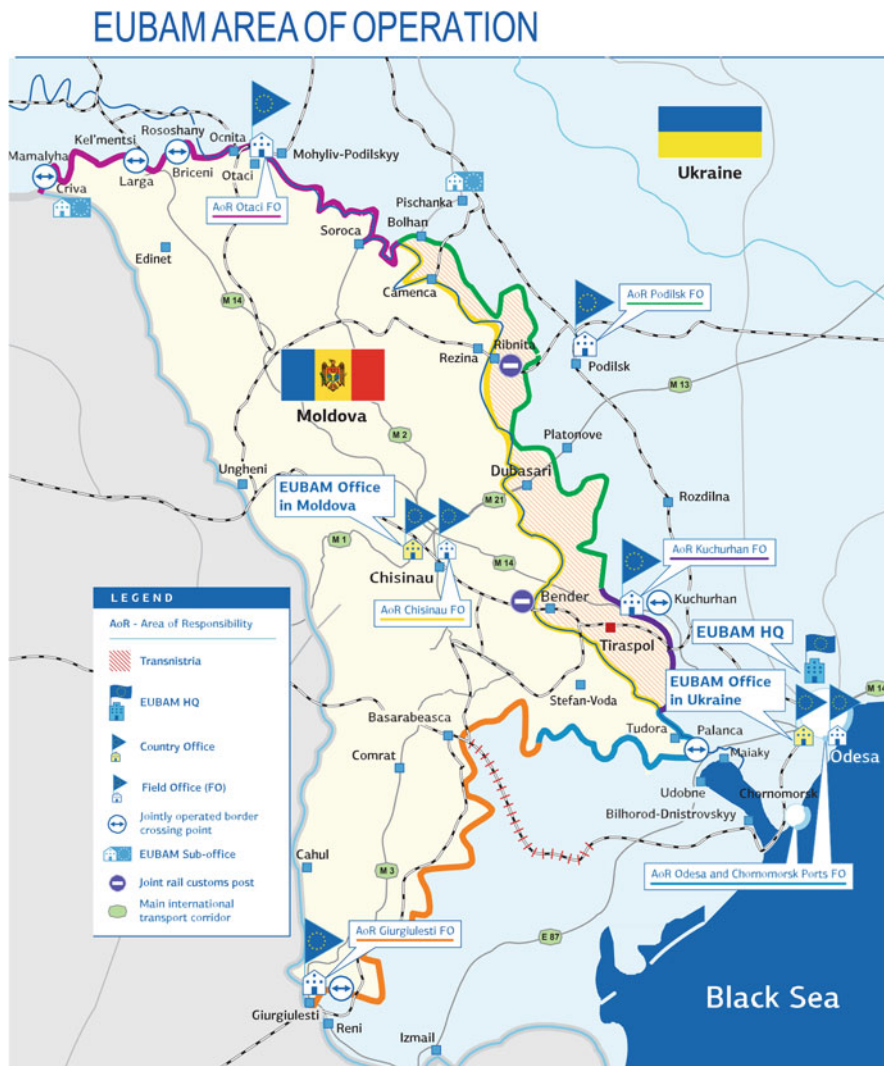
<sup>65</sup> EUBAM (2006), p. 4.

<sup>66</sup> EUBAM (2006), p. 4.

<sup>67</sup> EUBAM (2007), p. 2.

<sup>68</sup> EUBAM (2019), p. 31.

<sup>69</sup> EUBAM (2019), p. 31.



**Fig. 10.2** EUBAM Area of Operations (Reproduced from: EUBAM Annual Report, 1 December 2016–30 November 2017)

part.<sup>70</sup> As of 1 December 2019, EUBAM has 120 staff in total.<sup>71</sup> Among them, 48 were stationed in the headquarters and 72 were in the country offices.<sup>72</sup> In terms

<sup>70</sup>EUBAM website (2020) ‘Where We Work?’.

<sup>71</sup>EUBAM (2018), p. 34.

<sup>72</sup>EUBAM (2018), p. 34.

of the country of origin, 46 of them were dispatched from 11 EU member states, while 74 were local staff.<sup>73</sup>

#### ***10.4.2 Anti-Tobacco Smuggling as a ‘Flagship’ Initiative***

When EUBAM was launched in 2005, illicit tobacco trade was not particularly featured as a priority issue. The initial MoU signed in October 2005, which defined the Mission’s mandate, contains no explicit reference to cigarette smuggling or other aspects of illicit tobacco trade.<sup>74</sup> In the initial years, the Mission’s annual reports did not place any particular emphasis on strategies or operations to tackle cigarette smuggling.

Over the years, however, fighting tobacco smuggling has gained priority in the narrative surrounding the role of EUBAM. For instance, in the annual report covering December 2014 to November 2015, EUBAM articulated that it made fighting tobacco-smuggling one of its ‘flagship initiatives’.<sup>75</sup> In the words of EUBAM, cigarette smuggling represented ‘a major economic and security challenge for both countries’ and, simultaneously, posed ‘a serious concern for the European Union and its Member States’.<sup>76</sup> The 2017 annual report became even more equivocal in prioritising the efforts to combat tobacco smuggling. As part of a foreword from the Mission’s head, the 2017 annual report stressed that ‘cigarette smuggling’ had become ‘[f]oremost amongst the cross-border threats’ that must be addressed.<sup>77</sup> Likewise, the 2018 annual report, after the Mission’s term was renewed at the end of 2017, made a particular reference to tobacco smuggling as part of the Mission’s activity of preventing and fighting cross-border crime. The Head of the Mission articulated therein that EUBAM’s efforts would remain directed to ‘addressing the threats related mainly to smuggling tobacco products’.<sup>78</sup>

#### ***10.4.3 Facilitation of Anti-Tobacco Smuggling Operations***

In translating words into deeds, EUBAM has undertaken various initiatives to facilitate anti-tobacco smuggling operations. Foremost, information gathering is

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<sup>73</sup>EUBAM (2018), p. 34.

<sup>74</sup>Memorandum of Understanding between the European Commission, the Government of the Republic of Moldova and the Government of Ukraine on the European Commission Border Assistance Mission to the Republic of Moldova and to Ukraine (7 October 2005).

<sup>75</sup>EUBAM (2015), p. 18.

<sup>76</sup>EUBAM (2015), p. 18.

<sup>77</sup>EUBAM (2017), p. 2.

<sup>78</sup>EUBAM (2018), p. 5.

**Table 10.2** Seizures at the Moldova-Ukraine border, according to locations, in Dec. 2015–Nov. 2019 (Based on: EUBAM annual reports, 2016, 2017, 2018, 2019)

| Border locations | Number of seizures | Pieces of cigarettes |
|------------------|--------------------|----------------------|
| Northern         | 265                | 6,675,866            |
| Central          | 90                 | 74,662,747           |
| Southern         | 28                 | 2,448,360            |
| Total            | 383                | 83,786,973           |

**Table 10.3** Seizures at the Moldova-Ukraine border in Dec. 2015–Nov. 2019 (Based on: EUBAM annual reports, 2016, 2017, 2018, 2019)

| Date                   | Border locations | Number of seizures | Pieces of cigarettes |
|------------------------|------------------|--------------------|----------------------|
| Dec. 2015 to Nov. 2016 | Northern segment | 168                | 4,571,980            |
|                        | Central segment  | 32                 | 39,765,240           |
|                        | Southern segment | 9                  | 1,432,880            |
|                        | Sub-total        | 209                | 45,770,100           |
| Dec. 2016 to Nov. 2017 | Northern segment | 46                 | 94,746               |
|                        | Central segment  | 31                 | 14,097,927           |
|                        | Southern segment | 11                 | 669,880              |
|                        | Sub-total        | 88                 | 14,862,553           |
| Dec. 2017 to Nov. 2018 | Northern segment | 23                 | 1,383,600            |
|                        | Central segment  | 9                  | 1,702,740            |
|                        | Southern segment | 5                  | 204,120              |
|                        | Sub-total        | 37                 | 3,290,460            |
| Dec. 2018 to Nov. 2019 | Northern segment | 28                 | 625,540              |
|                        | Central segment  | 18                 | 19,096,840           |
|                        | Southern segment | 3                  | 141,480              |
|                        | Sub-total        | 49                 | 19,863,860           |
|                        | Total            | 383                | 83,786,973           |

one of such undertakings, and the Mission's annual reports provide an overview of seizures conducted at the border by Ukrainian and Moldovan border and customs authorities. As seen from Table 10.2, between December 2015 and November 2019, the seizure of illicit tobacco products was most frequent in the Northern segment of the border. In terms of the pieces of cigarettes seized, however, the Central segment (Transnistrian part) is by far the largest. During the period, more than 74 million cigarettes were seized in the Central segment of the border (Table 10.2). During the reported period, the number and volume of seizures were the largest between December 2015 and November 2016 (Table 10.3).

While the seizures were made by state authorities, EUBAM has offered practical assistance to some of the operations to detect and seize illicit cigarette trade. A series of training opportunities were provided by EUBAM to law enforcement authorities in Ukraine and Moldova.<sup>79</sup> EUBAM-assisted operations have resulted in seizures of

<sup>79</sup>E.g., In April 2011, for example, EUBAM organised a workshop specifically on investigations of tobacco smuggling: EUBAM, Annual Report of 1 December 2010–30 November 2011, at 14. In

cigarettes. In 2008, for instance, EUBAM extended assistance to the Security Service of Ukraine and the Information and Security Service of Moldova and the EUBAM-assisted operation resulted in a seizure of five million cigarettes.<sup>80</sup> In 2014, EUBAM's Task Force Tobacco supported twelve international criminal investigations involving a total of 1.5 billion cigarettes.<sup>81</sup> The operations involved the seizure of a consignment of 12.4 million cigarettes, which originated in Moldova and were smuggled into Romania.<sup>82</sup>

EUBAM's annual reports refer to numerous other instances of joint operations. For example, in 2014, the operation 'Olvia' has resulted in the seizure of 16.1 million cigarettes.<sup>83</sup> From May to October 2015, EUBAM facilitated a four-phase, joint border control operation called 'Danubius', involving Ukrainian and Moldovan law enforcement agencies, several EU member states, and international partners such as Europol, Interpol, Frontex, and the European Anti-Fraud Office (OLAF).<sup>84</sup> The operation resulted in the seizure of 1.3 million cigarettes, among others.<sup>85</sup> In April 2017, a joint border control operation code-named 'Orbis' monitored seven cigarette consignments totalling 120 million pieces<sup>86</sup> and resulted in the prevention of 37 cases of illegal movement of 494,440 pieces of cigarettes across the Ukrainian customs border.<sup>87</sup> The operation code-named 'Janus' in May and June 2018 resulted in the confiscation of several large cargoes of cigarettes which had been smuggled from Moldova or Ukraine into the EU.<sup>88</sup> In June-September 2019, EUBAM facilitated a joint operation, 'Scorpion', in order to combat cigarettes smuggling.<sup>89</sup> 'Scorpion' included border and customs agencies of Moldova, Ukraine, and Romania, as well as OLAF and EUROPOL,<sup>90</sup> with the result of '115 seizures of over 15 million pieces of cigarettes'.<sup>91</sup>

Apart from assisting in the operations involving Ukrainian and Moldovan authorities, EUBAM also provides information to EU member states to facilitate their own operations targeting illicit tobacco products. In March 2012, EUBAM provided information to the German Federal Police, which led to the seizure of 40,000 pieces

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May 2011, EUBAM organised a training session to improve the identification of counterfeit cigarettes in Odessa and Chisinau: EUBAM (2011), p. 14.

<sup>80</sup>EUBAM (2008), p. 23.

<sup>81</sup>EUBAM (2014), p. 17.

<sup>82</sup>EUBAM (2014), p. 17.

<sup>83</sup>EUBAM (2014), p. 20.

<sup>84</sup>EUBAM (2015), p. 21.

<sup>85</sup>EUBAM (2015), p. 21.

<sup>86</sup>EUBAM (2017), p. 24.

<sup>87</sup>EUBAM (2017), p. 9.

<sup>88</sup>EUBAM/OLAF (2018); EUBAM (2018), p. 29.

<sup>89</sup>EUBAM (2019), p. 26.

<sup>90</sup>EUBAM (2019), p. 26.

<sup>91</sup>EUBAM (2019), p. 26.



of non-declared cigarettes.<sup>92</sup> Likewise, in 2012, information that EUBAM provided to the Austrian Customs Service eventually led Italian authorities to seize 25,800 pieces of cigarettes found in the luggage of a Moldovan citizen.<sup>93</sup> The Mission facilitated the establishment of an information exchange mechanism that allows communications among Belarusian, Georgian, Hungarian, Lithuanian, Moldovan, Polish, Romanian, and Ukrainian customs administrations, as well as the Southeast European Law Enforcement Center (SELEC) and OLAF.<sup>94</sup> Overall, it appears that EUBAM established itself as a liaison between Ukrainian and Moldovan customs and security agencies on the one hand, and those of EU member states, on the other hand.

While EUBAM tends to insist that its role is technical in nature,<sup>95</sup> this does not mean that the Mission has no role in facilitating the general legal reforms and the changes in the states' strategies towards tobacco consumption and illicit trade. On the contrary, EUBAM served as a medium through which the EU facilitates legislative changes on the part of Ukraine and Moldova. This is in line with the broader expectation of the EU's ENP to achieve legislative approximation on customs and tax systems. As will be overviewed in the following sections, the deployment of EUBAM has therefore been combined with a series of other instruments that facilitate the general improvement of border management and customs and tax reforms on the part of Ukraine and Moldova.

## 10.5 ENP on Ukraine in Countering Illicit Tobacco Trade

### 10.5.1 *Legislative Approximation on Customs and Tax Systems*

#### 10.5.1.1 2005 Action Plan and 2009 Association Agenda

Within the framework of the ENP, the EU-Ukraine Action Plan was published in 2005 to open a new 'partnership' between the EU and Ukraine.<sup>96</sup> The Action Plan is characterised by its aim to achieve the 'legislative approximation' by Ukraine 'to meet EU norms and standards' and the EU provides support for it.<sup>97</sup> While the 2005 Action Plan does not refer to illicit cigarette trade in particular, it includes a series of reforms with regard to customs management which is a critical component for countering illicit trade in tobacco products. As the Action Plan made clear, it expects

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<sup>92</sup>EUBAM (2012), p. 23.

<sup>93</sup>EUBAM (2012), p. 23.

<sup>94</sup>EUBAM (2015), p. 18.

<sup>95</sup>EUBAM (2006), p. 4.

<sup>96</sup>Europa Varietas Institute (2005) EU/Ukraine Action Plan.

<sup>97</sup>Ibid, p. 3.

Ukraine to elaborate and implement customs legislation ‘aligned with international and EU standards’.<sup>98</sup> For instance, the Action Plan expects the revision of the Ukrainian Customs Code, ‘taking into account EU legislation and recommendations already made’.<sup>99</sup> The legislative harmonisation was combined with the EU’s request to improve the practices of the Ukrainian customs service. The 2005 Action Plan expects Ukraine to ‘[s]implify and modernise customs procedures at borders and inland’.<sup>100</sup> This means, for instance, developing a ‘single window approach for all international trade related documentation and control’ through ‘increased cooperation between all agencies working at the border’.<sup>101</sup>

The 2005 Action Plan was followed by the adoption in November 2009 of the EU-Ukraine Association Agenda as one of the key instruments to facilitate the negotiations and ratification of the Association Agreement. The Association Agenda anticipated, for instance, cooperation on the ‘implementation of modern customs control techniques based in particular on selective, risk based control, simplified procedures for release of goods and post clearance controls’.<sup>102</sup>

### 10.5.1.2 2014 Association Agreement

EU-Ukraine relations have reached a new level when they signed the political chapters of the EU-Ukraine Association Agreement in March 2014, and the remaining part of the Agreement in June 2014, including the Deep and Comprehensive Free Trade Area (DCFTA). The DCFTA is founded on the economic liberalisation which started based on the EU’s autonomous trade measures towards Ukraine since April 2014. Parts of the Association Agreement on cooperation on human rights and the rule of law were provisionally applied since November 2014, and the part on the DCFTA began to be applicable since January 2016. The Agreement came into full force on 1 September 2017.

The Agreement has a broad aim of promoting ‘gradual rapprochement’ between the EU and Ukraine ‘based on common values and close and privileged links’.<sup>103</sup> While ‘rapprochement’ may sound mutual, the Agreement essentially requires Ukrainian authorities to reform their national systems against the standards expected from the EU. While the Agreement encompasses a wide range of issues, for the sake of this chapter, it is necessary to highlight Chapter 5 of the Agreement pertaining to ‘customs and trade facilitation’ (Articles 75–84).

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<sup>98</sup> *Ibid.*, p. 16 (original italics omitted).

<sup>99</sup> *Ibid.*, p. 17.

<sup>100</sup> *Ibid.*, p. 17 (original italics omitted).

<sup>101</sup> *Ibid.*, p. 17.

<sup>102</sup> *Ibid.*, p. 20.

<sup>103</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, Art. 1(1).

In line with the Agreement's overall aim, Article 84 and Annex XV expects Ukraine to achieve the '[g]radual approximation' of customs legislation 'to the EU customs legislation as laid down in the EU and international standards'.<sup>104</sup> Based on Annex XV to the Agreement, Ukraine must incorporate some provisions of the Union Customs Code, which sets out customs rules and procedures in the EU customs territory, into Ukrainian law within 3 years following the entry into force of the Agreement (i.e., before 1 September 2020).<sup>105</sup> Ukraine must also adopt a common transit procedure within 1 year following the entry into force (i.e., before 1 September 2018).<sup>106</sup>

With regard to tobacco products more specifically, the crucial provision is Article 352 of the Agreement on the harmonisation of exercise rates, which provides as follows:

The Parties shall develop their cooperation and harmonise policies in counteracting and fighting fraud and smuggling of excisable products. This cooperation will include, inter alia, the *gradual approximation of excise rates on tobacco products*, as far as possible, taking into account the constraints of the regional context, including through a dialogue at regional level and in line with the World Health Organisation Framework Convention on Tobacco Control of 2003. To this end, the Parties will look to strengthen their cooperation within the regional context.<sup>107</sup>

Under the provision, the EU and Ukraine are required to achieve policy convergence with regard to excise rates on tobacco products. On the basis of this general expectation, Annex XXVIII (taxation) of the Agreement refers to more detailed instructions to achieve gradual legislative approximation.<sup>108</sup> Annex XXVIII does so by listing a set of EU directives which should guide the Ukrainian legislative changes. One of the most relevant for the sake of this study is Council Directive 2011/64/EU, which defines the structure and rates of excise duty applied to manufactured tobacco.<sup>109</sup> Directive 2011/64/EU provides 'general principles for the harmonisation of the structure and rates of the excise duty' on manufactured tobacco,<sup>110</sup> which, through the EU-Ukraine Association Agreement, 'shall be implemented' by Ukrainian authorities.<sup>111</sup>

The Association Agreement comes with the EU-Ukraine 'Association Agenda' which aims to operationalise the Agreement based on the priorities upon which the

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<sup>104</sup>Ibid, Art. 84.

<sup>105</sup>Ibid, Annex XV to Chapter 5.

<sup>106</sup>Ibid, Annex XV to Chapter 5.

<sup>107</sup>Ibid, Art. 352 (emphasis added).

<sup>108</sup>Ibid, Annex XXVIII (Taxation) to Chapter 4.

<sup>109</sup>Council Directive 2011/64/EU, OJ L 176/24.

<sup>110</sup>Ibid, Art. 1.

<sup>111</sup>Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, Annex XXVIII (Taxation) to Chapter 4; While the Directive's provisions ought to be implemented within 2 years of the entry into force of the agreement, this 2-year limit is not applicable to various substantive provisions on the rate of excise duty.

parties have agreed on the basis of political dialogues. The Association Agenda, as endorsed in March 2015 by the EU-Ukraine Association Council, contains a long list of actions to be taken by Ukrainian authorities. Illicit tobacco trade is referred to as one of the specific action items for the sake of customs and trade facilitation. According to the Association Agenda, the parties strengthen information exchange and other forms of cooperation regarding the fight against fraud to prevent and enforce illegal trade, including in excisable products, ‘in particular cigarettes’.<sup>112</sup>

### 10.5.1.3 Reforms in Ukraine

The Association Agreement and related instruments have led to a series of reforms in Ukraine about customs and taxation systems, including those specific to tobacco trade and consumption. With regard to illicit tobacco trade, one of the most notable changes pertains to the changes in tobacco tax in Ukraine. Already before the Association Agreement entered into force, Ukraine took several steps to increase excise taxes. In 2014, the specific excise rate was increased three times, and, in 2015, the excise tax rate for non-filtered cigarettes was raised up to the rate of filtered cigarettes.<sup>113</sup> From 2015 to 2017, the excise tax was annually increased by 40%.<sup>114</sup>

The major reform has arrived, however, in late 2017, after the Association Agreement fully entered into force. In November 2017, the Ukrainian Parliament adopted the draft law entitled ‘On amendments to the Tax Code concerning balancing of the budget revenues in 2018’.<sup>115</sup> It outlined a 7-year plan, which runs from 2018 to 2024, for gradually increasing tobacco taxes.<sup>116</sup> This was ‘the first time’ that Ukraine adopted the mandatory annual increases in the specific tax rate on cigarettes.<sup>117</sup> More specifically, the law increased both the specific tobacco tax and minimum exercise tax per 1000 cigarettes by 29.7%, and, in 2019–2024, specific tobacco taxes would be raised by 20% annually.<sup>118</sup> This meant that the price of a pack of cigarettes was expected to rise from € 0.88 to € 2.75 by 2025.<sup>119</sup>

It must also be noted that the 2014 Association Agreement strengthened the EU’s rationale to provide financial assistance to Ukraine. In March 2014, the Commission announced a support package of € 11.2 billion for the period of 2014–2020 to support the reform process in Ukraine.<sup>120</sup> In December 2018, as part of the packages,

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<sup>112</sup>EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement (as endorsed by the EU-Ukraine Association Council on 16 March 2015), p. 34.

<sup>113</sup>Hoe et al. (2020), p. 4.

<sup>114</sup>Ibid, p. 4.

<sup>115</sup>WHO FCTC (2020).

<sup>116</sup>Ibid.

<sup>117</sup>Hoe et al. (2020), pp. 1, 5.

<sup>118</sup>Ibid.

<sup>119</sup>Filippov (2019), p. 46.

<sup>120</sup>Ibid, at 12.

the EU and Ukraine signed the Financial Agreement in connection to the EU's support programme to strengthen Public Financial Management (PFM) system in Ukraine.<sup>121</sup> One of the objectives of the PFM programme pertains to the transformation of tax and customs administration into a more transparent system that allows authorities to collect revenues more effectively.<sup>122</sup>

### ***10.5.2 EU-Ukraine Cooperation on Customs Management***

Apart from facilitating legislative changes on customs and tax systems, the EU has taken various steps to facilitate cooperation between the EU and Ukraine on the management of customs and tax systems. Most notable in this regard is the EU-Ukraine Strategic Framework for Customs Cooperation that was endorsed in May 2012 to foster 'custom modernisation' in Ukraine.<sup>123</sup> The Strategic Framework set specific objectives for 2012–2014, one of which pertained to the coordination between border authorities. The Strategic Framework planned to improve 'operational cooperation between the customs authorities and other border authorities of Ukraine and neighbouring Member States'.<sup>124</sup> The Strategic Framework is overseen by the EU-Ukraine Sub-Committee on Customs and Cross-Border Cooperation, which is one of the sub-committees established earlier by the Partnership and Cooperation Agreement (PCA).<sup>125</sup> The Working Group was created to provide support for national customs authorities to strengthen their capacity, cooperation, efficiency and harmonisation.

The Strategic Framework has been accompanied by various sector-based cooperative arrangements. Notably, in June 2013, the Ministry of Revenues and Duties of Ukraine signed an administrative cooperation arrangement with the OLAF for combatting illicit traffic in tobacco products.<sup>126</sup> The Cooperation Arrangement aimed to strengthen cooperation between OLAF and the Ukrainian authorities in combatting illicit cigarette trade. They agreed on cooperation, not only to exchange information, but also to 'consider undertaking joint activities to prevent, detect, and investigate the illicit traffic of tobacco products'.<sup>127</sup> It was also agreed to meet periodically to strengthen cooperation and facilitate the creation of professional training opportunities.<sup>128</sup>

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<sup>121</sup> European External Action Service (2019).

<sup>122</sup> *Ibid.*

<sup>123</sup> Strategic Framework for Customs Cooperation (2012).

<sup>124</sup> *Ibid.*, at 2.

<sup>125</sup> *Ibid.*, at 3.

<sup>126</sup> European Commission (2014), p. 12.

<sup>127</sup> Cooperation Arrangement between the European Anti-Fraud Office (OLAF) and the Ministry of Revenue and Duties of Ukraine for Combating Illicit Traffic in Tobacco Products (2013), point B.

<sup>128</sup> *Ibid.*

Such cooperation is further envisaged under the 2014 Association Agreement. Article 80 of the Agreement provides the list of actions that the parties ought to take in order to strengthen customs-related cooperation. Those items are broadly formulated; for instance, the parties shall ‘exchange information concerning customs legislation and procedures’ and ‘develop joint initiatives relating to import, export and transit procedures’.<sup>129</sup> Article 80 also expects the parties to cooperate with regard to technical assistance and promote coordination among border agencies, both internally and across borders.<sup>130</sup> While Article 80 of the Agreement lists some broad action items, the Agreement further devises a specific mechanism to implement the framework of cooperation. Under Article 83, the Agreement established the ‘Customs Sub-Committee’, which reports itself to the Association Committee. The function of the Customs Sub-Committee includes regular consultations and monitoring of implementation and administration of the relevant part of the Agreement, including the issues of customs cooperation and cross-border customs cooperation and management.<sup>131</sup> The Customs Sub-Committee is responsible for determining measures and practical arrangements for implementing the Agreement relevant to customs cooperation.<sup>132</sup>

Needless to say, a wide range of commitments on the part of Ukraine to reform its tax, customs, border management, and related public administration systems come with the promise and delivery of financial assistance from the EU. According to the European Court of Auditors’ special report on EU assistance to Ukraine, the EU’s bilateral assistance to Ukraine in 2007–2015 in grants and loans was € 5.019 billion (5019 million), including macro-financial assistance (i.e., loans which were released in several instalments).<sup>133</sup> Among the assistance provided in 2007–2015, one of the specific programmes that the EU supported was the one on Support for Border Management Sector Policy in Ukraine in 2010, with the amount of € 66 million.<sup>134</sup> The rationale of the support was to assist the efforts of the Ukrainian government to approximate its border management to EU standards. One of the specific objectives of the Sector Policy support programme was to improve the capacity of the State Customs Service of Ukraine (SCSU) and the State Border Guard Service (SBGSU) to combat smuggling, illicit trafficking, and illegal migration.<sup>135</sup>

As explained in Sect. 10.4 of the present chapter, EUBAM has been providing assistance to Ukraine in managing border controls and countering cigarette smuggling. In this context, it is worth noting that in August 2017, the government of

<sup>129</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, Art. 80(a), (b).

<sup>130</sup> *Ibid.*, Art. 80(f), (h).

<sup>131</sup> *Ibid.*, Art. 83.

<sup>132</sup> *Ibid.*, Art. 83.

<sup>133</sup> European Court of Auditors (2016), p. 11.

<sup>134</sup> *Ibid.*, at 46.

<sup>135</sup> Action Fiche Ukraine, Annual Action Programme 2010 Part 2, ‘Support for Border Management Sector Policy in Ukraine’, p. 5.

Ukraine approved the Strategy for Countering Illegal Manufacturing and Turnover of Tobacco Goods.<sup>136</sup> According to EUBAM's annual report, the Strategy was jointly drafted by EUBAM experts, the Ukrainian Association of Tobacco Producers, and Ukrainian border, customs, and law enforcement agencies.<sup>137</sup> The aims of the Strategy was to prevent unlawful movement of tobacco goods across the state border by strengthening inter-agency cooperation as well as the partnership with the EU and international agencies.<sup>138</sup> The adoption of the Strategy was welcomed by EUBAM, which described the achievement as 'a firm and coordinated basis' for operational cooperation between Ukraine and the EU in tackling illicit tobacco smuggling.<sup>139</sup> In July 2019, the Cabinet of Ministers of Ukraine endorsed the 'National Strategy for Integrated Border Management', in accordance with the EU-Ukraine Association Agreement.<sup>140</sup>

Overall, taking into account the substantial flow of illicit tobacco products between Ukraine and EU member states, as well as its proximity to Moldova from which illicit products further flow to the EU, 'a coordinated approach and cooperation with the EU' seems to be 'the only effective way' in tackling tobacco smuggling, as the Minister for Revenue and Duties of Ukraine has acknowledged.<sup>141</sup> The EU has deployed a wide range of instruments, most important among which has been the 2014 Association Agreement that formalised legislative approximation and cooperation among customs and border management authorities.

## 10.6 ENP on Moldova in Countering Illicit Tobacco Trade

### 10.6.1 *Legislative Approximation on Customs and Tax Systems*

The EU's initial reluctance to develop relationships with Moldova has undergone some fundamental changes in the early 2000s as a result of the EU's Eastern enlargement.<sup>142</sup> As discussed in Sect. 10.3 of this chapter, the security narrative has affected the shape of the EU's engagement with its eastern neighbours, and

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<sup>136</sup>EUBAM (2017), p. 22.

<sup>137</sup>EUBAM (2017), p. 4.

<sup>138</sup>EUBAM (2017), p. 4.

<sup>139</sup>EUBAM (2017), p. 24.

<sup>140</sup>EUBAM (2019), p. 8.

<sup>141</sup>Ibid.

<sup>142</sup>Całus and Kosienkowski (2018), p. 101; This does not mean that there were no agreements before the early 2002. One of the initial frameworks that defined EU-Moldova relationship was the Partnership and Cooperation Agreement signed in November 1994: Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova [1998] OJ L 181/3; On the development of Moldova-EU relations, see, e.g., Danii and Mascauteanu (2011).

Moldova is no exception in this regard. As Calus and Kosienkowski articulated, the development of the EU-Moldova cooperation was apparently motivated by the construction of Moldova as ‘a potential source of security threats’ and as ‘a challenge for EU border integrity’.<sup>143</sup>

As it was in the case of the EU-Ukraine relationship, the EU has deployed a wide range of instruments in order to facilitate legislative changes to customs and tax systems in Moldova. The most comprehensive one has been the EU-Moldova Association Agreement signed in June 2014.<sup>144</sup> One of the key focuses of the Agreement, which entered into force in July 2016, is directed at the reform of the Moldovan public administration, with the particular focus on the elimination of corruption.<sup>145</sup> The Association Agreement contains several provisions which have direct relevance to the countering of illicit tobacco products.

The most relevant in this regard is Article 55 of the Agreement within Chapter 8 on taxation, which mirrors the wording of Article 352 of the EU-Ukraine Association Agreement.<sup>146</sup> According to Article 55 of the EU-Moldova Association Agreement, the parties shall ‘develop their cooperation and harmonise policies in counteracting and fighting fraud and the smuggling of excisable products’,<sup>147</sup> and such cooperation includes the ‘gradual approximation of excise rates on tobacco products’.<sup>148</sup> As in the case of the Ukrainian counterpart, the EU-Moldova Association Agreement requires Moldova to ‘implement’ Council Directive 2011/64/EU to harmonise the structure and rates of excise duty for manufactured tobacco.<sup>149</sup> The Association Agreement requires Council Directive 2011/64/EU to be implemented by 2025.<sup>150</sup>

In part in response to various initiatives from the EU, Moldovan authorities have been taking steps to increase excise tax on tobacco products. The study by Krasovsky (2016) provides an overview of the increase in tobacco excise taxes between 2007 and 2016 in Moldova. Since January 2008, Moldova has imposed the excise tax for filter cigarettes by way of a specific tax (set as a monetary value per 1000 cigarettes) and an *ad valorem* excise (as percentage of maximum retail prices).<sup>151</sup> According to Krasovsky (2016), the period between 2007 and 2009

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<sup>143</sup> *Ibid.*, p. 101.

<sup>144</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L 260/4.

<sup>145</sup> Montesano et al. (2016), pp. 10–11.

<sup>146</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, Art. 352.

<sup>147</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L 260/4, Art. 55.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, Annex VI to Chapter 8 (Taxation) of Title IV; Council Directive 2011/64/EU, OJ L 176/24.

<sup>150</sup> EU-Moldova Association Agreement, *Ibid.*, Annex VI to Chapter 8 (Taxation) of Title IV.

<sup>151</sup> Krasovsky (2016), p. 7.



hardly saw any increase in the specific tax or the *ad valorem* rates.<sup>152</sup> However, during the period between 2010 and 2013, the specific tax has been increased more than by 350% in total. The specific tax was 6.6 Moldovan Leu (MDL) per 1000 cigarettes in January 2010, but the amount was since increased to MDL 10 (April 2011), MDL 20 (January 2012), and MDL 30 (January 2013).<sup>153</sup> During the subsequent period between 2013 and July 2016, the specific tax was further increased by 900% in total, from MDL 30 in January 2013 to MDL 300 in July 2016.<sup>154</sup> With regard to the *ad valorem* excise tax, it has increased by 150% during the period of 2010–2013, although the rate was decreased during the subsequent period between 2013 to July 2016.<sup>155</sup> The increase in the excise tax has been said to have had an impact on the scale of illicit tobacco trade. According to Krasovsky (2016), the main factor that has led to the decrease in the outflow of smuggled cigarettes in the early 2010s pertained to the ‘substantial increase in the excise tax rates’ in Moldova.<sup>156</sup>

### 10.6.2 EU-Moldova Cooperation on Customs Management

As with the case of EU-Ukraine relations, the conclusion of the Association Agreement has been combined with various initiatives to facilitate cooperation between the EU and Moldovan authorities on the management of customs and tax systems. For instance, in 2013, the OLAF and Moldova’s Customs Service signed an administrative cooperation arrangement in order to pave the way for joint initiatives and information exchange to prevent and detect cigarette smuggling.<sup>157</sup> The arrangement was regarded as ‘crucial to tackling the illegal smuggling of cigarettes into the EU’.<sup>158</sup> In October 2015, Moldova’s Customs Service organised an international Conference entitled ‘Together in the Fight against Tobacco Smuggling’, which garnered customs officers and border guards from France, Poland, and Romania, and Ukraine.<sup>159</sup> The conference served as the kick-off of the ‘Strategy of the Customs Service in the Fight against the Smuggling and Illegal Trade in Tobacco Products for 2015–2018’, signed by Moldova, OLAF, and EUBAM.<sup>160</sup>

With regard to customs and related border management in Moldova, it must be noted that EUBAM—analysed in Sect. 10.4 of this chapter—has been providing

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<sup>152</sup> *Ibid.*, p. 7.

<sup>153</sup> *Ibid.*, p. 7.

<sup>154</sup> *Ibid.*, p. 7.

<sup>155</sup> *Ibid.*, p. 7.

<sup>156</sup> *Ibid.*, p. 14.

<sup>157</sup> Emerson and Cenuşa (2018), p. 56.

<sup>158</sup> *Ibid.*, pp. 56–57.

<sup>159</sup> EUBAM News (2015).

<sup>160</sup> *Ibid.*

both operational and strategic support to Moldovan customs services and border guards. After the conclusion of the Association Agreement, EUBAM's mission was further integrated into legal approximation of Moldovan customs and taxation systems with the EU's standards.<sup>161</sup> In this sense, it is important to reiterate that EUBAM's functions are by no means technical. EUBAM's role is necessarily intertwined with the EU's broader strategies and associated mechanisms to facilitate and require legislative and administrative reforms within the Union's eastern neighbours to tackle security threats, including illicit tobacco trade.

## 10.7 Conclusion

The political process through which illicit tobacco trade has been problematised in the ENP is, in itself, intriguing. As noted at the beginning of this chapter, the fight against cigarette-smuggling and other forms of illicit tobacco trade became 'a high priority for the EU' in its engagement with its eastern neighbours.<sup>162</sup> The EU's external engagement in countering illicit tobacco trade at the EU's eastern borders developed as part of the EU-wide initiatives to respond to one of the so-called 'security threats' to the EU. As noted in Sect. 10.3 of this chapter, the enlargement of EU membership has generated the narrative that the EU's eastern neighbours would bring security challenges to the EU. The discourse of urgency has influenced how the EU developed the ENP, including its strategy to counter illicit tobacco trade at the eastern borders.

As observed in Sect. 10.3, the ENP has been developed, not only as part of the CFSP and its external dimensions, but also as part of the external aspects of the AFSJ. The external dimension of the AFSJ is operationally epitomised by the establishment and development of EUBAM in Ukraine and Moldova, as discussed in Sect. 10.4. Within the broad framework of 'border management', EUBAM has played a role in assisting law enforcement actions and facilitating wider customs and tax reforms to counter illicit tobacco trade. In fact, EUBAM has received particular 'praise' in various EU documents. For instance, in the 2012 Strategic Framework on customs cooperation between the EU and Ukraine, EUBAM was described as a mission that had provided 'valuable assistance to foster a common understanding on border management and customs issues'.<sup>163</sup> As discussed in Sects. 10.5 and 10.6, EUBAM's role in Ukraine and Moldova has been combined with a wide range of instruments, including association agreements. The EU has deployed these instruments to foster customs and tax reforms and the improvement of border management.

<sup>161</sup> Emerson and Cenuşa (2018), pp. 35–36.

<sup>162</sup> European Commission (2016), p. 7 (original emphasis omitted).

<sup>163</sup> Strategic Framework for Customs Cooperation (2012).

While the analysis of the chapter is directed at the EU's external action to combat illicit tobacco trade, the analysis of the EU's engagement with Ukraine and Moldova in countering illicit tobacco trade offers broader insights and critiques into the EU's eastern neighbourhood policies. Overall, one has to acknowledge that the EU's engagement with these neighbours in combatting illicit tobacco trade cannot escape from the different levels of 'ambivalence'<sup>164</sup> characteristics of the EU's neighbourhood policy. The ambivalence is inherent in the 'problematization' by the EU of its Eastern neighbourhood after its enlargement of 2004 and 2007. The ENP has been criticised for its 'patronizing rationale' in that the EU defines neighbouring governments and populations as 'problematic' and attempts to offer solutions to remedy 'problematic' circumstances.<sup>165</sup> The recognition that some of its neighbours are a cause of concern has led to the production of a series of programmes which are intertwined with the EU's internal policies towards its member states and citizens. The EU's instruments towards its eastern neighbours in countering illicit tobacco trade reflect the idea that the latter's legal and political systems ought to achieve, on an incremental basis, coherence and harmonisation with the systems of the EU.

In this sense, the EU's relationships with its eastern neighbourhood has been continuously redefined in terms of its policy direction which is neither fully 'inside' nor 'outside' in terms of their Europeanisation processes.<sup>166</sup> A brief overlook of the EU's engagement with Ukraine and Moldova in countering cigarette smuggling—and wider security threats—appears to rather confirm a general critique of the EU's ENP. While it is methodologically difficult to assess the effectiveness of the EU's external relations in combatting illicit tobacco trade, the EU's external engagement has been fraught with the multiple levels of ambivalence, which may, in the long run, affect the outcomes of the EU's policy and financial inputs to counter illicit tobacco trade.

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<sup>164</sup>Jeandesboz (2009), p. 36 (original italics omitted).

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