

# The Italian National Legal Framework Related to Illicit Trade in Tobacco Products



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**Abstract** The chapter firstly examines the Italian legal background in the field of illicit trade of tobacco products, both in a substantive and procedural criminal law perspective, highlighting the complexity of the normative scenario and trying to identify the main existing best practices. Empirical data referred to the level of asset recovery in the fight against illicit trade of tobacco are also provided, as well as with regard to the main criminological aspects of smuggling cases investigated and prosecuted in Italy.

Finally, the author presents his conclusion by highlighting the theoretical adequacy of the national legal framework in ensuring effective instruments for contrasting the illegal trade of tobacco products, but also underlining the lack of stable communicative channels for the exchange of information between the public authorities involved.

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## 1 Substantive Law Issues

In general terms, the Italian national legal framework related to the illicit trade in tobacco products appears to be quite complex, being characterized by old and heterogeneous sources, amended by subsequent normative changes, which make it often difficult to individuate the specific provisions applicable to each particular case. Historically, the provisions dedicated to combatting the illicit trade in tobacco products are mainly the result of the implementation of supranational obligations. This might suggest that—differently from other criminal acts, such as drug trafficking—the phenomenon is not regarded too seriously by the national legislator.<sup>1</sup>

The illicit trade in tobacco products is punished in Italy on two levels: criminal and administrative sanctions might be applicable depending on the seriousness of the offence.

Firstly, it must be stressed that all criminal offences only punished by fine have been recently decriminalised by legislative decree n. 8/2016. For this reason, many violations originally regarded as criminal are now qualified as merely administrative breaches.<sup>2</sup>

More particularly, coming to the analysis of the relevant provisions, Law n. 907 of 17 July 1942 regulates illicit trade in national tobacco products.

Article 64 of the aforementioned Law prohibits the conduct of growing tobacco plants without the prescribed authorisations. The same article prohibits the manufacturing, preparation and sale of tobacco and its derivatives without the State's authorisation.

Article 65 forbids the introduction into the State's territory of tobacco products in violation of provisions established by law.

Finally, Art. 66 punishes whoever carries, holds, sells or simply handles illicit national tobacco products.

As said, after the decriminalisation effected by legislative decree n. 8/2016, most of these violations are now considered as administrative offences, punished with only a fine. However, the sanctions remain substantially unchanged. According to Art. 75 et seq. of Law n. 907/1942 and Art. 1 of Law n. 27 of 3 January 1957, all these crimes are punished with a financial penalty depending on the relevant quantity of illicit tobacco (from €387 to €1162 for each kg). However, due to Art. 1, par. 6 of legislative decree n. 8/2016, the fine imposed for such breaches cannot be lower than €5000 nor greater than €50,000.

By contrast, illicit trade in national tobacco products above the quantity of 15 kg still constitutes a criminal offence, punished with imprisonment of up to 2 years in addition to the aforementioned financial penalty.

Even the illicit trade of tobacco under 15 kg committed by someone who has already been convicted for smuggling offences—even if not related to tobacco

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<sup>1</sup>For a general overview of the criminal provisions applicable, Cerqua and Pricolo (2002), p. 1072 f.; Velani (2002), p. 659 f.; Scafati (2013).

<sup>2</sup>Bolis (2016), p. 1 f.

products—still constitutes a criminal offence, punished with a fine determined as above and detention of up to 6 months. The detention is furthermore increased from half to two-thirds of the penalty if a repeat offender commits another violation (Art. 82 of Law n. 907/1942).

At the same time, aggravated illicit trade in tobacco pursuant to Art. 81 of Law n. 907 of 17 July 1942 is punished with a fine and imprisonment from 6 months to 3 years—and thus still constitutes a criminal offence—when:

- (a) the culprit was armed;
- (b) three or more culprits obstructed police activities;
- (c) the offence is connected with other crimes against public faith or public administration;
- (d) the offence has been committed by participants in a criminal association of illicit traders.

All the crimes described are punishable only if intentional. On the other hand, administrative breaches are punishable if consciousness and willingness of the negligent conduct is ascertained, locating the burden of proof for the lack of responsibility on the perpetrator.<sup>3</sup>

Article 87 of Law n. 907/1942 imposes mandatory confiscation of the instruments used to commit violations constituting criminal offences, and of the object, the product and the income of such unlawful acts. During criminal proceedings the same items may also be seized.

Illicit trade in foreign tobacco products is regulated in Presidential Decree n. 43 of 23 January 1973 (so-called customs law).<sup>4</sup> These provisions are deemed to be applicable also to the so-called “cheap white” cigarettes (or “illicit whites”), that is, cigarettes legally produced outside the EU by authorised manufacturers but with low quality standards.

In order to apply the provisions of Presidential Decree n. 43/1973, the foreign tobacco products must be materially introduced into the State’s territory, even if only temporarily (see Court of Cassation, III criminal division, n. 7619/2012).

According to the customs law, the introduction into the State’s territory, the sale, the transportation and the possession of foreign tobacco products whose excise duties have not been properly paid is punished with a fine of €5.16 for each gram of tobacco (Art. 291 *bis*, par. 2).

If the quantity of illicit tobacco is below 10 kg, the violation constitutes an administrative breach, and the fine imposed cannot be lower than €5000 nor greater than €50,000.

If the quantity is above 10 kg, the conduct constitutes a criminal offence, and imprisonment between 2 and 5 years is applied in addition to the aforementioned fine (Art. 291 *bis*, par. 1, of Presidential Decree n. 43/1973).

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<sup>3</sup>See, among others, Court of Cassation, civil section n. III, n. 26306/17.

<sup>4</sup>Di Paola (2012), p. 575 f.

Illicit trade under 10 kg committed by a repeat offender constitutes a criminal offence punished with a fine and imprisonment of up to 1 year (Art. 296).

Article 291 *ter* contains some aggravating circumstances of the conduct of illicit trade described by Art. 291 *bis*. Namely, the fine increases to €25.82 per gram and imprisonment from 3 to 7 years is applied if:

- (a) the culprit holds weapons while committing the crime;
- (b) after committing the crime, the culprit with two or more persons obstructed police activities;
- (c) the offence is connected with other crimes against public faith or public administration;
- (d) special means of transport were used;
- (e) legal persons or money coming from States which did not ratify the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds made in Strasbourg on the 8/11/1990 were used in committing the crime.

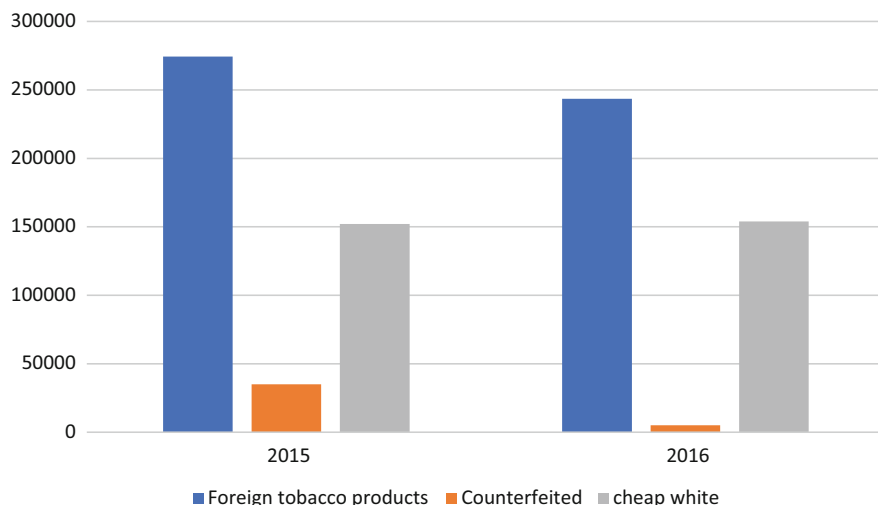
Finally, Art. 291 *quater* of Presidential Decree n. 43/1973 punishes the promotion, constitution, direction, organisation and financing of a criminal organisation of three or more persons for the commission of the offences described in Art. 291 *bis*. The penalty established is one of imprisonment from 3 to 8 years. The mere participation in such organisations is punished by 1 to 6 years of imprisonment. If the organisation owns weapons or if the circumstances described by Art. 291 *ter d*) or e) are present, the imprisonment is from 5 to 15 years, and 4 to 10 years for mere participation in the organisation.

All the crimes described are punishable only if intentional. By contrast, administrative breaches are punishable if consciousness and willingness of the conduct is ascertained, locating the burden of proof for the lack of responsibility on the perpetrator (Court of Cassation, civil section n. III, n. 26306/17).

According to Art. 338 of the Customs Law, excise duty for illicitly traded tobacco must be paid in any case in addition to the financial penalty, except if the goods were seized.

Article 301 of the Customs Law provides for mandatory confiscation of the articles used to commit violations constituting criminal offences and of the object, the product or the income of such unlawful acts. Additionally, vehicles used for smuggling activities are subject to mandatory confiscation. It is worth noting that this kind of confiscation is substantially harsher than ordinary criminal confiscation established by Art. 240 C.P., which only establishes the *possibility* of confiscating the same goods considered by Art. 301.

Article 3 of Law n. 92/2001 states that when confiscation of tobacco products ordered by a judicial authority becomes definitive, the same judicial authority orders its destruction, taking one or more samples of the goods destroyed. Such samples can be passed to national or foreign producers for analytical verification. According to Art. 301 *bis* of the Customs Law, vehicles seized or confiscated can be turned over to police forces or other public entities, and used for law enforcement, environmental protection or civil protection activities; otherwise, they are destroyed.



**Fig. 1** Kg of tobacco seized by the Guardia di Finanza in years 2015 and 2016, source Guardia di Finanza

Article 2, par. 7 of Law n. 92/2001 provides that administrative confiscation of illicit tobacco products must be always ordered in the event of breaches of the relevant provisions.

The quantity of seized/confiscated tobacco products in Italy appears to be quite large. The level of asset recovery by Guardia di Finanza from illicit trade in tobacco products for the years 2015–2016 is shown by Fig. 1.

The same data related to the activities of the National Customs Agency (A.A.M. S.) show for year 2017 the seizure of 71,455 kg of tobacco, corresponding to 1,899,979 packs of cigarettes.<sup>5</sup>

In addition to the provisions specifically related to illicit trade, other norms also should be considered.

If the standard of tobacco products does not meet the minimum requirements set out by EU directive n. 2014/40, implemented in Italy by legislative decree n. 6/2016, the manufacturer and the importer are indeed subject to the administrative financial sanctions established by Art. 25 of the aforementioned legislative decree, from €30,000 to €150,000. The administrative sanction from €500 to €5000 is in the same case applicable against the retailer of such products. An administrative breach occurs only if the conduct does not constitute a crime. Administrative sanctions from €20,000 to €120,000 are also applicable if the manufacturer or the importer do not respect the provisions regarding information and labelling of tobacco products.

Illicit trade in tobacco might raise fiscal responsibility issues. Beside the evasion of excise duties, punished as above according to Law n. 907/1942 or Presidential

<sup>5</sup>See “Yearly Report of the Agency for 2017”, p. 41, at: <https://www.adm.gov.it/portale/documents/20182/536133/ADMLibroBlu-2017-v2.pdf/0c4b31c2-46c9-4473-b5a5-b792a32da6ea>.

Decree n. 43/1973 depending on the origin of the goods, tobacco products are indeed subject to VAT, and thus, if the relevant rules are not observed, the perpetrator might be subject to the sanctions established by law. The relevant breaches can be merely administrative (see legislative decree n. 471/1997) or criminal, when no VAT tax return is submitted (Art. 5, legislative decree n. 74/2000), or VAT over €250,000 is not duly paid (Art. 10 *ter* d.lgs. n. 74/2000).

No specific link is established between the commission of unlawful acts in trade in tobacco products and other crimes. However, in general terms, the disposal of products or profits deriving from illicit tobacco trade (as from any other criminal act) can be regarded as an autonomous offence according to the Italian Penal Code. More specifically, Art. 648 punishes one who—without participating in the upstream illicit activity—holds money or goods deriving from a crime. The penalty for this violation is established as imprisonment from 2 to 6 years and a fine from €516 to €10,329.

At the same time, Art. 648 *bis* forbids money laundering by one who did not participate in the upstream illicit activities. In this case, the sanction is imprisonment between 4 and 12 years, together with a fine from €5000 to €25,000.

The mere use in economic or financial activities of money or goods deriving from criminal acts is also punished by Art. 648 *ter* and Art. 648 *ter*.1. If the perpetrator did not take part in the upstream illicit activity, the penalty is established as imprisonment between 4 and 12 years and a fine from €5000 to €25,000. If the culprit participated in the crime which generated the profit, the sanction for money laundering depends on the seriousness of the upstream criminal activity. Generally, the punishment is determined as imprisonment between 2 and 8 years with a fine from €5000 to €25,000. If the upstream crime is punished by not more than a maximum of 5 years imprisonment, the sanction is imprisonment from 1 to 4 years and a fine from €2500 to €12,500.

Criminological surveys show that the incomes derived from illicit tobacco trade are usually an important financing source for criminal organisations, including mafia-type groups and terrorist organisations. However, no specific legal provision exists to sanction these kinds of conduct.

Italian statutory law does not explicitly deal with the problem of the relation between criminal and administrative responsibility. More particularly, the principle of *ne bis in idem* between the two types of sanctions is not formally enshrined in legal sources, and Italian courts are traditionally reluctant to recognize this rule. However, in 2014, the European Court of Human Rights, in the case *Grande Stevens v. Italy*, stated that—with a view to Art. 4 of Protocol No. 7 of the ECHR—one cannot be punished twice for the same conduct, even if one of the proceedings brought against the accused is of a formal administrative nature, but has to be regarded as substantially criminal due to the seriousness of the penalties imposed.

Afterwards, this judgment was partially overruled by another verdict of the Grand Chamber of the ECHR (*A.B. v. Norway*, 15 November 2016), in which the judges mitigated the conclusions reached in *Grande Stevens v. Italy*, stating that European rules are not violated if there is a “sufficiently closely connected in substance and in time [between the criminal and the administrative sanctions]. In other words, it must be shown that they have been combined in an integrated manner so as to form a

coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected" (§130).

This approach is adopted by the Italian Court of Cassation, which recognises the possibility of applying criminal and formally administrative sanctions for the same facts, on condition that the penalty as a whole is proportionated to the seriousness of the facts.<sup>6</sup> No specific case-law is available with regard to the application of the *ne bis in idem* principle in the field of sanctions against illicit tobacco trade. This is probably because administrative and criminal sanctions imposed for these illicit activities constitute alternatives depending on the quantity of tobacco illegally traded, so that no combined application of penalties for the same conduct is practically foreseeable.

No *ad hoc* provisions are established for the conduct of counterfeiting tobacco products, with the result that the general norms of Articles 473 and 474 of the Penal Code will be applicable. More specifically, Art. 473 punishes whoever counterfeits or alters trademarks or other distinctive signs of industrial products with imprisonment from 6 months to 3 years and a fine from €2500 to €25,000. The same penalties are established for one who uses altered or counterfeited trademarks. Article 474 punishes whoever introduces into the State's territory industrial products with altered trademarks or other distinctive signs with imprisonment from 1 to 4 years and fine from €3500 to €35,000. The same article also establishes imprisonment of up to 2 years and a fine of up to €20,000 for the seller of such products. Finally, Art. 474 *bis* introduces mandatory confiscation of items used to commit the crimes punished by Art. 473 and 474, and of the object, product, price and income of the offence. According to Art. 474 *bis*, par. 2 of the Penal Code, when it is impossible to effect confiscation of such goods, value confiscation can be ordered.

Article 1, par. 7 of Law n. 80/2005 establishes an administrative sanction between €500 and €10,000 for those who purchase or accept goods that, for their quality, for the condition of the seller or for their price allow one to suspect that the provisions regulating the origin and provenience of the products have been breached. Those who in any way participate in the purchase are also punished with the same sanction. When the breach is committed by an importer or by a commercial operator the sanction is from a minimum of €20,000 up to €1 million. Administrative confiscation of the purchased goods is always ordered.

With regard to criminal or even administrative responsibility of legal persons, corporate liability is established by Art. 10, par. 2 of Law n. 146/2006 only for the crime of transnational criminal association for illicit tobacco trading *ex* Art. 291 *quater* of the Customs law. According to Art. 3 of Law n. 146/2006, the association is transnational when—alternatively—the crime is committed in more

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<sup>6</sup>Among others, Criminal Court of Cassation, ses. V, 16 July 2018, n. 45,829, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), with specific regard to the market abuse sanctioning system.

than one State, if it is committed in one State but a substantial part of its organization, direction or control takes part in another State, it is involved an organized criminal group which operates in more than one State, or if it is committed in one State but has substantial effects in another State. The corporation is subject to an administrative sanction of between €103,200 and €1,549,000. Disqualification penalties for a duration of at least 1 year are also applied. These are: disqualification from social activity; suspension or revocation of public authorisations necessary to commit the offence; ban from contracting with public authorities; exclusion or revocation of financing; ban on advertising. If the sole or main scope of the corporation is the illicit trade of tobacco, it can be permanently dissolved.

More generally, the system of corporate liability in Italy is regulated by Legislative Decree n. 231/2001. Formally, this kind of responsibility is qualified as administrative by the law, however, what gives rise to the liability is the commission of a criminal offence by one of the employees of the corporation in order to benefit the legal person. In addition, pursuant to Art. 34 and Legislative Decree n. 231/2001, the accused corporation shall face a criminal trial.

However, save for the aforementioned case of transnational criminal association of illicit trade in tobacco, corporations cannot be held liable for other violations related to illicit trade in tobacco products and, in the event of breaches of the relevant provisions, only the individual (natural person) will be charged under the conditions set out by law.

Italy is a party to the WTO FCTC, having signed the Convention on 16 June 2003, later ratified by Law n. 75 of 18 March 2008. Italy did not sign the FCTC Protocol of 2012. However, the unlawful conduct described by Art. 14 of the Protocol seems to be already envisaged as illicit in the domestic system. As pointed out above, no specific corporate liability is established in Italy for illicit trade in tobacco products except for a transnational organization of illicit traders of tobacco products pursuant to Art. 291 *quater* of the Customs Law and Art. 10, par. 2 of Law n. 146/2006.

## 2 Procedural Law Issues

Guardia di Finanza and the National Customs Agency (A.A.M.S.) are the main authorities involved in the investigation and prosecution of illicit trade in tobacco products, and of economic-tax crimes in general.

Guardia di Finanza is a police body dependant on the Ministry of Economy, and one of the Armed Forces of the Italian State. More particularly, the Central Service for the Investigation of Organized Crime (S.C.I.C.O.) is a specialised body of the Guardia di Finanza appointed for the prevention and repression of illicit activities, including illicit trade in tobacco products.

The Guardia di Finanza has administrative and criminal competences. It acts as customs police, with the power to control and inspect persons, bags and vehicles



according to Art. 19 et seq. of Presidential Decree n. 43/1973, usually through the use of scanners and x-ray devices, at least in the preliminary phase of the inspection.

In addition, the Guardia di Finanza may generally act as a criminal investigation division. In this case, the provisions of the Code of Criminal Procedure must be applied, and the personnel of the Guardia di Finanza is subject to the authority of the Public Prosecutor (Art. 59 of the Code of Criminal Procedure). However, it has some autonomous powers, especially in discovering and investigating criminal activities (Art. 55 of the Code of Criminal Procedure).

Personnel of the National Customs Agency (A.A.M.S.) is endowed with the same administrative tasks of control and inspection of persons and vehicles for the investigation of illicit trade in tobacco (Art. 19 et seq. Presidential Decree n. 43/1973). It is an administrative agency, whose investigative competence is limited to administrative breaches.

Article 325 of the Customs Law establishes that if a criminal violation is discovered, either by the Guardia di Finanza or A.A.M.S., written reports must be transmitted to the competent Public Prosecutor. By contrast, if an administrative breach is ascertained, a report will be forwarded to the Head of the Customs Office, which is the authority competent for the application of administrative sanctions (see also *infra*).

The Guardia di Finanza and A.A.M.S. operate together closely. No specific rules are present in the legal framework with regard to cooperation between the two bodies; their relationship is regulated by internal agreements, protocols and memoranda, mainly aimed at permitting access to databases and information. Offices of integrated analysis are established in the main ports of the country with the joint participation of A.A.M.S. and Guardia di Finanza. These offices conduct risk assessment activities in order to individuate the cargos to be controlled (usually through the use of x-ray scanning devices in order to reduce physical inspections) and, to this end, personnel of the Guardia di Finanza have access to the databases of the National Customs Administration.

The procedural rules for investigating and prosecuting illicit trade in tobacco depend on the nature of the relevant breach.

If administrative violations occur, the provisions applicable are those of the Legislative Decree n. 472/1997 regarding administrative sanctions for fiscal violations and, only subordinately, those of Law n. 689/1981, which regulates in general the procedure for applying administrative sanctions.<sup>7</sup>

In this case, the procedure is very simple. The authority competent for applying administrative sanctions is the National Customs Agency, which determines the sanction after verifications and inspections conducted according to Art. 19 et seq. of the Customs Law. The decision to apply an administrative sanction can be appealed before the Tribunal.

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<sup>7</sup>Note of the A.A.M.S., 24 May 2016, n. 55,383, available on-line at: <https://www.adm.gov.it/portale/documents/20182/1296686/20160524-N.55383.pdf/3c2973eb-e00b-49d6-8539-b6bab95a0383>.

Alternatively, it is possible to extinguish a violation by paying a reduced fine. For violations originally regarded as criminal, but recently depenalised by Legislative Decree n. 8/2016, half of the sanction applied can be paid within 60 days of verification for breaches committed before 6 February 2016 (Art. 9, par. 5 of Legislative Decree n. 8/2016). For decriminalised offences committed after that date, it is possible to pay one-fourth of the sanction applied within 60 days of verification (Art. 16 and 17 of Legislative Decree n. 472/1997).

Article 2 of the Law n. 92/2001 establishes that offences of smuggling of tobacco products under the amount of 10 kg only punishable with financial penalties can be extinguished by paying one-tenth of the sanction within 30 days of the notification of the breach.

According to Art. 13, par. 2 of Law n. 689/1981, it is possible to seize the items subject to confiscation following the rules of the Code of Criminal Procedure (see *infra*). Due to Art. 295 *bis* of the Customs Law, confiscation *ex* Art. 301 of the things used to commit violations constituting criminal offences and of the object, the product or the income of such unlawful acts is also applicable to administrative violations.

If the offence is qualified as a crime, the general rules of the Code of Criminal Procedure must be observed. No specific procedural provisions for illicit trading or tax crimes exists in the Italian legislative system.

Given that, the investigation shall be conducted by the Public Prosecutor, who directs the activity of the criminal investigation police (in this field, mainly the Guardia di Finanza). The investigative phase lasts 6 months, prolongable for a maximum of 18 months. During this period, evidence to ascertain the violation are collected and—if they are sufficient to support the accusation—the public prosecutor must proceed with the indictment of the suspected person. During the investigation, the prosecutor—sometimes with the authorization of the judge for preliminary investigation—can engage in a wide range of activities, such as inspections, searches and seizures when there is the suspect that items related to the commission of a criminal offence are being hidden in a certain place or on someone's body. Such measures are normally ordered by the Public Prosecutor, but, in case of urgency, they can be conducted directly by the police and subsequently validated by the prosecutor. Also, telephone wiretaps can be used under conditions set out by law, namely with the authorisation of the investigative judge when there is strong evidence suggesting the commission of a crime. Even operations not explicitly taken into consideration by the Code of Criminal Procedure can be performed. These include investigations involving new technologies (such as the use of GPS tracking or video surveillance). By contrast, the use of malware for the purpose of interception of communications has been recently regulated, and it is considered always admissible for the investigation of organised crime offences, including those punished by Art. 291 *quater* of the Customs Law. However, in general terms, it is unclear if malware could be used even for real time monitoring of non-communicative activities of the target of the investigation or just for the interception of communications.

Illicit trade in tobacco products is not included in the list of offences which can be also investigated through undercover operations (Art. 9 of Law n. 146/2006).

Article 332 of Presidential decree n. 43/1973 addresses a special case of arrest of a person accused of illicit trade in foreign tobacco products, who can be arrested if his identity is not known and cannot be released until it has not been verified.

After the indictment, the trial phase is opened before the court. As a general rule, evidence collected during the investigation cannot be used against the defendant, as the Italian criminal procedure system is inspired by the adversarial model. However, that evidence which cannot be presented again at trial is usable against the accused person.

Before the trial phase, the defendant can conclude a plea with the Public Prosecutor. The agreement must be subsequently approved by the judge. In this case the penalty can be reduced by one-third.

Also, probation is generally admissible and, if the defendant respects the obligations imposed, the crime is extinguished before the term of the verdict.

Special procedural rules are established only with regard to the investigation of the crime punished by Art. 291 *quarter* of the Customs Law, that is, a criminal organisation for illicit trade in foreign tobacco products. In this case, competence for conducting the preliminary investigation is enjoyed by the district public prosecutor. At the same time, investigations can last up to 2 years instead of 18 months.<sup>8</sup> Special evidentiary rules are applicable in this case; namely, examination of witnesses can be admitted only if it is not possible to produce minutes of earlier examinations of the witnesses in different proceedings in the presence of the defendant, or if the examination is necessary on the basis of specific needs (Art. 190 *bis* Code of Criminal Procedure).

Special rules for the phase of execution of the sentence are established for persons convicted of the crime punishable under Art. 291 *quarter* of the Customs Law. In general, they cannot be sentenced to measures alternative to detention. Such measures may be only applied if the convicted person becomes a cooperating witness, or—if cooperation is impossible—only if the absence of any link between the convicted person and criminal organisations is demonstrated.

### 3 Criminological Data

Table 1 shows the number of smuggling crimes investigated in Italy for each year of reference (data are lacking from 2000 to 2005). All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the provided data refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available. In addition, please also note that the data refers to smuggling offences

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<sup>8</sup>Also for the case of aggravated illicit trade of foreign tobacco products *ex art. 291 ter* letters a), d) and e) the duration of investigations is extended to 2 years.

**Table 1** Number of smuggling crimes investigated in Italy per year

2006	1150
2007	1096
2008	1062
2009	1132
2010	1067
2011	1034
2012	1284
2013	1254
2014	1231
2015	1106
2016	408
2017	360

2006		1150
2007		1096
2008		1062
2009		1132
2010		1067
2011		1034
2012		1284
2013		1254
2014		1231
2015		1106
2016		408
2017		360

(table 1) - number of smuggling crimes investigated in Italy per year

**Fig. 2** Amount of tax loss in million € resulting from illicit trade in tobacco products

in general, including goods different from tobacco products. Data specifically related to illicit trade in tobacco seems to be unavailable.

Figure 2 shows the amount of tax loss in million € resulting from illicit trade in tobacco products in Italy (source: “Project SUN” by KPMG, available online at: <https://public.tableau.com/profile/project.sun#!/vizhome/ExecutiveSummary2017/ProjectSun-ExecutiveSummary2017?publish=yes>).

Table 2 shows the number of definitive convictions for smuggling since 2000 divided into male and female offenders. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the data provided refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available. In addition, please also note that the data refers to smuggling offences in general, including goods different from tobacco products.

**Table 2** Number of definitive convictions for smuggling divided into male and female offenders

Sex	Male	Female	Total
Period			
2000	11,244	531	11,775
2001	8654	468	9122
2002	6323	393	6716
2003	9809	449	10,258
2004	14,494	965	15,459
2005	14,338	1108	15,446
2006	8508	557	9065
2007	3836	267	4103
2008	3990	324	4314
2009	2449	195	2644
2010	1754	163	1917
2011	1286	155	1441
2012	1284	180	1464
2013	1639	219	1858
2014	2133	216	2349
2015	2555	268	2823
2016	2017	234	2251
2017	1320	140	1714

**Table 3** Number of definitive convictions for smuggling divided into male and female, foreign offenders

Sex	Male	Female	Total
Period			
2000	3401	103	3504
2001	3224	66	3290
2002	1152	25	1177
2003	1736	32	1768
2004	1973	26	1999
2005	1568	17	1585
2006	1190	20	1210
2007	994	34	1028
2008	1020	50	1070
2009	759	67	826
2010	830	95	925
2011	830	99	929
2012	747	93	840
2013	659	70	729
2014	642	85	727
2015	750	80	830
2016	691	100	791
2017	522	70	592

**Table 4** Number of definitive convictions for smuggling of tobacco products divided into offenders with and without prior criminal record

	Without prior criminal record	With prior criminal record	Total
Period			
2000	435	769	1328
2001	506	925	1623
2002	350	760	1252
2003	349	619	968
2004	264	454	718
2005	285	403	738
2006	279	251	545
2007	308	254	604
2008	491	304	836
2009	619	308	969
2010	700	288	1017
2011	676	333	1099
2012	651	380	1031
2013	627	502	1129
2014	698	843	1541
2015	840	1246	2086
2016	652	996	1648
2017	475	846	1321

Table 3 shows the number of definitive convictions for smuggling since 2000, divided into male and female, for foreign offenders. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the data provided refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available. In addition, please also note that the data refers to smuggling offences in general, including goods different from tobacco products.

Table 4 shows the number of definitive convictions for smuggling of tobacco products since 2000, divided into offenders with and without prior criminal record at the moment of conviction. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the provided data refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available.

Table 5 shows the duration of imprisonment imposed for the smuggling of tobacco products. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the provided data refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available.

**Table 5** Duration of imprisonment imposed for the smuggling of tobacco products

Period	Less than 1 month	1 to 3 months	3 to 6 months	6 months to 1 year	1 to 2 years	2 to 3 years	3 to 5 years	5 to 10 years	More than 10 years	Total
2000	5	6	144	516	251	6	7	1	0	936
2001	5	4	153	568	262	6	3	0	0	1001
2002	3	2	125	433	267	7	3	0	0	840
2003	5	10	69	289	237	24	1	1	0	636
2004	4	3	39	214	178	9	1	0	0	448
2005	12	9	28	156	152	5	0	0	0	362
2006	6	3	15	94	99	10	0	0	0	227
2007	5	3	13	68	104	12	0	0	0	205
2008	2	4	6	69	100	8	1	0	0	190
2009	1	3	10	87	91	6	2	2	0	202
2010	0	5	6	32	55	14	1	0	0	113
2011	1	2	2	30	35	11	9	0	0	90
2012	3	4	6	21	39	4	3	0	0	80
2013	0	4	2	34	47	2	0	1	0	90
2014	4	3	2	24	28	5	2	1	0	69
2015	2	5	5	33	54	7	0	1	0	107
2016	3	17	8	21	48	13	3	0	0	113
2017	36	50	26	30	61	5	1	0	0	209

**Table 6** Main security measures applied in addition to the principal penalty for smuggling crimes

Security measure	Confiscation	Confiscation and destruction of seized goods	Hospital for criminally insane	Penal labour	Probation	Expulsion	Others
Period							
2000	6915	0	0	34	22	5	0
2001	5756	0	0	14	33	3	0
2002	4904	0	0	15	34	2	0
2003	6606	3	0	18	43	0	0
2004	12,224	1	0	25	27	1	0
2005	13,266	2	1	11	13	1	0
2006	8170	1	0	3	26	4	0
2007	3009	673	0	1	34	2	0
2008	2245	1737	0	1	11	1	0
2009	1625	740	0	1	32	3	0
2010	992	742	0	0	18	1	0
2011	340	899	0	1	7	0	0
2012	271	1031	0	1	5	0	1
2013	412	1248	0	1	5	0	1
2014	373	1763	0	0	16	0	0
2015	277	2321	0	0	7	1	0
2016	315	1764	0	0	17	0	0
2017	214	1358	0	2	11	0	0



**Table 7** Age at the time of the crime of perpetrators convicted with a definitive verdict for the smuggling of tobacco products

	Less than 15 years	16–17 years	18–24 years	25–34 years	35–44 years	45–54 years	55–64 years	More than 65 years	Total
Period									
2000	0	1	196	524	322	136	50	8	1237
2001	0	8	268	682	443	199	55	9	1664
2002	0	5	208	489	355	153	59	16	1285
2003	2	1	212	436	316	141	54	12	1174
2004	0	0	101	286	261	147	62	5	862
2005	0	1	101	288	229	120	47	12	798
2006	0	0	73	204	178	113	42	17	627
2007	0	1	76	237	195	99	35	5	648
2008	0	0	110	298	248	184	60	14	914
2009	1	0	105	391	352	220	65	20	1154
2010	0	0	106	367	326	195	70	19	1083
2011	0	0	126	340	348	193	61	22	1090
2012	0	0	143	363	321	200	72	29	1128
2013	0	0	163	398	319	253	76	21	1230
2014	0	0	256	522	450	273	112	26	1639
2015	0	0	316	692	622	417	173	27	2247
2016	0	0	227	522	558	354	136	40	1837
2017	0	0	112	372	408	307	141	34	1374

Table 6 shows the main security measures applied in addition to the principal penalty for smuggling crimes. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the provided data refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available. In addition, please also note that the data refers to illicit trade offences in general, including goods different from tobacco products. Data specifically related to illicit trade in tobacco seems to be unavailable.

Table 7 shows the age at the time of the crime of perpetrators convicted with a definitive verdict for the smuggling of tobacco products by offenders with prior criminal records. All the provided data originates from the archives of the National Institute for Statistics.

Please be aware that the provided data refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available.

Table 8 shows the number of convictions for the smuggling of tobacco products pronounced in combination with other crimes. All the provided data originates from the archives of the National Institute for Statistics.

**Table 8** Number of convictions for the smuggling of tobacco products pronounced in combination with other crimes

Number of concurring offences	1	2	3	4 or more	Total
Period					
2000	509	604	64	27	1204
2001	664	712	40	15	1431
2002	452	609	32	17	1110
2003	528	415	21	4	968
2004	424	276	14	4	718
2005	453	221	14	0	688
2006	430	89	8	3	530
2007	400	134	14	14	562
2008	659	105	13	18	795
2009	756	120	18	33	927
2010	880	62	21	25	988
2011	946	43	13	7	1009
2012	951	53	15	12	1031
2013	1071	44	5	8	1128
2014	1482	34	9	17	1542
2015	1943	79	43	21	2086
2016	1521	83	22	22	1648
2017	1276	31	9	5	1321

Please be aware that the data provided refers only to criminal offences, with the exclusion of merely administrative violations, for which no statistical data appears to be available.

No specific data is available with regard to the number of smuggling cases that have been prosecuted in Italy, neither with regard to illicit manufacturing nor counterfeiting activities.

The main trends deriving from the analysis of the data collected can be summarised as follows.

The collected data show a significant decrease in the number of smuggling cases investigated since 2016. However, the estimated tax loss remains substantially unchanged even for 2016. This may be evidence of a change in the phenomenological aspects of the illicit trade, which may progress from numerous minor offences to bigger trafficking activities.

The number of convictions for smuggling and illicit trade in tobacco products remains substantially unchanged in the period under consideration; nonetheless, a significant decrease of convictions for smuggling cases in general is observable. This suggests that smuggling of tobacco products has a significant bearing on smuggling activities in general and continues to be the main smuggling activity.

Confiscation and destruction of goods appear to be the most frequent security measures applied for the smuggling of tobacco products.

The involvement in smuggling crimes of offenders with prior criminal records appears to be very frequent. This suggests that such offences are often committed by persons already integrated into a criminal environment.

The conviction for smuggling of tobacco products is almost always accompanied by a conviction for at least another criminal offence.

Among the forms of illicit trade described by Art. 15, par. 1 of the WHO FCTC, the most common in Italy can, of course, be identified in the smuggling of foreign tobacco products. Such conduct has been widespread in Italy since the 1970s years, as a source of self-financing and money laundering for mafia-type organisations. The most common mode of smuggling in that period was by sea, mainly along the Adriatic coast, avoiding customs controls.

At present, smuggling maintains strong links with organised crime (mafia-type and human trafficking organisations<sup>9</sup>) and often takes place through the presentation of goods for customs controls, hiding illicit tobacco products so as to hinder inspections (so-called “intra-inspective” smuggling).

Smugglers continue to use sea routes for extra-inspective smuggling (particularly for products coming from North African regions). Alternatively, they use overland transportation, mainly for products coming from eastern market (Poland, Russia, etc.).

## 4 Preventive Measures

As mentioned above, the EU Directive n. 2014/40 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products has been implemented in Italy through Legislative Decree n. 6/2016.

The national legislation regulates all the preventive measures mentioned in the European legislation and—more specifically—introduces specific prescriptions for the labelling of tobacco products with health warnings (Art. 9–13), establishes a system of tracking and tracing of products which must be marked with a unique identification sign (Art. 16). Moreover, each package shall be provided with a tamper-proof security feature (Art. 17) and new tobacco products must be notified to the Italian Ministry of Health and to the Ministry of Economics (Art. 20).

According to Legislative Decree n. 6/2016, it is also forbidden to label tobacco products in order to encourage their consumption, presenting the relevant products as less harmful than other similar ones, recalling tastes or aromas which are not present in the product, suggesting that the product is environmentally friendly or presenting it as similar to foods or cosmetics (Art. 14).

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<sup>9</sup>See, among others, the *Report to the Ministry of Interiors by the Central “anti-mafia” Investigative Bureau for the 1st semester 2018*, available on-line at: <http://direzionewinvestigativaantimafia.interno.gov.it/semestrati/sem/2018/1sem2018.pdf>, p. 745 ss.

It must be also stressed that, according to Art. 1, par. 50 *bis* and 50 *ter* of Law n. 296/2006, the National Customs Agency can restrict access to web pages through which foreign tobacco products are illegally sold or advertised, such activities being forbidden.

In addition to the provisions related to the prevention of illicit trade in tobacco products, the Italian legal system is characterized by general preventive mechanisms.

Firstly, the criminal police divisions (mainly the Police, Carabinieri and Guardia di Finanza) and the Public Prosecutor itself may—on their own initiative—investigate violations even before a formal criminal offence report is submitted.

The Guardia di Finanza and the National Customs Agency may also undertake controls to ascertain investigative violations, mainly through static and dynamic surveillance at ports, airports and borders, and also through online monitoring of websites.

Moreover, a system of preventive measures is established by Legislative Decree n. 159/2011 (so-called anti-mafia code). According to its provisions, a wide range of personal and patrimonial measures can be applied to those who, although not convicted of a criminal offence, are deemed to be “dangerous” to public order. Such dangerousness might be “generic”, referring to those usually involved in criminal activities or who live from profits derived from criminal activities (Art. 1 of Legislative Decree n. 159/2011). Preventive measures can also be applied—among others—against those suspected to be part of an organisation of illicit traders of foreign tobacco products punished by Art. 291 *quater* of the Customs Law (Art. 4 of Legislative Decree n. 159/2011 in conjunction with Art. 51, par. 3 *bis* of the Code of Criminal Procedure).

The most important and afflictive personal preventive measure is “special surveillance”, which establish various restrictions on personal freedom, related mainly to places one cannot frequent and persons one cannot meet.

The main patrimonial preventive measures are seizure and confiscation of goods which appear to be disproportionate with regard to the income of the person suspected, as well as of goods which appear to be the product of illicit activities.

Both personal and patrimonial preventive measures must be applied by a court, upon proposal of the Police Commissioner, the competent Public Prosecutor or the Director of the Anti-Mafia Investigative Bureau.

No particular practices or strategic policies with regard to the prevention of illicit trade in tobacco products different from those generally referred to other forms of criminality are made available to the public.

## 5 Cooperation

Administrative cooperation between European national institutions in the field of illicit trade in tobacco products is regulated in Italy by the “Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and

cooperation between customs administrations” (Napoli II Convention), ratified through Law n. 217/2008.

This legal instrument establishes mutual assistance instruments to prevent, investigate, prosecute and punish violations of customs laws—thus including illicit trade in tobacco products—providing three different forms of mutual assistance.

Firstly, assistance can be provided on request of a Member State to another Member State. Such a request may concern a request for information, for surveillance or for enquiries (Art. 8–14 of the Convention).

Spontaneous assistance through surveillance or sharing of information is also possible (Art. 15–17).

The Convention also regulates “special forms of cooperation”. Namely, officers of the customs administration of one of the Member States pursuing in their country an individual observed in the act of committing one of the infringements referred to in Article 19(2) of the Convention which could give rise to extradition, or participating in such an infringement, shall be authorised to continue pursuit in the territory of another Member State even without prior authorisation in case of urgency (Art. 20).

In addition, officers of the customs administration of one of the Member States who are keeping under observation in their country persons in respect of whom there are serious grounds for believing that they are involved in one of the infringements referred to in Article 19(2) shall be authorised to continue their observation in the territory of another Member State where the latter has authorised cross-border observation in response to a request for assistance which has previously been submitted (Art. 21).

Covert investigations (art. 23) and setting up joint investigation teams (art. 24) are also regulated in the Convention.

Therefore, at least with regard to assistance on request of a Member State, it seems there exists a duty to cooperate pursuant to the conditions set out by the Convention, without prejudice to the exemptions of Art. 28, according to which the Convention shall not oblige the authorities of Member States to provide mutual assistance where such assistance would be likely to harm the public policy or other essential interests of the State concerned, particularly in the field of data protection, or where the scope of the action requested, in particular in the context of the special forms of cooperation, is obviously disproportionate to the seriousness of the presumed infringement. In such cases, assistance may be refused in whole or in part or made subject to compliance with certain conditions. Refusals to give assistance shall be in any case duly motivated.

The Convention regulates national coordination offices with the task of coordinating received requests for mutual assistance. Such an office has been appointed in Italy through the Decree of 10 May 2018.

Within the framework of European cooperation, Italy is a party to the “Convention on the Use of Information Technology for Customs Purposes” (CIS Convention), which has been ratified through Law n. 291/1998. The text established a common action of the customs administrations of the Member States, and procedures to exchange data and information regarding suspect activities. The National

Customs Administration is identified as the national authority responsible for the system. Both the Guardia di Finanza and National Customs Administration have access to the CIS database.

With specific regard to EU Law, particular mention should be made of Council Regulation n. 515/97 of 13 March 1997 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 matters, as amended by 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 matters. The two sources further strengthen the customs cooperation system, attributing a central role to coordination by the European Commission and establishing the possibilities for joint customs operations between different Member States.

The Italian Customs Administration has also concluded various cooperation agreements with non-European third countries (Albania, Algeria, Argentina, Azerbaijan, Belarus, Croatia, Ethiopia, Russia, Finland, Japan, Jordan, Iran, Israel, Yugoslavia, Macedonia, Morocco, Norway, United States of America, Tunisia, Turkey, Ukraine, Uzbekistan, Vietnam), mainly aiming at ensuring the exchange of documents and information regarding suspect customs operations.

Italy has signed the “International Convention on mutual administrative assistance for the prevention, investigation and repression of Customs offences” concluded in Nairobi on 9 June 1977 and entered into force on 21 May 1980, within the framework of the World Customs Organization (WCO).

In the field of police cooperation, one of the most relevant instruments is Framework Decision n. 2002/465/GAI, implemented in Italy through Legislative Decree n. 34/2016, on joint investigation teams. The framework decision establishes a special form of cooperation which facilitates the formation of investigative teams comprising public prosecutors and the police forces of multiple Member States when there is a need to investigate serious crimes in territory under a different national jurisdiction, or when investigative coordination is necessary. In Italy, a joint investigation team can be constituted to investigate crimes punishable by at least 5 years of imprisonment, or for specified offences including that of criminal association for smuggling of foreign tobacco products punished under Art. 291 *quater* of Presidential Decree n. 43/1973.

Italy cooperates within the framework of Europol and Interpol through the Service for International Police Cooperation established at the Ministry of Interior.

Finally, the role of OLAF should also be given consideration. According to Art. 3 of EU Regulation n. 883/2013 (so-called OLAF Regulation), the Office is entitled to conduct “external investigations” and carry out on-the-spot checks and inspections in the Member States and, in accordance with the cooperation and mutual assistance agreements and any other legal instrument in force, in third countries, to combat illegal activities affecting the financial interests of the European Union. During such activities, OLAF is subject to the rules and practices of the Member

State concerned, and the competent authorities shall provide for the assistance needed in order to carry out its tasks effectively.

## 6 General Issues

Likely one of the most important social factors contributing to the growth of illicit trade in tobacco products in Italy may be found in the significant tax burden related to these goods. More than 70% of the price of tobacco products is comprised of fiscal duties. More specifically, concerning cigarettes, the final price of each package is composed as follows: 59.1% of the final price—excise duties; 22% of the final price—VAT (Excise duties + VAT cannot be lower than €175.74 per kg of tobacco); 10%—dealer fee. The remaining portion of the price constitutes the income of the producer. Therefore, it is easy to understand that illicit products are offered at prices which are substantially lower than those distributed via the regular market, making them attractive especially for low-income consumers and incentivizing the activities of illicit traders.

The strong presence of criminal organisations (mainly mafia-type organisations but recently also smaller organisations of foreigners) is favourable to the illicit trade in tobacco products, which still represents an important form of self-financing for such criminal groups.

Another important factor is represented by the migrant flows impacting Italy. Human traffickers, often belonging to criminal organisations also active in the field of illicit trade, use the same routes and means of transportation to carry migrants and tobacco products, thus maximizing their profits derived from these activities.

Italy's geographical position also contributes to the growth of the illicit trade in tobacco products. Italy has large coastal areas with important commercial ports. The country sometimes represents the final destination of smuggled products, and it is also sometimes a transit location for the subsequent movement of goods to mainly northern European countries.

## 7 Conclusion

The national operators involved in the fight against illicit trade in tobacco products almost unanimously recognize the adequacy of the relevant legal framework existing in Italy. Italian legislation punishes—either criminally or administratively—all the relevant forms of conduct through which this illicit trade is performed, sometimes also imposing very afflictive sanctions such as value confiscation.

However, the establishment of stable communication channels for the exchange of information between the public authorities involved and also between public actors and private stakeholders (such as tobacco manufacturers) could further improve the efficacy of strategies to combat illicit trade, monitoring relevant trends

in the licit and illicit markets so as to immediately adopt an adequate strategy to limit the illicit trade.

Given the increasing importance of online platforms, it is worth noting the possibility to prohibit access to web pages through which foreign tobacco products are illegally sold or advertised as ensured by Art. 1, par. 50 *bis* and 50 *ter* of Law n. 296/2006; this law was established in Italy following experience in the fight with illicit gambling.

The strong controls existing in Italy with regard to the authorized network of retailers of tobacco products and the prohibition of online purchases prevents the infiltration of illicit products into the regular market, limiting the distribution of such goods, which are therefore sold via alternative channels.

Each of these actions could in principle be exported to different legal systems, if they have not yet been adopted, thereby contributing to the fight against illicit trade.

On an operational level, no specific best practices in the fight against illicit trade in tobacco products have been made available to the public.

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