

MATERIAL OBJECT AS A QUALIFICATION SUBJECT TO THE CRIMINAL CRIME IN THE CRIMINAL LAW OF THE REPUBLIC OF MOLDOVA

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Abstract

By Law no. 257 of 16-12-2020 regarding the amendment of some normative acts, which entered into force on 01.01.2021, in the Criminal Code of the Republic of Moldova were made essential amendments in the matter of criminalization of smuggling offenses, the incriminating sphere was extended and, on the other hand, a differentiated sanctioning regime was established for the different normative ways in which they can appear. At the basis of this differentiation are the objective and subjective requirements of the legal content of the crime, requirements that are to be established in each particular case in the process of qualifying the crimes. Emphasizing the different procedures for interpreting the criminal law, in this study we tried to interpret the will of the legislator materialized in the description of the new formulations of legal content that characterize the acts of smuggling.

Keywords: crime, smuggling, goods, excise duties, import duties, cultural values

Introduction

Cross-border movements and processes are inherent in the process of globalization and bring multiple economic and social benefits to different countries around the world. At the same time, the process of globalization and

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cross-border movement create conditions for committing crimes with a negative impact on national and international communities. The crime of smuggling belongs to the category of transnational crimes that have a high share of spread, especially in the Republic of Moldova.

By Law number 257 of 16-12-2020 regarding the modification of some normative acts in the Criminal Code of the Republic of Moldova, several essential legislative amendments were operated regarding the incrimination of smuggling offenses. These innovations in the field require an extra effort on the part of the law enforcement bodies to interpret the criminal law, an activity that must be based on the strict observance of the principle of legality of incrimination provided by article 7 to the ECHR, article 22 of the Constitution and art. 3 of the Criminal Code. of the Republic of Moldova. Consequently, this study characterizes the material object of the smuggling offenses incriminated in Article 248 and Article 248¹ of the Criminal Code by taking into account the new legislative vision, visions transposed in life by Law No. 257 of 16-12-2020 when amending some normative acts.

According to Article 248 of the Criminal Code, which retained its old name of "smuggling", the following constitute offenses of smuggling:

(1) The entry into or removal from the territory of the Republic of Moldova of goods, through places established for customs control, by concealment of customs control, by concealment in places specially prepared or adapted for this purpose, or customs identification, or by a non-declaration or inauthentic declaration in the customs documents or in other documents crossing the border, if the value of the goods is higher than 8000 conventional units,

shall be punished by a fine in the amount of 2,500 to 3,000 conventional units or imprisonment for up to 3 years, and the legal person shall be punished by a fine in the amount of 5,000 to 6,000 conventional units by deprivation of the right to engage in a particular activity.

(2) The entry or removal from the territory of the Republic of Moldova of goods through places other than those established for customs control, if the value of the goods is higher than 4000 conventional units,

shall be punished by a fine in the amount of 3500 to 4500 conventional units or imprisonment for up to 3 years, and the legal person shall be punished by a fine in the amount of 5500 to 6500 conventional units by deprivation of the right to exercise a certain activity.

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(3) The alienation or release for free circulation, without payment of import duties, of goods under the customs supervision, if the value of the goods is greater than 8000 conventional units, is punishable by a fine of 4,000 to 5,000 conventional units or imprisonment for up to 3 years, and the legal person is punished by a fine of 6,000 to 7,000 conventional units with deprivation of the right to engage in a particular activity.

(4) Removal from the territory of the Republic of Moldova of goods by non-authentic declaration of the origin of the goods as being obtained entirely in the Republic of Moldova, if their value is higher than 8000 conventional units,

shall be punished by a fine in the amount of 4500 to 5500 conventional units or by imprisonment for up to 3 years, and the legal person shall be punished by a fine in the amount of 6500 to 7500 conventional units by deprivation of the right to exercise a certain activity.

(5) The introduction on or removal from the territory of the Republic of Moldova of cultural values both through places established for customs control and through places other than those established for customs control, by hiding in places specially prepared or adapted for this purpose, or with the use fraudulent use of customs documents or means of identification, or by a non-declaration or inauthentic declaration in customs documents, as well as non-return on the territory of the Republic of Moldova of cultural values in case their return is mandatory

shall be punished by a fine in the amount of 4500 to 5500 conventional units or by imprisonment for up to 5 years, and the legal person shall be punished by a fine in the amount of 6000 to 8000 conventional units by deprivation of the right to exercise a certain activity.

(6) The entry into or removal from the territory of the Republic of Moldova, both through places established for customs control and through places other than those established for customs control, by hiding in places specially prepared or adapted for this purpose, or with fraudulent use of documents or means of customs identification, or by a non-declaration or inauthentic declaration in customs documents, drugs, precursors, ethnobotanicals or their analogs, toxic and noxious substances, weapons and ammunition banned in the civil circuit or subject to authorization, essential components of the firearms, strategic goods, military devices, explosive, nuclear or radioactive materials

shall be punished by a fine ranging from 5500 to 6500 conventional units or by imprisonment from 3 to 8 years, and the legal person shall be

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punished by a fine in the amount of 7000 to 11000 conventional units with deprivation of the right to exercise a certain activity.

In the same normative context, according to article 2481 of the Criminal Code, with the marginal name of “smuggling of excise goods”, they represent smuggling offenses:

(1) The introduction or removal from the territory of the Republic of Moldova of goods subject to excise duties, through places established for customs control, by concealment of customs control, by concealment in places specially prepared or adapted for this purpose, means of customs identification, or by non-declaration or inauthentic declaration in customs documents or other documents crossing the border, if the value of the goods is higher than 4000 conventional units, and in the case of filtered or unfiltered cigarettes - a higher quantity 60,000 pieces, shall be punished by a fine in the amount of 2500 to 3000 conventional units or imprisonment for up to 3 years, and the legal person shall be punished by a fine in the amount of 5000 to 6000 conventional units by deprivation of the right to exercise a certain activity.

(2) The introduction or removal from the territory of the Republic of Moldova of goods subject to excise duties, through other places than those established for customs control, if their value is higher than 2000 conventional units, and in the case of filtered or unfiltered cigarettes - a more than 30,000 pieces, shall be punished by a fine in the amount of 3500 to 4500 conventional units or imprisonment for up to 3 years, and the legal person shall be punished by a fine in the amount of 5500 to 6500 conventional units by deprivation of the right to exercise a certain activity.

(3) The alienation or release for free circulation without payment of import duties of excisable goods under customs supervision, if their value is greater than 4000 conventional units, and in the case of filtered or unfiltered cigarettes - a quantity greater than 60 000 pieces, is punishable by a fine of 4,000 to 5,000 conventional units or imprisonment for up to 3 years, and the legal person is punished by a fine of 6,000 to 7,000 conventional units with deprivation of the right to engage in a particular activity.

4. The actions provided for in paragraphs 1 to 3:

a) committed by two or more persons;

b) committed with the use of the service situation;

c) if the value of the excised goods is higher than 8000 conventional units, and in the case of filtered or unfiltered cigarettes - a quantity higher than 120,000 pieces, are punished with imprisonment from 4 to 10 years, and the legal person is punished with a fine in the amount of 8000 to 12 000

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conventional units with deprivation of the right to exercise a certain activity.

Methodology

At the basis of the elaboration of this study was a cumulation of research methods related to the field subject to research, namely, the method of logical-legal interpretation, the historical method and the comparative method of studying law.

Results

From the interpretation of the legal notions mentioned above and based on the specifics of the legislative technique used by the legislator to describe the offenses in criminal law, we can easily see that Articles 248 and 248¹ of the Criminal Code provide for criminal liability for several smuggling offenses. Thus, in these two articles are formulated several criminal norms, which establish the legal notions of several smuggling offenses, offenses that can conventionally be titled as follows:

- smuggling of goods through customs control (Article 248, paragraph 1, Criminal Code);
 - smuggling of goods through circumvention of customs control (Article 248 paragraph (2) Criminal Code];
- the alienation or putting into circulation without payment of import duties on goods under customs supervision (Article 248 paragraph (3) of the Criminal Code];
- smuggling by non-authentic declaration of the origin of the goods as being obtained in full in the Republic of Moldova [Article 248 paragraph (4) of the Criminal Code.];
- smuggling of cultural values (Article 248, paragraph (5) of the Criminal Code);
- smuggling with dangerous objects (Article 248, paragraph (6) of the Criminal Code];
- smuggling of excise goods by evasion of customs control (Article 248¹ paragraph (1) of the Criminal Code];
- smuggling of excisable goods by evading customs control (Article 248¹ paragraph (2) of the Criminal Code];
- the alienation or putting into circulation of excise goods under customs supervision (Article 248, paragraph (3) of the Criminal Code].

The special legal object of the smuggling offenses, whatever the

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normative way of committing it, is the totality of the social relations whose normal existence and development is conditioned by the protection of the customs policy and security of the Republic of Moldova. In accordance with Article 6 paragraph (2) of the Customs Code, the customs activity consists of the implementation of the customs policy, ensuring compliance with customs regulations when crossing goods, means of transport and persons across the customs border of the Republic of Moldova, collection of import duties and export duties, customs clearance, control and customs supervision. The customs activity is carried out in accordance with international norms and practices. The Republic of Moldova participates in international cooperation in the field of customs activity [1].

Smuggling is part of the category of criminal acts in which the perpetrator, in order to endanger the above-mentioned social relations, must act or enter into physical interaction with certain material entities that incorporate values and social relations conditioning their existence and normal development. In the legal framework, it is mandatory to take into account the rule according to which the *material object* of the smuggling offenses is established for each offense. At the same time, it is important to state that the material object is the main sign, based on which the legislator assessed the prejudicial degree of various smuggling offenses described in Art. 248 and 248¹ Criminal Code.

In the case of the offenses referred to in Article 248 (1) and (2) of the Customs Code, the material object shall be the goods. According to art. 1.1 Customs Code, goods means any movable property: objects and other values, including foreign exchange values (foreign currency and national currency in cash, payment instruments and materialized securities denominated in foreign currency and national currency), electricity, thermal energy, other energy, as well as means of transport (which are the subject of an external economic transaction), except for those provided in point 4. According to point 4 of the same article, the means of transport means any means of transport (which is not the subject of an external transaction) used for the international carriage of passengers and goods, including containers and other means of transport [1].

For the existence of the crime component provided in article 248 paragraph (1) it is mandatory that the value of the goods exceeds the amount of 8000 conventional units of the fine (400 000 lei), and in the case of art. 248

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paragraph (2) Criminal Code - 4000 conventional units (200,000 lei).

The material object of the crime provided in art. 248 paragraph (3) of the Criminal Code *is formed by the goods under customs supervision*. In accordance with art. 1 point 20 of the Customs Code, *customs supervision* refers to "actions taken, in general, by the customs authorities to ensure compliance with customs regulations and, where appropriate, other provisions applicable to goods under customs supervision" [1]. By way of example, the category of such goods includes goods under the customs procedure of temporary admission (such as means of transport registered abroad and which are temporarily admitted on the territory of the Republic of Moldova), goods admitted under the customs procedure for inward processing (for example, raw material imported into the Republic of Moldova for the production of other goods), goods admitted under the customs procedure for the purpose of outward processing (for example, a defective means of transport is removed from the Republic of Moldova for repair work in the origin), etc. For the existence of the crime component provided in Article 248 paragraph (3) of the Criminal Code, it is mandatory that the value of the goods exceed the amount of 8000 conventional units (400,000 lei).

The material object of the crime is provided in art. 248 paragraph (4) *is the foreign or domestic goods that are not obtained entirely in the Republic of Moldova*. According to Law number 1380 of 20-11-1997 regarding the customs tariff, goods obtained entirely in the respective country are considered: a) mineral deposits and other natural substances extracted from the soil of the respective country or from the bottom of its territorial waters; b) plants and plant products grown or harvested in that country; c) live animals born and raised in that country; d) products obtained from live animals raised in the respective country; e) the products obtained from hunting and fishing practiced on the territory of the respective country; f) products resulting from sea fishing and other products extracted from the sea beyond the territorial waters of the respective country by its vessels or those rented by it; g) the products manufactured on board the processing vessels of the respective country, exclusively from the products mentioned in let. f); h) waste and scrap from production and processing operations carried out in that country; i) used articles collected in the respective country that can be used only for the recovery of raw materials; j) products manufactured in the country exclusively from the products specified in letter a) -i)] 2]. For the

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existence of the legal content of the crime, it is mandatory that the nominated goods exceed the amount of 8000 conventional units of the fine (400,000 lei).

The material object of the crime provided for in Article 248 paragraph (5) of the Criminal Code is represented by cultural values. According to Article 133 of the Criminal Code, religious or secular cultural values are the values set forth in the Convention of the United Nations Educational, Scientific and Cultural Organization of 14 November 1970 on measures to prohibit and prevent the introduction, removal and transmission of the right ownership of cultural values.

The material object of the smuggling is provided in art. 248 paragraph (5) of the Criminal Code which forms the objects in respect of which the legislator establishes special traffic regimes. These objects are stipulated *ad litteram* in the incriminating text of the law, as follows: drugs, precursors, ethnobotanicals, their analogues, toxic and noxious substances, weapons and ammunition banned in the civil circuit or subject to authorization, essential components of firearms, goods strategic, military devices, explosive, nuclear or radioactive materials. In the interpretation of these notions, the authentic interpretation will be used in the foreground, since several of the above-listed objects are expressly defined even in the criminal law in Chapter XII of the Penal Code, entitled The meaning of some terms or expressions in this Code. When these notions are not defined by the criminal law, in a subsidiary plan, the legal notions defined in other laws or normative acts to which the provision of Article 248 paragraph (5) of the Criminal Code implicitly refers will be used. In accordance with article 1341, paragraph (1) of the Criminal Code, drugs means drugs or narcotic or psychotropic substances, or mixtures containing such plants or substances, established by the Government". Therefore, the category of drugs includes narcotics, psychotropic substances, plants containing them and mixtures of such plants or substances. In accordance with art. 1341 paragraph (1) Criminal Code of the Republic of Moldova, narcotics means the substances listed in the annexes to the United Nations Single Convention on Narcotic Drugs of 1961, as amended by the Protocol of 1972 and provided for in the normative acts of the Government. Also, according to art. 1341 paragraph (3) Criminal Code. Psychotropic substances are substances listed in the Annexes to the 1971 Convention on Psychotropic Substances and provided for in Government regulations

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The nomenclature of narcotic substances is stipulated in Table I of the list approved by Government Decision no. 79 of 23.01.2006, and that of psychotropic substances - in Table II of the same list. A substance other than those indicated in the tables mentioned cannot be recognized as a narcotic or psychotropic substance [5]. According to the provisions of Government Decision number 79 of 23.01.2006 on the approval of the List of narcotic substances, psychotropic substances and plants containing such substances detected in illicit trafficking, as well as their quantities [5], plants containing narcotics and psychotropic substances are specified in table number 3 of the List, these being classified in plants that do not grow on the territory of the Republic of Moldova and plants that grow on the territory of the Republic of Moldova. Coca, Kat, *Argyrea nervosa*, *Nymphaea caerulea*, *Salvia divinorum*, *Turbina corymbosa* and *Tabernanthe iboga* are among the plants that do not grow in Moldova due to climatic conditions and are prohibited for cultivation. The second category includes plants that grow on the territory of the Republic of Moldova and are prohibited for cultivation or require special authorization: poppy plant, hemp plant.

Mixtures containing narcotics or psychotropic drugs are also included in the category of drugs. In this case, the drug quality has only the component part of the mixture which according to the Government Decision no. 79 of 23.01.2006 on the approval of the *List of narcotic substances, psychotropic substances and plants containing such substances detected in illicit trafficking, as well as their quantities*, represents a narcotic substance, psychotropic substance or plant containing it. The finding is important, as it is only on the basis of this part that the quality of the mixture is determined.

According to Article 134¹, paragraph (4) of the Criminal Code, ***the precursor*** means the substance of natural or synthetic origin used as a raw material in the production of narcotic or psychotropic substances. Substances used as raw material for the production of narcotics, psychotropic substances or analogues (precursors) are provided in the Government Decision on the approval of tables and lists of narcotic substances, psychotropic substances and their precursors, subject to control number 1088 of 05.10.2004 [5].

Also, the list of precursors is exhaustive, in the sense that substances other than those specified in the Government Decision of 05.10.2004 cannot be declared as precursors. A contrary interpretation would lead to a breach of the

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principle of legality, in particular, Article 3 paragraph (2) of the Criminal Code, according to which the application of criminal law by analogy is prohibited. Ethnobotanicals (synthetic drugs), also called "legal drugs", are a new category of psychoactive drugs, created from experiments and research conducted on the composition and effects of existing psychoactive drugs.

In accordance with Article 134¹ paragraph (5) of the Criminal Code, ethnobotanical (ethnobotanical) products are defined as mixtures of dust and/or plants or mixtures of herbs and various parts of plants sprayed with chemicals, which produce changes that induce physiological effects and / or mental, hallucinogenic and/or psychoactive actions. From the notion of the text of the law it results that ethnobotanicals are characterized by two basic features: 1) by composition they represent mixtures of dust and/or plants or mixtures of herbs and various parts of plants sprayed with chemicals; 2) after the effect they produce changes that induce physiological and/or mental effects, hallucinogenic and/or psychoactive actions.

The notion of analogue, in turn, is enshrined in Article 134¹ paragraph (6) of the Criminal Code, according to which the analogue of the narcotic or psychotropic substance means any substance or combination of substances of natural or synthetic origin, in any physical state, or any product, plant, fungus, or part thereof which has the capacity to produce psychoactive effects and which, whatever its content, its name, its mode of administration, presentation or advertising, is or may be used instead of a narcotic, psychotropic or psychotropic substance or preparation or a plant or substance under national and/or international control.

Another entity that is the material object of the smuggling described in Article 248 paragraph (6) shall be toxic or noxious substances. In accordance with 134¹⁶ of the Criminal Code, toxic substances are substances with drastic action, which are under national and international control, in accordance with the international treaties to which the Republic of Moldova is a party, and which are included in the lists approved by the Government.

Toxic or noxious substances are substances that contain a toxicant (for example, ricin, tetanus toxin, butoline toxin, etc.) that is harmful to the environment or the living organism it comes in contact with and can cause certain doses and death. Dangerous chemicals and particularly hazardous

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chemicals defined in Law no. 277 of 29-11-2018 on chemicals [6]. According to the above-mentioned law on hazardous chemicals, chemical substances and mixtures that meet the criteria for physical hazards, health hazards or environmental hazards are covered by the Regulation on Classification, Labelling and Packaging of Substances and Mixtures, approved by the Government. Extremely hazardous chemical means any chemical substance and mixture which, in accordance with the Regulation on classification, labelling and packaging of substances and mixtures, is classified in one or more of the following hazard classes: (a) acute toxicity, categories 1, 2 and 3; b) carcinogenicity, category 1A or 1B; c) mutagenicity of embryonic cells, category 1A or 1B. [6]

The category of objects included in the provisions of Article 248 paragraph (6) of the Criminal Code also includes weapons and ammunition prohibited in the civil circuit or subject to authorization. In this case, in order to ascertain the material object, the legislator refers to the Law on the regime of weapons and ammunition with civil destination no. 130 from 08.06.2012. In accordance with Annex no. 1 of this Law, the group of weapons and ammunition prohibited in the civil circuit includes weapons introduced in Category A, such as, for example, automatic firearms, firearms camouflaged in the form of another object, ammunition with perforating projectiles, explosives or incendiary, etc. [7]. Also, according to Annex no. 1 of Law no. 130 of 08.06.2012 to the category of weapons and ammunition subject to the authorization may be assigned the weapons provided in Category B, such as semi-automatic or repeating short firearms, short firearms with a single shot; single-shot long firearms through the smooth-bore, as well as the corresponding ammunition; short guns (pistol or revolver) with rubber projectiles, as well as ammunition, etc. [8]. Finally, in accordance with Article 2 of Law No. 130 of 08.06.2012, the essential component of the firearm is the closing mechanism, the cartridge chamber, and/or the barrel of the firearm which, as separate objects, are included. in the category of firearms on which they are mounted or are designed to be mounted [9].

The material object of the offense provided for in Article 248¹ paragraph (1) and paragraph (2) of the Criminal Code. it is formed by the goods subject to excise duties. According to Article 119 Fiscal Code. excise duty is a state tax that is levied, directly or indirectly, on the following consumer goods: a) ethyl alcohol and alcoholic beverages; b) processed tobacco; c) oil and its

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derivatives; d) caviar and caviar substitutes; e) perfumes and eau de toilette; f) fur clothing, etc. [10]. It is mandatory that the value of the goods subject to excise duty be higher than 4000 conventional units of the fine (200,000 lei), and in the case of cigarettes with or without filter - a quantity of more than 60,000 pieces.

The material object of the crime provided in art. 248¹ paragraph (3) of the Criminal Code is formed by excisable goods under customs supervision if their value is higher than 4000 conventional units (200,000 lei), and in the case of cigarettes with or without filter - a quantity higher than 60,000 pieces. The notion of goods under customs supervision has been analysed above, in the context of the examination of the material object of the offense provided for in Article 248 paragraph (3) of the Criminal Code.

Conclusions

In light of the current study, we can highlight certain findings and conclusions regarding the legal classification of the smuggling offenses described based on the new legislative wording:

- the criminal legislation in force provides for criminal liability for several smuggling offenses, six of which are described in Article 248 of the Criminal Code, and three - in Article 248¹ of the Criminal Code. These offenses are described through different components of offenses, on the basis of which local sanctions regimes are determined. Therefore, when a person, through a single action, smuggles objects described in different paragraphs of art. 248 or of art. 248¹ Criminal Code. The qualification is made according to the rules of the ideal competition of crimes;
- The special legal object of smuggling offenses is represented by the social relations whose normal existence and development are conditioned by the protection of the customs policy and security of the Republic of Moldova. Horizontally, the content of these social relations is particularized and differentiated, showing the signs related to the material object of smuggling. For example, in the case of the offense provided in art. 248 paragraph (1) Criminal Code. social relations related to customs policy and customs security are endangered by the smuggling of goods, and in the case of art. 248¹ paragraph (1) Criminal Code the same values and social relations are endangered by the smuggling of excise goods. The basis for establishing a separate sanctioning regime for these acts is the will of the legislator who considered that smuggling of excisable goods

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- poses a greater social danger to social relations regarding customs policy and security than smuggling of goods not subject to excise duty;
- qualitative signs and quantitative signs inherent in the material object of smuggling, with some exceptions, are the main signs underlying the establishment of distinct and differentiated criminal liability for smuggling offenses set out in Article 248/248¹ Criminal Code
 - the qualitative signs of the material object result from the nature or essence of the goods (things) that are smuggled and which are represented by: goods - article 248 paragraph (1) and paragraph (2) of the penal code; goods under customs supervision - Article 248 paragraph (3) Criminal Code .; goods not fully obtained in the Republic of Moldova - Article 248 paragraph (4) of the Criminal Code cultural values - Article 248 paragraph (5) Criminal Code; drugs, precursors, ethnobotanicals, their analogues, toxic and noxious substances, weapons and ammunition banned or authorized in the civil circuit, essential components of firearms, strategic goods, military devices, explosive, nuclear or radioactive materials - Article 248 (6) Criminal Code excise goods - Article 248¹ paragraph (1) and paragraph (2) Criminal Code excise goods under customs supervision - Article 248¹ paragraph (3) Criminal Code
 - the quantitative signs of the material object are determined by the material value of the goods expressed in conventional units or by the number of cigarettes when it comes to cigarette smuggling: 8000 conventional units - art. 248 paragraph (1), (3) and (4) of the Criminal Code.; 4000 conventional units - Article 248 paragraph (2) and Article 248 paragraph (1) Criminal Code. 60,000 filtered or unfiltered cigarettes in the case of the offense provided for in Article 248¹ of the Criminal Code and 30,000 cigarettes with or without a filter - in the case of the offense provided for in Article 248¹ paragraph (2) of the Criminal Code.

Ferenda law recommendations

- Although the grammatical interpretation of the criminal law applies the rule that "singular" has the same meaning as "plural", to ensure a full identity between the name and the incriminating sphere, we propose to rename Article 248 of the Criminal Code from “smuggling” to “crimes of smuggling” and Article 248¹ of the Criminal Code.
- In the context of the European integration aspirations of the Republic of Moldova, we consider that the criminal prevention of smuggling crimes must be based on a single neighbourhood policy, especially with the EU member

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states. In this sense, we promote the idea of bringing the model of criminalization of smuggling established in the Republic of Moldova closer to the one established in Romania as an EU member state.

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