

Crimes of Smuggling in the Regulation of the Romanian Customs Code

Alexandru Peicea

Bucharest Bar Association, Romania, alexandru.peicea@gmail.com

ABSTRACT: In Romanian doctrine, the crime of smuggling has been defined in various ways, but it has been concluded that this is the circumvention of customs duties by avoiding customs checkpoints. By committing a crime of smuggling, the perpetrator seeks to avoid the payment of excise duties, VAT, the payment of other taxes or duties, as well as the avoidance of rules prohibiting the sale of certain goods or merchandise. The aim of the paper is to bring to the attention of the general public both theorists and legal practitioners, the content of the criminalization norm regarding the crime of smuggling, the object of the crime, the subjects of the crime, its place, objective side, subjective side, but also forms of crime. This paper is also intended to address some procedural issues regarding the prosecution, investigation and sanctioning of those who commit such crimes.

KEYWORDS: smuggling, assimilated smuggling, skilled smuggling, jurisprudence, mitigating circumstances.

Headquarters of Matter

The crime of smuggling is provided by the Customs Code at art. 270 having the following content:

(1) The entry into or removal from the country, by any means, of goods or merchandise, through places other than those established for customs control, constitutes the crime of smuggling and is punishable by imprisonment from 2 to 7 years and the prohibition of certain rights.

(2) It also constitutes a crime of smuggling and is punished according to par. (1):

a) the entry into or exit from the country through the places established for customs control, by evasion from customs control, of goods or merchandise to be placed under a customs regime, if the customs value of the stolen goods or merchandise is greater than 20,000 lei in the case of products subject to excise duties and more than 40,000 lei in the case of other goods or commodities;

b) the entry into or exit from the country, twice during a year, through the places established for customs control, by evading the customs control, of the goods or merchandise to be placed under a customs regime, if the customs value of the goods or of the stolen merchandise is less than 20,000 lei in the case of excisable products and less than 40,000 lei in the case of other goods or commodities;

(3) They are assimilated to the crime of smuggling and are punished according to par. (1) the collection, possession, production, transport, taking over, storage, delivery, sale and sale of goods or merchandise to be placed under a customs procedure knowing that they originate from or are intended to be smuggled.

Pre-Existing Conditions

The legal object of the crime of smuggling consists in the social relations appeared as a result of the establishment of the customs regime, customs regime which, according to art. 4 point 20 of the Customs Code consists in free circulation, transit, customs warehousing, inward processing, processing under customs control, temporary admission, outward processing and export. As regards the material object of the crime, it is the goods or merchandise brought in or out of the country or which is the subject of smuggling or which are intended for the commission of that crime.

The active subject of the crime is not qualified, any natural or legal person being able to commit this crime. Moreover, if the active subject is a civil servant and facilitates smuggling for

the purpose of receiving money or other benefits, he will be liable, as established in judicial practice, both for the crime of bribery and for complicity in the crime of smuggling (The defendants did not fulfill their duties, intentionally in order to facilitate, thus, the commission of smuggling by the defendant C.V. by illegally introducing cigarettes into the country, this independent criminal activity being the realization of the purpose for which the benefits were received, and not an element of the objective side of the crime of bribery - High Court of Cassation and Justice, Criminal Section, Decision no. 2083/2004). Also, the crime of smuggling can be committed in competition with the crime of organized criminal group. In this regard, the High Court of Cassation and Justice ruled that “the criminal group exists in the case, the defendants acted in a coordinated manner, each took certain roles, the agreed criminal acts are serious and they involved obtaining illicit material benefits. And the act of introducing goods or merchandise into the country, through places other than those established for customs control, committed by several persons together, and meets the constitutive elements of the crime of smuggling” (High Court of Cassation and Justice, Criminal Section, Decision no. 3238/2008).

The passive subject of the crime of smuggling is the state, holder of the social value protected by the establishment of the incrimination norm.

The material element of the objective side is an act of bringing into or leaving the country goods or merchandise subject to the customs procedure, through a place other than that established for customs control.

An unresolved legal issue in judicial practice has endorsed the legal classification of the possession of excisable products subject to marking outside the tax warehouse, without being marked or improperly marked or with false markings, beyond the limits provided by law, knowing that they come from smuggling. By decision no. 17/2013, pronounced in resolving an appeal in the interest of the law, the united sections of the High Court of Cassation and Justice ruled that: “*The act of possessing excise goods subject to marking outside the fiscal warehouse, without being marked or improperly marked or with false markings, over the limits provided by law, knowing that they come from smuggling constitutes the crime provided by article 270 para. (3) of the Customs Code*”.

Also, another issue settled by the High Court of Cassation and Justice, this time by pronouncing a decision to resolve a question of law, was whether “*in relation to the crime of smuggling, if the goods which are the subject of the crime have been identified and made unavailable for confiscation,, both the confiscation of the respective goods and the author (s) to pay customs duties, excise duties and value added tax, calculated in relation to the customs value of the confiscated goods or confiscation of the respective goods*”.

The immediate consequence is the creation of a state of danger for the customs regime and, in most cases, the damage to the public budget, and equivalent to the amount of money not paid as a result of the passage of goods through another place than established by law. The causal relationship does not raise practical problems, resulting from the materiality of the deed.

Subjectively, the crime of smuggling is committed with direct or indirect intent. The preparatory acts are incriminated as an independent crime in the situation in which they realize the constitutive content of the crime provided in article 270 para. (3). The attempt is punished, and if the crime is committed by one or more armed persons or by two or more persons together, in their charge will be retained the aggravated form of the crime provided by article 274 of the Customs Code.

Qualified Smuggling

The assimilated crime of smuggling consists in the introduction or removal from the country, without right, of weapons, ammunition, explosive materials, drugs, precursors, nuclear materials or other radioactive substances, toxic substances, waste, residues or hazardous chemicals.

The legal object is identical to that of the crime of simple smuggling. What differs, however, is the material object of the crime, which, in the case of qualified smuggling, consists of weapons, ammunition, explosives, drugs, precursors, nuclear or other radioactive materials, toxic substances, waste, residues or hazardous chemicals.

It is also essential for the detention of qualified smuggling that the introduction or removal from the country of the objects that constitute the material object of the crime be carried out without the right (Hotca coord. 2019, 208).

Assimilated Smuggling

The collection, possession, production, transport, taking over, storage, delivery, sale and sale of goods or merchandise to be placed under a customs procedure knowing that they come from smuggling or are intended for its commission constitutes the crime of assimilated smuggling provided by article 270 para. (3) of the Customs Code.

Regarding the incrimination of the crime of assimilated smuggling, the Criminal and Juvenile Section of the Alba Iulia Court of Appeal notified the High Court of Cassation and Justice and requested it to issue a preliminary ruling to resolve a legal issue regarding the interpretation of the provisions of article 270 para. (3) of the Customs Code. CA Alba Iulia asked the Supreme Court to establish whether the notion of smuggling used by the legislator in the provisions of article 270 para. (3) in the phrase “knowing that they come from smuggling” refers to the crime of smuggling within the meaning of article 270 para. (1) and (2) or the notion of smuggling in the broadest sense.

Following the admission of the notification, the HCCJ established that the notion of “smuggling” used by the legislator in the provisions of art. 270 paragraph, (3) of Law no. 86/2006 in the phrase “knowing that they come from smuggling” refers to smuggling consisting in the introduction into the country of goods or merchandise to be placed under a customs procedure through places other than those established for customs control, by evading customs control. Obviously, in this situation it is necessary to prove that the person accused of committing this crime had the representation of the way in which the goods he owned entered the territory of Romania illegally.

Considering that article 270 para. (3) represents an assimilated modality of the smuggling crime, it is necessary to reveal the provisions of article 270 para. (1) of the Customs Code. Article 270 para. (1) states that “the introduction or removal from the country, by any means of goods or merchandise through places other than those established for customs control, constitutes the crime of smuggling and is punishable by imprisonment from 2 to 7 years and the prohibition of certain rights”.

Taking into account the provisions of article 270 para. (1) referred to in article 270 para. (3) and in conjunction with Decision no. 32/2015 for resolving legal issues, we can say without denying that in order to be in the presence of a crime of smuggling in the assimilated form must exist previously, to be discovered and proven a crime of smuggling in the standard version.

Also, with regard to the crime of assimilated smuggling, the question arises as to whether mitigating circumstances should be retained in the situation where the defendant pays the damage caused before the first trial.

From our point of view, in such a situation, the mitigating circumstance provided by article 75 paragraph 1 lit. d) Criminal Code, the crime of smuggling provided by article 270 para. 3 of Law no. 86/2006 on the Romanian Customs Code not falling within the categories of offenses expressly and limiting provided by the text of the law, regarding which the respective mitigating circumstance is not incidental. The crime of smuggling cannot be integrated in the phrase “crime regarding the state border”, within the meaning of article 75 para. (1) lit. d) Criminal Code. This is because the crimes “regarding the state border”, with this name used by the legislator in article 75 para. (1) lit. d) Criminal Code, are incriminated in the Special Part,

Title III, Chapter II of the Criminal Code, chapter in which the crime of smuggling is not incriminated, the headquarters of the matter being Law no. 86/2006 on the Romanian Customs Code. It is true that the crime of smuggling - both in the standard form and in the assimilated form - represents (as shown in the recitals of the decisions of the High Court of Cassation and Justice no. 17/2013 pronounced on appeal in the interest of the law and no. 11/2015 pronounced for resolving legal issues in criminal matters) a complex crime, which criminalizes a specific way of evading taxes, namely by introducing or possessing goods that entered the country in violation of the legal regime of the border and that the object the legal nature of the crime of smuggling is a complex one, because it defends both the regime of administration of taxes, fees, contributions and other amounts due to the general consolidated budget (main legal object), and the state border regime (secondary legal object).

However, the classification of the crime of smuggling incriminated by Law no. 86/2006 regarding the Customs Code, in the enumeration provided by article 75 para. (1) lit. d) Criminal Code, in the absence of an express reference of the above criminal norm to the crimes incriminated by the Customs Code, would determine the extension, to the detriment of the defendant, of the inapplicability of the mitigating circumstance provided by article 75 para. (1) lit. d) Criminal Code, in cases not expressly provided by the legislator.

Because the headquarters of the matter of border crimes (namely those crimes committed for the purpose of illegally crossing the state border of persons, means of transport, merchandises or other goods, as defined by article (1) letter l of Emergency Ordinance no. 105/2001 of 27 June 2001 on the state border of Romania) is different, respectively the Special Part of the Criminal Code and the Customs Code and given the fact that only for the first category of offenses (found in the Special Part of the Criminal Code) the legislator expressly provided that they represent “offenses state border”, it is not possible to extend this category to other crimes that are not found in the Special Part, Title III, Chapter II of the Criminal Code, in the absence of the express will of the legislator in this regard.

The criminal law being of strict interpretation, the categories of crimes to which the mitigating circumstance provided by article 75 para. (1) lit. d) The Criminal Code is not applicable to them are strictly those found in the enumeration of the criminal norm, enumeration that does not refer to the crimes incriminated by the Customs Code.

Therefore, the retention of the mitigating circumstance provided by article 75 para. (1) lit. d) Criminal Code in favor of the defendant - provided that the documents and works of the file show that he fully covered the material damage caused by the crime, until the first trial, the defendant no longer benefiting from this circumstance within 5 years before committing the deed is fair and legal.

Conclusions and Proposals

In principle, from our point of view, crimes of smuggling have a well-structured regulation in Romanian legislation, but, obviously, this can be improved.

It should be noted that article 270 para. (3) of the Customs Code (which contains the assimilated version of the crime) does not provide among the constituent elements, in the manner of possession or storage of cigarettes from smuggling (for example, the purpose of resale), but only the circumstance of knowing the origin of goods. In other words, the person in question also commits the crime in question and buys or stores even a single pack of cigarettes, or a small quantity of contraband cigarettes, as one of the alternative material elements of the crime in question will be fulfilled.

However, in those circumstances, in the event that a person buys (therefore owns) a small quantity of cigarettes or stores them, if the prosecutor does not waive the criminal investigation, but orders the prosecution, there is no procedural means by which the judge may exclude such an act in the sphere of criminal wrongdoing.

That is why we consider that the lack of a value threshold below which the act in question no longer constitutes a crime (as provided, for example, even in Article 270 paragraph (2) of the Customs Code, or in Article 2961 paragraph (1)) of the Fiscal Code, leads to a violation of the principle of *ultima ratio in criminal matters*.

In this regard, we must also consider relevant statement of reasons of the new Criminal Code, which found, among other things, that the elaboration of this normative act analyzed all the criminal provisions contained in the special laws, including the decriminalization of certain facts provided in the special legislation and their contravention, where appropriate, whereas compliance with the principle of minimum intervention governing the criminal law of any rule of law requires recourse to the criminal protection mechanism only in cases where the protection afforded by the regulations of other branches of law is insufficient.

We emphasize, again, that the issue of the lack of a value threshold is not purely theoretical, as in the role of the courts have been in recent years, after the entry into force of the new Criminal Code, numerous cases in which defendants have been prosecuted for derisory facts (subsistence crime). For example, we mention the file no. 15913/302/2016, in which the defendant was sent to court for the sale of 10 packs of cigarettes, and another defendant for 2 packs of cigarettes.

The provisions of article 181 of the old Criminal Code allowed the exclusion from the sphere of criminal wrongdoing of petty deeds. It so happened that, pursuant to this article, by ordinance no. 10718/P/2010 dated 20.12.2012, respectively by ordinance no. 311/P/2011 dated 07.02.2012, the Prosecutor's Office attached to the District 5 Court of Bucharest considered that the possession by a defendant of 848 packs of contraband cigarettes, respectively 763 such packs, does not present the degree of social danger of a crime, for which reason he was fined only an administrative fine.

The discrepancies between the solutions provided under the old substantive regulations and those that can be available today highlight the need for the intervention of the constitutional court to comply with the principle of *ultima ratio in criminal matters* and, implicitly, to comply with constitutional guarantees regarding the right to a fair trial.

References

- Hotca M.A. coord., Gorunescu M., Neagu N., Pop D.G., Sitaru A., Geamănu R.-F. 2019. *Infrațiuni prevăzute în legi speciale, Comentarii și explicații (Crimes provided in special laws, Comments and explanations)*, 5th Edition. Bucharest: C.H. Beck Publishing House.
- Law no. 286/2009 regarding the Romanian Criminal Code.
- Law no 86/2006 on the Romanian Customs Code.
- Decision no. 11/2015 of the High Court of Cassation and Justice.
- Decision no. 17/2013 of the High Court of Cassation and Justice.
- Decision no. 2083/2004 of the High Court of Cassation and Justice.
- Decision no. 3238/2008 of the High Court of Cassation and Justice.