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PROCEDURAL ASPECTS REGARDING SMUGGLING'S CRIME

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Abstract

For romanian's judicial authorities, smuggling's crime investigation is and will be put to the test by the ingenious ways of evading the customs obligations applied by the people who commit such an illegal act and who often prove difficult to detect.

Although the smuggling's crime prosecution and trial is not carried out in the framework of a special procedure, I appreciated that it is necessary to analyze, through the lens of cases from judicial practice, the ways of notifying the investigators regarding the commission of such an act, the methods and the techniques used for the collected evidence administration proving crime's commission, the preventive measures taken, the civil action initiated, as well as the trial phase, whether the criminal investigation was completed with the notification of the court through the indictment, or by concluding a plea agreement.

Key words: *smuggling crime, criminal liability, evidence, judicial expertise, competence.*

INTRODUCTION

Smuggling crime is prosecuted and tried according to the rules of ordinary criminal procedure, meaning no special formality for a criminal investigation file, the competent authority does it on her own initiative, and the competence to carry out the criminal investigation belongs to the criminal police investigators.

The criminal prosecution, regardless of the quality of the person, if the crime of smuggling has entered into the purpose of an organized criminal group, belongs to the Directorate of Investigation of Organized Crime and Terrorism (DIICOT).

Even if the prosecution and trial for smuggling crime does not require special procedure application, due to the manner of committing this crime, an

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analysis is required from the perspective of judicial practice of the activities carried out by the judicial authorities for this crime investigation.

1. ASPECTS REGARDING SMUGGLING CRIME PROSECUTION'S

Smuggling crime's criminal investigation object is to gather the necessary evidence regarding act existence's, the identification of the persons who committed the crime, the establishment of criminal liability, in order to determine whether or not it is necessary to order go to court.

According to code of criminal procedure provisions's of the, the criminal investigation includes three stages: the fact investigation that begins with the start of the criminal investigation, pursuant to art. 305 para. 1 cpp, the person investigation, which begins with the moment when it is ordered to continue the criminal investigation against the suspect and the stage of solving the case by the prosecutor, which differs depending on the way in which the criminal investigation file was instrumented. thus, in cases where the prosecutor oversees the criminal investigation, the beginning of this phase is marked by the receipt of the file with a proposed solution from the criminal investigators, and in cases where the criminal investigation is carried out by the prosecutor, the limit between the last two stages is marked by the end of the administration of evidence. (*M. Udroiu and others, 2020, p. 1696*).

In judicial practice, complaint was not a way to notify the criminal prosecution investigators with a smuggling crime, considering that the romanian state is the person who suffers an injury by committing this crime, criminal prosecution investigators represent the state and they act ex officio regarding the commission of such an illegal action.

On the other hand, a common notification method in judicial practice is the criminal case dismissal as a result of the prosecution of a person for whom criminal responsibility has been established and that the criminal prosecution is complete, and, subsequently, the registration of the dismissed case pending to the competent prosecutor's office in order to continue the criminal prosecution for the facts and persons against whom there was insufficient evidence.

As a rule, the competence to carry out the criminal investigation in smuggling crime case's belongs to judicial police investigators under the coordination and supervision of the prosecutor attached to the court competent to judge the case in the first instance. Pursuant to art. 325 of the Code of Criminal Procedure, the prosecutor attached to a higher court can order the case to be taken over from a lower hierarchical prosecutor's office.

If the smuggling crime is part of an organized criminal group, the competence to carry out criminal investigation activities belongs to DIICOT. (*art. 11 din Ordonanța de urgență nr. 78/2016*).

Criminal prosecution conduct

The criminal investigation is started with regard to the deed in all cases where the criminal prosecution investigators has been notified in a legal manner, immediately after receiving the notification, including in the situation where the perpetrator is indicated in the notification or is known.

The legislator considered that this regulation is necessary so that no person can be accused of committing a crime solely on the basis of a report, no matter how serious it is, for the formulation of an accusation against a person, it is necessary to administer evidence, so the creation of a framework for their administration, by starting the criminal investigation in rem. (*M. Udroi* and others, 2020, p.1725) *.

Evidence administration's techniques

Among smuggling crime evidence administration's we mention:

- conversations and telephone communications interception's based on technical surveillance mandates;
- video surveillance, audio and photography in the ambient environment of people based on technical surveillance mandates;
- locating and tracking, by means of technical means such as GPS, the vehicles used in the activity of cigarette smuggling pursuant to technical surveillance mandates;
- the entry into private spaces, respectively into cars and into a building belonging to the defendants, about which there were data and information that some investigated persons meet in it, in order to establish the method of operation, to activate or deactivate technical means used for the execution the measure of technical supervision based on technical supervision mandates, all of which are issued by the judge of rights and freedoms and extended, at the request of the case prosecutor;
- uploading images captured by the surveillance cameras from the toll stations regarding the tracked means of transport.

The use of technical surveillance methods and means are essential in smuggling crime case's, given the novel ways of hiding contraband cigarettes in modified and adapted means of transport, so as to give the appearance of legal transport of fluids or other substances in the form of powder for which the means of transport were intended from the factory, as well as in paper rolls, industrially made, so that for their discovery it was necessary to use tools such as: chainsaw, flex.

At the same time, because there are many people who commit such acts, who are organized on management, intermediary, transport, storage, distribution levels and who use a large number of telephone stations, as well as a slang language during conversations and telephone communications transmitted only through written messages so that the persons involved cannot be identified.

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Another means of managing the evidence in smuggling crime investigation's is the technical-scientific assessment which is carried out either by the Travel Document Expertise and Forensic Departments within the Ministry of Internal Affairs, or by the National Fiscal Administration Agency (ANAF).

The technical-scientific findings, materialized in findings reports, differ according to the objectives to be met.

Thus, on the one hand, in judicial practice, it was established that the main objective to be achieved by the Criminalistics Department is that of ascertaining the technical changes that have been made to certain means of transport to ensure the illicit transport of excisable products, namely that the entire amount of cigarette was inserted inside the trailer on the two doors from the back side. The tarpaulin of the trailer being intact, sealed, tied with a cable that was passed through all the eyes specially provided for tying. On the other hand, ANAF must establish the damage caused to the Romanian state as a result of the introduction on Romanian territory of goods for which customs duties have not been paid. (*Decizia penală nr. 32 din 10/01/2022 - Curtea de Apel Craiova*).

The technical-scientific finding is also the basis for carrying out an expertise, for example a financial and accounting expertise, which will establish, based on the conclusions of the technical-accounting finding and the objections formulated by ANAF, whether the defendant caused damage to the state budget by the way in which it registered supply expenses from companies, what this damage consists of and what is its amount. (*Decizia penală nr. 3621 din 30/06/2004 - Înalta Curte de Casație și Justiție - Secția Penală*).

Preventive Measures

Criminal procedural measures are coercive institutions that can be ordered by the criminal judicial authority for the proper conduct of the criminal process and ensuring the achievement of the object of the actions exercised in the criminal process. According to art. 202, para. 4 of the Criminal Procedure Code, preventive measures are detention, judicial control, judicial control on bail, house arrest and preventive arrest.

Regarding smuggling crime, the Romanian judicial authorities order the detention of the person caught in the act for 24 hours, after which they formulate a proposal for preventive arrest as a result of the detention, aspects that will be analyzed through the lens of judicial practice.

Detention

Detention is a preventive measure that can only be if there is evidence from which there is a reasonable suspicion that the suspect or defendant has committed crime smuggling, the measure of detention should be proportional to the nature of the facts for which the person in question is being investigated and necessary in order to carry out in good conditions of all the activities necessary for a complete criminal investigation, of avoiding the suspect or defendant's evasion

or preventing the commission of another crime, as well as that there is no reason to prevent the initiation of the criminal action.

In judicial practice, for the act of the defendant who owned and sold cigarettes that must be placed under a customs regime, knowing that they come from smuggling and who, during the search his home, found cigarettes from those previously owned and sold, in based on art. 404 para. (4) lit. a) C. proc. pen the court deducted the duration of detention and pretrial detention from the imposed penalty. (*Decizia nr. 31 din 13/01/2022 - Curtea de Apel Suceava*).

Preventive Arrest

Smuggling crimes, either in the basic versions (simple or assimilated), or in the qualified version, are punishable by imprisonment for more than 4 years, and letting those who commit such acts at liberty present a concrete danger to public order, in relation to the nature of the social values protected by the incriminating text, the consequences produced and the special impact such facts have among civil society.

This concrete danger to public order is determined both by the person of the defendants, who organized and planned the commission of these acts and which, in the current socio-economic context, experienced a particular magnitude, as well as by the disturbance that would occur in the community by letting the them in the current conditions.

The smuggling offenses provided by the customs code come to sanction the violation of social relations related to the customs regime, which aims at the special protection of customs clearance operations, the protection of public trust in customs transport or commercial documents and last but not least, the violation of those social relations regarding the proper conduct of economic-financial activities, the realization of which requires the honest fulfillment by taxpayers of the obligations deriving from the executed commercial operations.

In judicial practice, it has been held that the social danger also results from the magnitude of cigarette smuggling and the fact that the area of action of the defendants is the eastern border of the European Union, which before joining the Schengen area would must be secured. In this sense, the Romanian legislator understood not only to tighten the penalties for such acts, but to introduce new sanctioning regulations for all categories of illegal activities in the field related to smuggling and that the preventive arrest of the defendants is required. (*Decizia penală no. 468/R of 14/12/2010 Tribunalul Vaslui*).

In addition, in another case, the court held that the conditions for taking the measure of preventive arrest are met, the court taking into account the nature and concrete way of committing the crimes, when the defendants, under the cover of darkness to ensure the success of the criminal activity, they did not voluntarily obey the signal of the police bodies to stop the cars for control, it being necessary to follow them by the police crews, followed by the abandonment of the cars, it being necessary for the police workers to make use of the weapons and

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ammunition provided for the arrest and immobilization of the defendants, the large amount of cigarettes transported and the large value of the damage caused. (*Decizia penală nr. 1618 din 05/12/2018 - Curtea de Apel București*).

Therefore, the attempt of the defendants to evade, at any risk, the pursuit of the police investigators only shows the contempt and disregard they show for everything that means state authority, legality and normality.

If the Romanian authorities did not react firmly against these citizens who commit crimes with the aim of getting rich, as is the case above, the conditions would be created for this circumstance to be interpreted as a more than obvious encouragement for all Romanian citizens to act in a similar way because they will not suffer anything, which is unacceptable.

2. CIVIL ACTION

In judicial practice, the court found that the elements of tortious civil liability are met in the person of the defendants brought to trial, for which solutions of conviction were pronounced, for smuggling crimes. Regarding the values of the contraband cigarettes, according to the established brands, and in the case of non-identification of the brands, according to the estimate requested by the civil party, the court held that the value of the cigarettes was established based on the provisions of art. 30 para. 1 and para. 2 lit. a, art. 31 para. 1 and art. 214 of EEC Regulation no. 2913/1992 of the Council establishing the Community Customs Code, art. 142 para. 1, art. 150 of EEC Regulation no. 2454/1993 of the Commission establishing provisions for the application of EEC Regulation no. 2913/1992.

For the cigarettes that were not identified and seized during the criminal investigation, the value of the damage was calculated by including the customs value of the cigarettes, according to art. 277 of Law no. 86/2006 on the Customs Code, to which are added the amounts due in the form of customs duties, excises and value added tax, and in the case of those that have been identified and seized and are to be subject to confiscation, the amount of the damage was calculated consisting of the amounts due in the form of customs duties, excise duties and value added tax. (*Decizia penală no. 31 of 13/01/2022 Curtea de Apel Suceava*).

In judicial practice, the question arose as to whether the person convicted of the crime of corruption for facilitating the introduction of contraband goods into the country, for which he received a bribe, pays together with the smugglers, the damage caused to ANAF as a result of the evasion of customs duties for the goods that have smuggled. (*I. Neagu and others, 2021, p. 125*).

We believe that it is necessary to oblige the persons convicted of corruption to pay jointly and severally with the persons who committed the crime of smuggling, the damage caused to the consolidated budget of the state, because part of the profit obtained as a result of the non-payment of customs duties for the

goods that were the object of smuggling belongs to and those who facilitated this illegal act.

With regard to the damage caused by the commission of the crime of smuggling, the question was whether or not its payment constitutes a mitigating circumstance provided for in art. 75 paragraph 7 letter d of the Criminal Code.

Both in specialized literature and in judicial practice, it is appreciated that the crime of smuggling, although it is not provided as an exception to the application of the legal mitigating circumstance regulated by art. 75 paragraph 7 letter d of the Criminal Code, is part of the wider range of crimes against the state border of Romania. (*V. Pușcașu și C. Ghigheci, 2021, p. 81*).

3. MATTERS REGARDING SMUGGLING CRIME TRIAL

The trial is the procedural activity carried out before the judicial authority with jurisdictional powers, activity during and with the help of which the case is investigated, evaluated and resolved, in a word, the conflict of law deduced before it is judged. Unlike the criminal prosecution phase, which is characteristic of the criminal process, the trial is the central and most important phase in the complex of criminal procedural activities. (*V. Dongoroz, 2003, p.125*).

The trial phase begins, in the case of the joint procedure, from the date of the definitive stay of the conclusion by which the preliminary chamber judge resolved the preliminary chamber procedure by the solution to start the trial. In the case of the special plea agreement procedure, the trial phase begins on the date the court is referred to the plea agreement concluded between the defendant and the prosecutor. The trial phase comprises two distinct procedural stages: the first instance trial and the appeal trial. During each procedural stage, incidental issues can be discussed which, in turn, are subject to a double degree of jurisdiction, the resolution of the issue in the first instance and the appeal stage. (*M. Udriou and others, 2020, p.1868*)*.

In the following, we will analyze from the perspective of the two procedures for starting the trial, the incidental issues encountered in the judicial practice that have as their subject cases deduced from the trial regarding smuggling crime .

Plea agreement court notice

The plea agreement is an element of negotiated justice, constituting the official document drawn up, legally, between the prosecutor and the defendant, by which he understands to recognize the facts for which he is being investigated and consents to a punishment and a method of individualization of it and, from which, it follows that the criminal investigation is completed and that the criminal investigation file will be submitted to the competent court.

Thus, in the case of the crime of smuggling, the criminal action was initiated against the defendant and the legal classification of the crimes charged against the defendant was changed from the crimes of forming an organized

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criminal group, in the form of membership, and smuggling, in the assimilated form, the defendant who she was assisted by a lawyer, being heard in the presence of the defender, she admitting the accusations and accepting the legal framing of the facts and the punishment established by the legislator is a maximum of 15 years in prison. (*Decizie penală nr. 33/A din 12/01/2022 - Curtea de Apel București*).

The plea agreement was concluded, concluded in writing by the prosecutor and the defendant, approved in advance and in writing by the superior hierarchical prosecutor, the court finds that the evidence administered during the criminal investigation results in sufficient data regarding the existence of the facts and the defendant's guilt. In the case, under the aspect of the crime of forming an organized criminal group (in the manner of joining), the court found that the defendant's membership in the criminal group is not only determined by the fact that she committed a singular act of assimilated smuggling, but the defendant was concerned with maintaining the clandestine activity of selling contraband goods. Thus, according to the court report, the defendant was intercepted while drawing the attention of a person regarding the presence of gendarmes near the location where contraband goods were sold, in which context the interlocutor showed that he drew the attention of another person about the presence of the authorities, so that the illegal activity of the group is not detected. Moreover, while the undercover investigator was in front of the space where contraband cigarettes were sold, several people bought contraband cigarettes from the defendant. In addition, on another occasion, another defendant calls the defendant to deal with the sale of contraband cigarettes. All these aspects prove that the crime of joining a criminal group has its own individuality, the rules of the competition of crimes being applicable.

The defendant had a position of recognizing the deed and its legal framework, she did not challenge the evidence administered during the criminal investigation and, as it follows from the statement given to the prosecutor and from the plea agreement signed during the criminal investigation, she agreed to a sentence of 9 months in prison for the crime of forming an organized criminal group (in the manner of joining) and a sentence of 2 years and 3 months in prison for the crime of assimilated smuggling. (*Decizie penală nr. 33/A din 12/01/2022 - Curtea de Apel București*).

In judicial practice, the court of appeal has to resolve the appeal against the sentence of the trial court by which it rejected the plea agreement, on the grounds that the directions operated by the case prosecutor regarding the completion of the legal classification of the smuggling offense exceed the limits imposed by the procedure provided by art. 278 C.p.p.

In this sense, the Court, taking into account the nullity regime applicable in the case, considered - contrary to what was held by the first court - that the corrections made by the case prosecutor do not lead to the rejection of the

recognition agreement as illegal, noting, first of all, that the legal classification was not changed by a material error rectification decision, but there was a prior order to change the legal classification, the material error correction being issued in connection with this procedural act.

Secondly, the appellate court assessed that the provisions of art. 367 para. (2) and (5) C. pen. were detained because the crime in question is punishable by a penalty of more than 10 years, and the defendant not only admitted the imputed facts, but also the fact that she described in detail the way the criminal activities were carried out at the place called the pawn shop, coordinated by other people involved and indicated the participants in the commission of the crimes apprehended in his charge, facilitated the prosecution of the members of the criminal group investigated in the case.

Therefore, the ordinance correcting the material error took into account exactly the factual situation retained in the ordinance by which the change of legal classification was ordered, this aimed at the complete legal classification in relation to the data of the case.

Compared to what was stated above, we appreciate that by correcting the material error, according to those ordered by the criminal investigation body, there are no provisions that attract absolute nullity, only the conditions of relative nullity can be analyzed, but obviously, the defendant did not suffer no procedural injury, according to art. 282 of the Penal Code, as long as, in the presence of the chosen lawyer, he signed the subsequent act of correction and completion of the plea agreement, insisting on the admission of the plea agreement, as it results from the conclusions formulated in support of the appeal stated in the case.

Inquisition court notice

The notification of the court with the indictment represents the analysis of the entire evidentiary material administered during the criminal investigation phase, from which it follows that the factual situation retained is correct, being proven with the help of the evidence administered in the case.

In judicial practice, with the resolving any criminal case, the rule regarding the preventive measures taken against the defendants is to judge them in freedom state and, with the exception, only when the situation requires it, in detention.

In resolving this request, the end of the indictment was used, in which, among other things, in the charge of the defendant investigated for committing the crimes of constituting an organized criminal group, qualified smuggling and bribery, it was noted that a disjunction was made with respect to the material documents committed during the month of September 2009, in which the participation of the defendant is also noted and that there are data from which it is necessary to maintain the detention, so that the defendant does not have a behavior that influences the further smooth running of judicial activities in the trial. (*Decizia penală No. 494/R/ of 12/11/2009 Curtea de Apel Oradea*).

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We agree with maintaining the detention, because any of these illegal acts, viewed independently of the concrete acts of the case, are of particular gravity, each time requiring a firm reaction from the competent state institutions to create a climate of safety and trust, essential for any state proper function.

CONCLUSIONS

In conclusion, although the crime of smuggling does not require the initiation of a special investigation and trial procedure, but the manner of committing the act, have as a consequence the predominant use of some ways of notifying the state authorities regarding the commission of such an act, of using of techniques and methods of evidence administration.

It was also noted that release presents a concrete danger for public order, this being proven by the particular gravity of these facts, by the fact that people who cooperate in a network, including with other people, investigated in separate cases, even and state bodies, the great damage caused to the state budget, the circumstances and the concrete way of organizing and committing the crimes, including by applying a plan of measures, with different meeting places, use of different cars, different phone numbers for communication, for not to be discovered and by the audacity of the defendants to commit such acts, which, carried out over certain periods of time, constitute an illicit but easy means of obtaining material benefits.

From the documentation of the criminal activity of the defendants who commit such acts, it was realized that the full criminal investigation can only be carried out by carrying out some activities that involved the administration of evidence that is difficult to administer, being determined by their dangerousness.

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