

## MIGRANTS SMUGGLING EUROPEAN PHENOMENON OR CRIME?

C. M. Tudor (Barbu)

**Corina Maria Tudor (Barbu)**

Police Academy „Alexandru Ioan Cuza”, Doctoral Law School - Bucharest

Address: Barbu Corina Maria – Aleea Zmeurei nr. 3, Constanta, Romania

Email: [tudorcorina515@yahoo.com](mailto:tudorcorina515@yahoo.com)

### ABSTRACT

*Because, in the context of the crisis of illegal migration in Europe, the notion of migrants smuggling is increasingly used, especially in the field of judicial cooperation in criminal matters between romanian and other member states judicial authorities, we intend to determine whether this term is regulated as an independent crime or whether it is just the name of a new phenomenon at european level. At the same time, we try to establish whether the notion of migrants smuggling is part of smuggling or migrants trafficking crime.*

**KEYWORDS:** smuggling, migrants trafficking, migrants smuggling

### INTRODUCTION

According to the definition from romanian's explanatory dictionary language smuggling consists in country's illegal introduction of prohibited goods or for which no customs duties have been paid, being one of the main forms of fraud in the European Union. This form of fraud supposes, in most cases, the use of ingenious ways of avoiding customs duties, which are often difficult to detect by the authorities responsible for combating this phenomenon.

The persons and goods free movement principle establishment and application has intensified smuggling and illicit trade in excisable products has led to substantial losses for billions of euros in annual budgets to the European Union and Member States. ( Goods subject to excise duty are: alcohol, energy products and electricity, as well as tobacco products, (<https://europa.eu/youreurope/business>).

People free movement in recent years made Europe to deal with the worst migration challenge since World War II, as people have fled in large numbers to Europe to escape conflict, terror and persecution from their countries (<https://www.europarl.europa.eu/news/ro/headlines>).

In the context of the need for an overview on migration in European Union - which includes solidarity and fair ownership, border management and visa policy, existence of safe and legal routes to Europe for asylum seekers and refugees, strategies development to cooperate with third countries, appropriate legal economic migration development, funds analysis used in migration field and Common European Asylum System implementation - it is necessary to combat *migrants smuggling*, human beings trafficking and migrants labor exploitation.

From a legal point of view smuggling, trafficking and labor exploitation are three different phenomena, creating different legal obligations under international law and european law. In practice, however, these phenomena often overlap and their differentiation can be difficult.

In general terms, *migrants smuggling* involves facilitating the illegal entry or stay of a person in a Member State. On the other hand, trafficking in human beings involves the recruitment, transport or reception of a person by violent, deceptive or abusive means for the purpose of exploitation.

## MIGRANTS SMUGGLING EUROPEAN PHENOMENON OR CRIME?

There are three elements that clearly differentiate smuggling from human trafficking:

1. source of profit: for human beings trafficking, the profit is obtained from victims exploitation. For smuggling, the profit comes from those who pay to benefit from the facilitators services. Under EU law, under Directive 2002/90 / EC, smuggling of migrants (facilitating illegal entry) is currently criminalized even in the absence of financial gain;
2. transnational component: human beings trafficking can take place in a single country (without crossing borders) or through legal or illegal border crossings; smuggling by definition involves an illegal crossing of international borders;
3. Victimization: smuggled migrants generally agree to this, although they often fall victim to violent crime along the way; human beings trafficking by definition involves the exploitation and, implicitly, person's victimization, whose consent has no value due to the means used to obtain it.

In this paper, we set out to analyze the constitutive content of a person's entry, stay or exit facilitating activity, on romanian territory, in order to establish if *migrants smuggling* can be considered a smuggling form according to Law No. 86/2006 on the Romanian Customs Code or migrants trafficking crime according to art.263 from Criminal Code.

Thus, we will analyze the constitutive content of both the crimes smuggling and migrants trafficking, but also the romanian judicial authorities decisions in criminal judicial cooperation with other states taken in this matters.

### SMUGGLING CRIME

Smuggling includes all persons acts who manage to avoid the customs duties payment for excise goods (tobacco products, alcohol and petroleum products).

In other words, smuggling means a culpable violation of the law in order to avoid customs duties imposed on the goods crossing borders, which means that its existence supposes a legal customs regime, because, if there were no such regime legally, if rules had not been imposed on the crossing of certain categories of goods across borders, smuggling as a crime would not have existed.

Customs legal regime represents the set of provisions contained in the Customs Code, in its Regulations, as well as in other national and international legislation ratified by our state and which contain provisions regarding the customs field. These provisions regulate the goods's and transport's means customs control, the customs taxation by applying the customs tariff and other operations specific to the customs activity. (Florin Sandu, *Smuggling - a component of organized crime*, National Publishing House, 1997, p. 20).

The customs legal regime should not be confused with the customs regime, as there are relations between the two as part of the whole, the second being a branch of the first.

If, in Law no. 141/1997 on the old romanian Customs Code, the customs regime is defined as representing the totality of the norms that apply within the customs procedures, depending on the purpose of the commercial operation and the destination of the goods (Art. 47 of Law no. 141/1997 on the Romanian Customs Code, published in the Official Gazette of Romania No. 180 of August 1, 1997), in Law no. 86/2006 on the new romanian Customs Code, the customs regime represents the totality of customs operations carried out with goods or merchandise, respectively release for free circulation, transit, customs warehousing, inward processing, processing under customs control, temporary admission, outward processing and export (Art. 4, point 20 of the Law no.86 / 2006 on the Customs Code of Romania published in the Official Gazette of Romania, Part I no.350 / 19 April 2006).

At the same time, smuggling is considered a fraud that seriously affects the social relations in customs regime field, being an act of customs authorities misleading in relation to the situation of certain goods, generating uncertainty and disorder in the sphere of border crossing goods, in a word it creates social danger (Costică Voicu, *Criminal Business Law*, Rosetti Publishing House, Bucharest 2002, p. 200-201).

272 / 5000

We agree with this perspective according to which smuggling by misleading the customs authorities creates a social danger for the customs regime and for the Romanian society by defrauding the country budget.

According to the Romanian Language Explanatory Dictionary, smuggling represents border crossing goods without customs duties payment.

From our point of view, smuggling consists in crossing Romanian border, without paying customs duties for certain categories of goods in order to obtain significant material gains.

According to the Romanian legislation, smuggling crime is simple and consists border crossing, by any means, goods or merchandise, through other places than those established for customs control (Art. 270 paragraph 1 of Law no. 86/2006 on the Romanian Customs Code).

As can be seen, smuggling crime as simple form consists certain goods crossing borders, through other places than those established for customs control.

Therefore, there is an essential requirement for the existence of this crime's form - the place where it can be committed.

However, in the national legislation, customs border is one and the same with the Romania's state border.

Thus, it must be specified that the crossing of the state border of Romania is carried out, through the crossing points of the state border open to international traffic. It is also provided that the crossing Romania's border can be done through other places, but only on the basis of bilateral documents concluded by Romania with neighboring states and only in compliance with certain conditions established by mutual agreement.

Even if the places through which the entry / exit from the country is carried out are regulated by the state border legislation, the means of transport and goods crossing border will be done in compliance with the provisions of the customs regime.

Goods, luggage and persons customs control will be carried out after the control of documents for crossing the border state (art. 8 of O.U.G. 105/2001 on the Romania's border state published in the Official Gazette of Romania no. 352 of June 30, 2001).

In the case of other forms smuggling crime, goods or merchandise category to be placed under a customs procedure includes any goods or merchandise which has been assigned a customs destination and which are placed under one of the two customs procedures - suspensive or economic - (Art. 107 of Law no. 86/2006). Subsequently, depending on the type of goods and the customs regime that can be used, the National Agency for Fiscal Administration may establish, by decision, the competence to carry out customs control and to apply customs regulations only for some customs offices (Art. 83 of Law no. 86/2006).

In addition, it should be noted that goods or merchandise customs value covers: the costs of transporting the goods to the Romanian border, the costs of loading, unloading and handling, related to transport, of imported goods related to the external route and the cost of insurance on the external route (Art.56 paragraph 2 of Law no. 86/2006).

With regard to the assimilated variant, it can be seen that in order to constitute crime, it must be proved by the criminal investigation bodies that the person in question knew that the goods came from smuggling.

From our point of view, assimilated smuggling crime is similar to concealment crime because of its material element which consists in collecting, holding, producing, transporting, taking over, storing, handing over, selling and selling.

Regarding the goods subject to excise duties, we mention that excise duties are special taxes levied directly or indirectly on the consumption of certain products including alcohol and alcoholic beverages, processed tobacco and energy products and electricity (Art.335 paragraph 2 of Law no. 255 / 2015 on the Fiscal Code, published in the Official Gazette of Romania No. 688 of September 10, 2015).

## *MIGRANTS SMUGGLING EUROPEAN PHENOMENON OR CRIME?*

Another form of smuggling is qualified smuggling and involves the unlawful entry/exit across the border of weapons, ammunition, explosives, restricted explosive precursors, drugs, precursors, nuclear or other radioactive materials, toxic substances, waste, residues or hazardous chemicals.

With regard to this smuggling crime form, it can be seen that consists in the border crossing of certain goods or merchandise without the right to cross the border state.

In conclusion, regardless of whether it is a simple or qualified form, smuggling crime consists in crossing over the Romania border state, without paying customs duties, certain categories of goods in order to obtain significant material gains.

As can be seen, smuggling crime, in Romanian law, refers exclusively to the illegal goods's crossing borders for which the law established to pay customs duties. Human beings are not included in the category of such goods, as they are naturally subject to a different rule, which expressly stipulates the conditions they must fulfill in order to move freely and legally, and the persons that help the ones who do not fulfill the criteria established by law, to illegally enter/exit Romanian territory, represents the crime of trafficking in migrants and is provided in art. 263 Criminal Code, which we will analyze further.

### **MIGRANTS TRAFFICKING CRIME**

Migrant trafficking crime is the criminal act which consists in recruiting, guiding, transporting, transferring or sheltering a person, in order to fraudulently cross Romania's border state ( art.263, alin.1).

This is more serious if it has been committed:

- a) in order to obtain, directly or indirectly, a material benefit;
- b) by means that endanger the life, integrity or health of the migrant;
- c) by subjecting the migrant to inhuman or degrading treatment, the punishment is imprisonment from 3 to 10 years and the prohibition of exercising certain rights(art.263, alin.2).

Given the legal text, we appreciate that the migrants trafficking crime material element consists in several alternative actions, which is why we will analyze all of them.

Recruitment means the election of a person who has migrant status for the purpose of illegally crossing a state border.

Guidance consists in directing, giving a direction to the migrant in order to illegally cross the border. Guiding involves being with the migrant and driving him or her across the border.

Thus, the guide is the crime's author that effectively illegally crosses state border.

Persons's transport represents migrant's moving from one place to another by means of transport.

The transfer consists in migrant's handing over from one person to another in order to facilitate the entry, the stay or the exit from the territory of a state.

The shelter is the migrant's accommodation in order not to be uncovered until the moment when the transport will take place.

The state border of Romania delimits the Romanian's territory from the territory of each of the neighboring states and the territorial sea of Romania from the contiguous zone. Vertically, the state border delimits the airspace and the basement of the Romanian state from the airspace and the basement of each of the neighboring states (art. 2 of GEO no. 105/2001 regarding the state border of Romania).

The quality of migrant is attributed to a stateless person who is in transit on the Romanian's territory and if he fraudulently crosses the state border, on his own, he performs the specific actions of illegal border crossing (art. 262 Criminal Code).

## MIGRANTS SMUGGLING

According to the Palermo Protocol against Migrants Illegal Trafficking by land, air and sea, in addition to the United Nations Convention against Transboundary Organized Crime - *migrants smuggling* – “means the help, for the purpose of obtaining, directly or indirectly, a financial or material benefit, the unlawful entry into a European state of a person who is not a national or a permanent resident of that state”(Article 3 (a) - Palermo Protocol against Illegal Trafficking in Migrants by land, air and sea, in addition to the United Nations Convention against Organized Cross-Border Crime; the text of the act published in the Official Gazette of Romania no. 813 of November 8, 2002).

Under the provisions of the same document, *human smuggling* consists in the existence of the voluntary agreement that the trafficked person has consented to, the illegal activity taking place when the migrant, due to legal restrictions and lack of knowledge about the legal ways of departure, cannot travel free across the borders of the country.

Thus, they also pay voluntarily the smuggler to help them cross the border.

In the judicial practice of the Romanian courts, the first mention of the notion of *migrants smuggling* appears in the Civil Sentence no. 1437/13.10.2009 of the Galați Court, by which the request formulated by the General Directorate of Passports Bucharest was resolved, which had as object the request to restrict the exercise of the right to free movement in Turkey of a person who was returned from Turkey on 05.01.2009, based on the Readmission Agreement concluded by Romania with Turkey regarding the readmission of the citizens of their states and of the aliens in an illegal situation on the territories of these states published in the Official Gazette no. 604 of 06.07.2004. The provisions of this Agreement provide that each contracting part shall readmit, at the request of the other part, without special formalities, persons who do not or no longer fulfill the legal conditions to enter or reside in the territory of the requesting contracting state, prove or be reasonably presumed that such persons are nationals of requesting state.

The court also noted that this agreement is based on the desire to prevent illegal migration, *migrants smuggling* and human beings trafficking, respecting the inviolable rights of individuals, regardless of ethnicity, nationality, religion, color, sex, disability.

In another case, by the criminal sentence no. 29 of 26.05.2020, the Iași Appeal Court accepted German authorities's request for the execution of the European arrest warrant based on the national arrest warrant issued for participation as an accomplice in the “ *migrants smuggling crime* in groups and dangerous *migrants smuggling*, repeatedly and profitably ”, provided for in sections 97 II, 96 I and 95 I of the German Law of Residence.

One of the conditions for admitting the execution of a European arrest warrant is the finding of the existence of double criminality, respectively that the crime for which the requested person is being investigated is provided by the criminal law of both the requesting state and the requested state.

Thus, the Romanian court considered this condition fulfilled, considering that *the migrants smuggling* crime in groups and dangerous migrants smuggling has the correspondent in the Romanian legislation in the migrants trafficking crime, provided and sanctioned by art. 263 para. 1 and 2 of the Criminal Code and not in the smuggling crime provided and punished by art. 270 or art. 274 of Law no. 86/2006 on the Romanian Customs Code.

At the same time, by the criminal Sentence no. 81/F/ 06.05.2019 the Galați Appeal Court admitted the request of the Hungarian authorities for the execution of the European arrest warrant based on the warrant for the execution of the sentence for 2 years imprisonment for committing the *migrants smuggling* crime provided by art. 353 of the Hungarian Criminal Code, having a correspondent in art. 263 para. 2 lit. a - Romania's Criminal Code in the migrants trafficking crime.

Analyzing the provisions of art. 353 of the Hungarian Criminal Code, we found that it is called “Clandestine Immigration Channel” and not “*migrants smuggling*” and is the act of

## MIGRANTS SMUGGLING EUROPEAN PHENOMENON OR CRIME?

a person who provides support to another person for crossing the state border in violation of applicable law (<http://codexpenal.just.ro/laws/Cod-Penal-Ungaria-RO.html>, accessed on 28.11.2021).

Furthermore, in the same legal text, it is provided that if the act of illegal immigrants trafficking is carried out for the purpose or for financial benefits or involves several persons for crossing the state border, as well as if the criminal activity of trafficking is carried out by torturing the person trafficked, carrying or displaying a deadly weapon or in association with other persons, the penalty provided for is higher.

Considering what romanian courts retained in the judicial cooperation in criminal matters with other Member States, we appreciate that the phrase *migrants smuggling* has the correspondent in the romanian legislation in the crime of migrants trafficking and not in the crime of smuggling.

At the same time, we believe that the notion of *migrants smuggling* is not regulated as a crime in its own right in the legislation of any of the Member States, being essentially just the name of a phenomenon that has grown in Europe amid the crisis of illegal migration.

## CONCLUSIONS

In conclusion, the notion of *migrants smuggling* has been used at european level to refer to a new concept that involves the voluntary person's consent to be trafficked, paying sums of money in this regard, and illegal activity takes place when the migrant, due to legal restrictions and lack of knowledge about the legal ways of departure, cannot move freely across the country's borders.

Referring exclusively to the examples from judicial practice, we have found that the term *migrants smuggling* is not provided for as an independent crime, although the requests for judicial cooperation in criminal matters are specified, when invoking the legal basis of the effective cooperation procedure, the legal text indicated refers to migrants trafficking and not to smuggling.

In the same note, the romanian judicial authorities consider double criminality's condition fulfilled and set as the correspondent in the romanian legislation for *migrants smuggling* the migrant trafficking crime provided and sanctioned by art. 263 para. 1 and 2 of the Criminal Code and not the smuggling crime provided and punished by art. 270 or art. 274 of Law no. 86/2006 on the Romanian Customs Code.

We appreciate that the romanian courts have taken the correct decision on the grounds that the smuggling crime, in national law, refers exclusively to the illegal crossing of borders of goods that have established by law a material value for which the person transporting them must pay customs duties, category in which human beings are not included.

Human beings are naturally subject to a different legal regime, which expressly stipulates the conditions they must fulfill in order to move freely, legally, and the aid given to persons who do not meet the criteria established by law for entry, stay and legal exit in / from the Romania's territory, represents the migrants trafficking crime and is provided in art. 263 Criminal Code.

If it is decided at european level to classify the concept of *migrants smuggling* as an independent crime, the activity will be a long one, as it must first be clarified whether the act in question relates to a certain group of legal provisions infringements ( crimes) or if it is simply an immoral act. Subsequently, the existence of the degree of social danger must be established in order to determine whether it constitutes an crime or delict.

In summary, we consider that it is not appropriate to qualify as a crime the term *migrants smuggling*, because a person who commits such an illegal activity does not go unpunished, as long as the criminal law provides for the smuggling crime, respectively the crime migrants trafficking crime, which is why *migrants smuggling* must remain an immoral act of an european phenomenon.

**BIBLIOGRAPHY**

1. Florin Sandu, Smuggling – An organized crime component, National Publishing House, 1997;
2. Costica Voicu, Business Criminal Law, Rosetti Publishing House, Bucharest 2002;
3. Law no. 141/1997 on the Romanian Customs Code, published in the Official Gazette of Romania no. 180 of August 1, 1997;
4. O.U.G. 105/2001 regarding the state border of Romania published in the Official Gazette of Romania no. 352 of June 30, 2001, published in the Official Gazette of Romania no. 352 of June 30, 2001;
5. Law no. 86/2006 on the Romanian Customs Code published in the Official Gazette of Romania, Part I no. 350/19 April 2006;
6. Law no. 286/2009 on the Criminal Code published in the Official Gazette, Part I no. 510 of July 24, 2009, as subsequently amended and supplemented;
7. Law no. 255/2015 on the Fiscal Code, published in the Official Gazette of Romania no. 688 of September 10, 2015;
8. Palermo Protocol against Illegal Trafficking in Migrants by land, air and sea, in addition to the United Nations Convention against Organized Cross-Border Crime; the text of the act published in the Official Gazette of Romania no. 813 of November 8, 2002;
9. The readmission agreement concluded by Romania with Turkey regarding the readmission of the citizens of their states and of the aliens in an illegal situation on the territories of these states published in the Official Gazette no. 604 of 06.07.2004;
10. Civil Sentence no. 1437 of 13.10.2009 of the Galați Court, [www.lege5.ro](http://www.lege5.ro), consulted on 01.12.2021;
11. Criminal Sentence no. 29 of 26.05.2020, Iași Appeal Court, [www.lege5.ro](http://www.lege5.ro), consulted on 01.12.2021;
12. Criminal Sentence no. 81 / F dated 06.05.2019 Galați Appeal Court, consulted on 01.12.2021;
13. [https://europa.eu/youreurope/business/taxation/excise-duties-eu/product-excise-duties/index\\_ro.htm](https://europa.eu/youreurope/business/taxation/excise-duties-eu/product-excise-duties/index_ro.htm), accessed 27.09.2021);
14. <https://www.europarl.europa.eu/news/ro/headlines/priorities/imigratia/20170629STO78631/criza-migratiei-in-europa>, accessed on 05.12.2021;
15. [www.lege5.ro](http://www.lege5.ro), consulted on 01.12.2021;
16. <http://codexpenal.just.ro/laws/Cod-Penal-Ungaria-RO.html>, accessed on 28.11.2021.