

# IMPACT OF ENACTMENT OF THE NEW PENAL CODE ON THE OFFENCE OF INTERNATIONAL HIGH RISK DRUG TRAFFICKING

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## Abstract

*The entry into force of the new Penal code has brought some changes on the offence of international high-risk drug trafficking. This study aims to analyze the impact of the new Penal Code, by changing the limits of punishment in the case of the international high-risk drug trafficking, had on this offence, in relation to other existing criminal provisions referring to the high-risk drugs or very high-risk drugs.*

**Keywords:** *drugs, high-risk drugs, very high risk drugs, smuggling, drugs for personal consumption.*

1. Romania's Constitutional Court declared<sup>1</sup> that the new Penal Code is the law more favorable compared to the previous Penal Code, repealed in February 2014. The main reason cited was the fact that the lawmaker of the new Penal Code decreased the punishment limits for the offences set out in the Penal Code and for the offences under some special non-criminal laws.

The rationale for which the lawmaker of the new Penal Code decreased the punishment limits of different offences was to impose a future easier punitive treatment for defendants who are at their first violation of the criminal law and, irrespective of guilt, commit a single offence and not a plurality of offences. For defendants persisting in their antisocial behavior by committing more offences, the lawmaker sought to introduce a harsher punitive treatment; its preventive role is to dissuade those tempted to break repeatedly the social values protected by criminal law.<sup>2</sup>

On the same line of thought is Law No.187/2012 implementing the new Penal Code<sup>3</sup>, which reduced the punishment limits for the international drug trafficking offences provided by Article 3 of Law No. 143/2000 for the preventing and combating illicit drug trafficking and consumption.<sup>4</sup>

2. Law No.143/2000 republished<sup>5</sup>, includes a number of nine offences concerning the regime of drugs subject to national and international control. The material object of eight offences of nine consists of high-risk and very high risk drugs. The impact mentioned in the title of this scientific paper relates to Article 3 of Law No.143/2000, republished.

Article 3 has the following legal content:

(1) Bringing into or removing from the country, and import or export of high-risk drugs by breaking the law is punishable with imprisonment from 3 to 10 years and removal of rights;

(2) If the deeds provided in paragraph (1) concern very high risk drugs, the punishment is imprisonment from 7 to 15 years and deprivation of certain rights.

Please note that before the amendment of Law No.143/2000 by Law No.187/2012, the punishment provided for in Article 3 para. (1) was imprisonment from 10 to 20 years and deprivation of certain rights, and for the deeds provided in para. (2), the punishment was imprisonment from 15 to 25 years and removal of rights.

Changing of the punishment in case of international high-risk drug trafficking provided by Article 3 paragraph (1) of Law No. 143/2000, republished, makes debatable the correlation of this law text with the existing incriminations in other pieces of legislation covering high-risk or very high risk drugs.

In this regard, Article 271 of Law No. 86/2006<sup>6</sup> concerning the customs regime criminalizes the act of aggravated smuggling. According to this text, "bringing into or removal from the country, by breaking the law, of weapons, ammunition, explosives, drugs, precursors, nuclear or other radioactive substances, toxic substances, waste, hazardous chemical residues or materials constitutes the offence of aggravated smuggling and is punishable by imprisonment from 3 to 12 years and removal of rights, unless criminal law provides for a more severe punishment."

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<sup>1</sup> To see Decision no.265/06.05.2014, of the Constitutional Court of Romania, published in Official Journal of Romania nr. 372/20.05.2014.

<sup>2</sup> Decision no.265/2014 of the Constitutional Court of Romania, p.6.

<sup>3</sup> Law no.187/2012 establishing Law nr.286/2009, regarding New Penal Code, published in Of.Journal of Romania nr.757/12 November 2012;

<sup>4</sup> This law has been published for the first time in the Official Journal of Romania, 1<sup>st</sup> Part, nr. 362/3 of August 2000, being modified several times until entering into force the Law no. 187/2012, that decreased the punishments for some acts so, Law no.143/2000 has been republished.

<sup>5</sup> Law no.143/2000 on combating illicit drug trafficking and published in the Official Journal, Part I no. 362/03.08.2000;

<sup>6</sup> This law has been published in the Official Journal of Romania, 1st Part, no. 350/19.04.2006

From the regulation of Article 271 of Law No. 86/2006, in the matter of our concern, we see two aspects:

a) That the law text makes no distinction between aggravated smuggling of "high-risk drugs" and aggravated smuggling of "very high-risk drugs" using only the terms "drugs" and "precursors". Therefore, in the concept of Law No. 86/2006, which is consequent to Law No.143/2000 which distinguishes between "high-risk drugs" and "very high-risk drugs", crossing of such drug categories across borders without authorization is considered aggravated smuggling and is punishable by imprisonment from 3 months to 12 years;<sup>7</sup>

b) That aggravated smuggling is subsidiary to the existence of any other piece of criminal legislation, which disciplines the same social defense relationships concerning narcotic and psychotropic substances, but provides sanctions of more than 12 years of imprisonment. In terms of subsidiarity of smuggling, amendment of the old sanctions provided for in Article 3 of Law No. 143/2000, by Law No.187/2012, calls into question the proper legal classification of the act of bringing into or removal from the country, by breaking the law, of high-risk or very high-risk drugs.

Thus, in terms of the facts of bringing into or removal from the country, by breaking the law, of very high-risk drugs for which Article 3 para. (2) of Law No. 143/2000, republished, stipulates the sanction of imprisonment from 7 to 15 years, the aggravated smuggling crime is subsidiary, since it provides for a punishment of 3 months to 12 years in prison (which is lower than that prescribed in Article 3 para. 2). Specifically, it means that always bringing into or removal from the country, by breaking the law, of very high-risk drugs will constitute international illicit drug trafficking provided by Article 3 para. (2) of Law No. 143/2000, republished, and will not be considered aggravated smuggling.

On the contrary, always, bringing into or removal from the country, by breaking the law, of high-risk drugs, following the amendment of old sanctions stated in Article 3 of Law No. 143/2000 republished by Law No. 187/2012, will constitute aggravated smuggling and not international illicit drug trafficking provided by Article 3 para. (1) of Law No. 143/2000, republished, as the punishment provided by the lawmaker for the offence of smuggling, specifically imprisonment from 3 months to 12 years is greater than the punishment provided by Article 3 para. (1) of Law No. 143/2000, republished, specifically imprisonment from 3 to 10 years.

By modifying the sanctions provided for in Article 3 para. (1) and (2) of Law No. 143/2000 by Law No. 187/2012, Article 3 para. (1) of this law will no longer find applicability to the illicit international

trafficking of high-risk drugs. Changing of the punishment and inapplicability of Article 3 para. (1) of Law No.143/2000, republished, cannot lead to the conclusion that it would be repealed by the effect of Law No. 187/2012, because this paragraph provides the objective side of the offence of international illicit trafficking of very high-risk drugs, provided in para. (2) thereof.

3. The decreased punishment for the offence of illicit international trafficking with high-risk drugs, attracts notable consequences for the current judicial practice compared to that existing in the past.

The first consequence would be that currently we can no longer talk of international illicit trafficking of high-risk drugs [Article 3 para. (1) of Law No. 143/2000 republished] but of aggravated high-risk drug smuggling. Thus, if a person brings into Romania, by breaking the law, high-risk drugs and very high-risk drugs at the same time (on the same occasion), we will have a formal concurrence between the offence of illicit high-risk drug trafficking, provided by Article 3 of Law No. 143/2000, republished, and the offence of aggravated high-risk drug smuggling, provided by Article 271 of Law No. 86/2006. No one could argue that the legal classification of the offence, as described above, would be only in accordance with Article 3 para. (2) of Law No. 143/2000, republished – the more severe offence - which would absorb the least severe one (aggravated high-risk drug smuggling) and therefore would not constitute multiple offences.

The solution of multiple offences is required, on the one hand, because the text of Article 271 of Law No. 86/2006 sends for punishment to a more severe incriminating regulation, so that the act of bringing very high-risk drugs into the country, with its dangerous consequences for public health is provided for in Article 3 para. (2) of Law No.143/2000, republished, with a heavier punishment, while the same act of introducing high-risk drugs into the country with its consequences and another special legal object is deemed aggravated smuggling as provided by Article 271 of Law No. 86/2006, because it provides a harsher punishment than that prescribed by Article 3 para. (1) of Law No.143/2000, republished. Please note also that by criminalizing the act of smuggling in general, the lawmaker sought to protect mainly the social relationships settled by the State concerning customs duties and the procedure for bringing into or removal from the country of goods.

Moreover, because the action of bringing into or removal from the country of "high-risk drugs" or "very high-risk drugs", by breaking the law, takes place at borders, results that such actions violate not only the drug regime, but also the customs procedures of Romania.

<sup>7</sup> In our opinion, there is an omission of the legislator regarding that the Law no.86/2006 subsequently emerged Law no.143/2000 distinguishes between drug risk and high-risk drugs, didn't make this classification within qualified contraband.

Listing in Article 271 of Law No. 86/2006 of certain categories of dangerous goods, which require special authorization to be carried across border, the lawmaker has changed the simple smuggling into aggravated smuggling in the event that such goods would be removed from or brought into the country without such authorization and provided a harsher punishment.

As the legal object of the offence of smuggling consists in the social relations settled on the customs regime, removing from or bringing into the country of high-risk drugs without authorization, does not change this legal object, even if subsidiary they are put into risk the relations regarding the public health.

This specification enables us to say that by in removing from or bringing into the country of high-risk or very high-risk drugs, by breaking the law, the perpetrator violates two distinct categories of social relationships primarily protected by the lawmaker, specifically the social relations concerning public health, in case of high-risk drugs, which is why they must be liable for both international illicit trafficking provided by Article 3 para. (2) of Law No. 143/2000 and for the offence of aggravated high-risk drug smuggling, provided by Article 271 of Law No. 86/2006 (multiple offences).

It is true that removing from or bringing into the country, by breaking the law, of high-risk drugs endangers the public health, but following the amendment brought by Law No. 187/2012, the lawmaker has protected mainly the customs regime and in the alternative the public health.

Because of this new situation created by Law No. 187/2012, the act of bringing or removing high-risk drugs by breaking the law remains within the aggravated smuggling with the adequate legal object, being removed from the scope of offences against public health.

Another example of judicial practice could be that a person consumer of cannabis (high-risk drug) goes to Turkey and acquires 200 grams of cannabis for personal consumption.

After crossing the border, it is found with those 200 grams of cannabis. In connection with this drug, the person in question says it brought it into the country for own consumption, being actually a consumer.

And in this case, we can question the fact whether the person concerned is liable for only one offence, specifically possession of high-risk drugs for personal consumption provided by Article 4 of Law No. 143/2000, republished, the crime of aggravated high-risk drug smuggling provided by Article 271 of Law No. 86/2006, being absorbed by it, or multiple offences between aggravated high-risk drug smuggling and possession of high-risk drugs for own consumption.

In judicial practice, it was considered that in case of crossing drugs across border exclusively for own consumption and not for illicit drug trafficking, the act falls within the offences provided by Article 4 para. (1) of Law No. 143/2000, absorbing in its content the deed of crossing drugs across border.<sup>8</sup>

The solution is objectionable because, in case of aggravated smuggling, this offence subsists even if the drug passed across border without authorization is used for own consumption.

The solution of the multiple offences is correct because the same action includes the content of two separate offences, specifically that provided by Article 271 of Law No. 86/2006 and that provided by Article 4 of Law No. 143/2000, republished.

Thus, the offence of aggravated smuggling occurs instantaneously when crossing the border of high-risk drugs without authorization. After this moment of the first offence, occurs the second offence that is continued possession by breaking the law of the 200 grams of cannabis for personal consumption.

If a person holds at home for illicit trafficking both high-risk drugs and very high-risk drugs, we have a single offence of possession of very high-risk drugs and legal classification is only according to Article 2 of Law No.143/2000, republished.

**In conclusion**, along with decreased sanctions for the offence of illicit high-risk drug trafficking provided by Article 3 para. (1) of Law No.143/2000, republished, the main impact will be changing the legal classification of Article 3 para. (1) in Article 271 of Law No. 86/2006, which criminalizes the act of aggravated smuggling.

Of course, we expect the future judicial practice to reveal other situations where decreased punishments for the offence provided by Article 3 of Law No. 143/2000, republished, give rise to controversial solutions.

## References

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<sup>8</sup> In this sense, see decision no.3619/25 of June 2005, of High Court of Justice, unpublished;