

# PROTECTION OF THE WASTE REGIME BY CRIMINAL LAW. ACTUAL SITUATION IN ROMANIA

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## Abstract

*In this paper, the author discusses the main weaknesses of the incrimination provided by article 63 of Romanian Law no.211/2011, regarding the waste regime, in its actual state, as a result of legislation changes that occurred repeatedly.*

*The paper is structured in three parts. The first part indicates the most relevant legislation changes for article 63 of Romanian Law no.211/2011 since its entry into force. The second part identifies the inconsistencies of the actual version of the law, focusing mainly on the constitutive content of the crime, while the third part points out the main solutions to the deficiencies previously mentioned, alongside de lege ferenda proposals.*

**Keywords:** waste regime, waste protection, crimes against environment, inadequate legislation.

## 1. Introduction

The legal regime of waste in Romania is regulated by Law no.211/2011, republished<sup>1</sup>, with subsequent amendments. The major impact of the management of waste on the environment is beyond doubt, even resulting from article 1 of the law previously mentioned that states: "This law establishes the necessary measures to protect the environment and human health by preventing or reducing adverse effects resulting from the production and management of waste and by reducing overall impacts of the use of resources and improving the efficiency of their use".

The criminal protection assured by the legislator under the provisions of article 63 of Law no.211/2011 aims at ensuring the compliance with the provisions regarding marketing, recovery, treatment, disposal and transport of waste criminalization containing six different normative contents, sanctioned in the same manner.

Art.63 of Law no.211/2011 states: "(1) An offense punishable by imprisonment from three years to five years or a fine following facts: a) the import of appliances, equipment, machinery, materials and products used from a waste category prohibited to import; b) failure to take or respect measures in carrying out the collection, transport, recovery and disposal of hazardous waste; c) trade, abandonment and/or failure to assure the load of waste during transit through the territory of Romania; d) the refuse to return waste to the country of origin if it was brought into the country for purposes other than that of disposal and for which the competent authority ordered the return; e) placing the waste in the country in order to eliminate and / or not used for the purpose for which it has been

introduced; f) acceptance by operators of deposits/incinerators for disposal of waste of smuggled waste and / or of waste brought into the country for purposes other than disposal and which could not be used for the purpose for which they were introduced. (2) The attempt is punishable".

Regarding the most relevant legislative changes that occurred since its entry into force, we observe that since November 25<sup>th</sup>, 2011<sup>2</sup>, Law no.211/2011 has been modified three times.

The first amendment was done by Law no.187/2012 regarding the enactment of Law no.286/2009, the Criminal Code. This act had a direct relevance for the provisions analyzed, namely art.63 of Law no.211/2011, because it reduced the penalty limits originally established by the legislator, in 2011, at 3 to 5 years of imprisonment, or a criminal fine, to 6 months to 5 years of imprisonment or a criminal fine. The reason behind the reduction of the penalty limits came alongside the philosophy of the new Criminal Code, Law no.286/2009, enforced in the 1<sup>st</sup> of February, 2014, that provided some reduced the penalty limits for most crimes by comparison to the old legislation.

Two months later, on March 28<sup>th</sup>, 2014, Law no.211/2011 was republished, but this did not affect, in any way, the provisions of art.63.

The second important amendment to the Law was done by the Government Emergency Ordinance (G.E.O.) no.68/2016, regarding the amending and supplementing of Law no.211/2011 concerning the waste regime, entered into force on October 28<sup>th</sup>, 2016<sup>3</sup>, approved by Law no.166/2017 on July 16<sup>th</sup>, 2017<sup>4</sup>. By this amendment, the first paragraph of art.63 was again modified, by return to the previous regulation, namely, the limits of the penalty were raised from 6 months to 5 years of imprisonment or a criminal fine to 3 to 5

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<sup>2</sup> Published in the Official Gazette, Part I, No. 837/25.11.2011

<sup>3</sup> Published in the Official Gazette, Part I, no. 823/18.10.2016

<sup>4</sup> Published in the Official Gazette, Part I, no. 554/13.07.2017

years of imprisonment, or a criminal fine, just like the original provisions of the Law, as entered into force in 2011.

The hesitation of the legislator to modify the penalty limits followed by a reenactment of the previous version of the law is an indicator of the Romanian legislative fluctuation in the matter of waste regime in the last years, fluctuation that prevented a consequent judicial practice in the same timeframe.

The third legislative change was made by G.E.O. no.74/2018<sup>5</sup>, regarding the amending and supplementing of Law no.211/2011 concerning the waste regime, of Law no. 249/2015 regarding the management of packaging and of the waste of packaging, and of G.E.O. no.196/2005 regarding the Environmental Fund. G.E.O. no.74/2018 was approved by Law no.31/2019<sup>6</sup>. This third legislative amendment to Law no.211/2011 does not include relevant changes to the provisions of art.63, subjected to analyze.

## 2. Particularities of the incrimination

In order to establish the actual status and deficiencies of the crime regulated by art.63 of Law no.211/2001 we will briefly point out the particularities and weaknesses of the text.

The generic legal object consists in the protection of the environment against pollution by waste. The special legal object, as we appreciate, consists in the social relationships formed around environmental protection and human health by strictly regulating the marketing, recovery, treatment, disposal and transport of waste.

Depending on the features of each variant normative, the material object can be represented by appliances, equipment, machinery, materials and products used and worn in the category of waste, prohibited import waste or hazardous waste.

The definition of waste is stipulated in Section 9 of Annex 1 to this Law, as follows: “any substance or object which the holder throws or intends to throw or is required to throw”. Hazardous waste is defined by section 11 of Annex 1 to the same law as follows: “any waste which displays one or more of the hazardous properties listed in Annex no.4 of the law”.

In an unexpected manner, although the qualification of hazardous waste depends on the provisions of Annex 4, part of Law no.211/2011, this annex was repealed by article 1, point 33 of G.E.O. no.68/10.12.2016 amending and supplementing Law no.211/2011 on waste regime.

This way, the actual enactment does not contain a functional definition of the concept of hazardous waste. Given the fact that the concept is used in criminal regulation, and section 11 of Annex 1 of Law no.211/2011 strictly refers to Annex 4, we appreciate that the definition of hazardous waste should not be taken from another law, but, as a last resort, if another provision clearly stipulates the definition, it can be used. As we observed, a definition of hazardous waste can be found in Article 2, point 21 of G.E.O. no.195/2005, regarding the protection of the environment<sup>7</sup>. According to this text, hazardous waste is “waste classified generically under specific waste regulations in these types or categories of waste and that have at least one constituent or a property that makes it hazardous”. This cannot be considered a valid definition, mainly because it refers to special regulation that classifies waste, and, under Romanian law, that classification was made by Annex 4 of the Law no.211/2011, actually repealed.

The concept of hazardous waste was defined by legal literature<sup>8</sup> as “waste arising from anthropogenic activities that once introduced or maintained in the environment has a negative effect on the environment, people, plants, animals and material goods”.

Other authors<sup>9</sup> state that for the management of waste a list containing all types of waste, including hazardous waste must be established, but the author does not refer to an existing list.

An environmental law dictionary<sup>10</sup> defines hazardous waste as “toxic, inflammable, explosive, infectious, corrosive, radioactive, or other similar types of waste that once introduced or maintained in the environment can harm the environment, plants, animals and people”.

We appreciate that a definition given by a scholar, even of the highest academic rank, cannot replace the incrimination text that can only be provided by the legislator, as an effect of *nullum crimen sine lege* principle.

As a result, none of the provisions stipulated for hazardous waste can be applied at this moment.

The active subject of the offense is not qualified by law, therefore it can be represented by any physical person or legal person held liable according to general criminal law provisions.

In what concerns the normative variant covered by article 63, paragraph 1, letter f, previously quoted, the active subject is, in fact, a legal entity, but since the law does not circumstantiate this distinction, we appreciate that an Operator can also be an individual person, therefore, even a physical person is likely to commit the offense.

<sup>5</sup> Published in the Official Gazette, Part I, no. 630/19.07.2018

<sup>6</sup> Published in the Official Gazette, Part I, no. 37/14.01.2019

<sup>7</sup> Published in the Official Gazette, Part I, no.1196/30.12.2005

<sup>8</sup> D.S.Marinescu, M.C.Petre – *Environmental Law Treaty (original title: Tratat de Dreptul Mediului)*, 5<sup>th</sup> edition, Universitara Publishing House, Bucharest, 2014, pg.535

<sup>9</sup> M.Duțu, A.Duțu – *Environmental Law (original title: Dreptul Mediului)*, 4th edition, CH Beck Publishing House, Bucharest, 2014, pg.442

<sup>10</sup> C.P.Romîțan – *Environmental Law Dictionary (original title: Dicționar de Dreptul Mediului)*, All Beck Publishing House, Bucharest, 2004, pg.59

The main passive subject is the State as guarantor of the integrity of the environment. If a legal or physical person is harmed by the action incriminated under the provisions of art.63, we appreciate that there will not be a secondary passive subject of this crime, but a single passive subject of another offense against patrimony or physical integrity of the victim.

Given the fact that the offenses covered by Article 63 of Law no.211/2011 are incriminated in six variants with different regulations, we appreciate that the premise and the constitutive content must be analyzed for each variant.

Therefore, in what concerns the variant regulated by article 63, paragraph 1, letter a, we shall not encounter a premise situation, and the material element consists of an import operation, namely the placing inside the national borders, regardless of title of goods, as circumscribed in the present situation: appliances, equipment, machinery, materials and products used and waste from abroad. In this regard, we appreciate that the civil context in which the goods were brought into the country is not relevant, as long as they are within the borders of Romania and are likely to alter the quality of the environmental quality in this area.

For the crime to be typical, the material element must have an essential requirement attached, namely that the imported products fall within the category of waste prohibited to import.

A major shortcoming of this regulation is that the forbidden to import waste category is not determinable. As we analyze the Romanian legislation, we observe that the regime of import of waste materials of any kind and other dangerous substances to health and the environment has been established in Romania by Government Decision no.340/20.06.1992<sup>11</sup>, but the quoted decision has been repealed by art.30 of the Government Decision no.228/2004<sup>12</sup> regarding the control of placing unharmed waste inside the borders considering import, active perfecting or transit.

The only actual act designating conditions directly applicable to import of waste is the Regulation (EC) no. 1013/2006 of the European Parliament and of the Council, but an exhaustive list of prohibited to import waste that cannot be found.

In these circumstances, we consider that the provisions of article 63, paragraph 1, letter a of Law no.211/2011 are not likely to be applied in practice, fact that requires the intervention of the criminal legislature in order either to repeal the provision, or to establish a category of waste prohibited to import. Given the need to protect the environment, especially in the last decade, we find it imperative for the Romanian legislator to determine the category previously mentioned.

The second normative variant of the offense can be found in article 63, paragraph 1, letter b of Law no.211/2011.

The prohibited conduct is represented by the failure to take or respect measures in carrying out the collection, transport, recovery and disposal of hazardous waste. The premise situation is the pre-existence of an obligation to take measures or respect the measures taken in processing hazardous waste in the manner established by the law: collection, transport, recovery and disposal.

To establish the existence of the premise situation it is necessary to predetermine the category of hazardous waste. In this regard, we refer to the explanations given when analyzing the material object of the crime and conclude that hazardous waste is defined in section 11 of Annex 1 of Law no.211/2011 as waste which displays one or more of the hazardous properties referred in the Annex no. 4 the law, but Annex 4, inexplicably, was repealed, without being replaced by another list of dangerous properties in accordance to the legal text.

This way, the provisions of article 63, paragraph 1, letter b of the Law no.211/2011 are without practical effect, since the type of waste for which the conduct was prescribed is not determined or determinable by current legislation. As earlier stated, the definition of hazardous waste cannot be borrowed from another law.

The third normative variant is found in article 63, paragraph 1, letter c of Law no.211/2011, and incriminates the trade, abandonment and/or failure to assure the load of waste during transit through the territory of Romania. The regulation has no premise situation and the material element consists of three alternative actions, namely trade, abandonment of waste and failure to assure the load of waste during transit through the territory of Romania.

The imprecise legislative manner used by the legislator cannot be accepted in criminal regulations, because the use of "and/or" in a criminal provision may create the impression that the three actions should be carried out either cumulatively or alternately. We appreciate that such confusion is not compatible with the accuracy and predictability of the incrimination in criminal matters, and the only reasonable interpretation, in our view, concerns the alternative nature of the conducts incriminated, and this way, the only valid conjunction would be "or" instead of "and/or".

We shall not focus on the three actions that represent the *verbum regens* because no deficiencies have been found. The essential requirement attached to the material element states that the prohibited act must occur while the waste is located in Romania.

The fourth normative variant is found in article 63, paragraph 1, letter d that incriminates the refuse to return waste to the country of origin if it was brought into the country for purposes other than that of disposal and for which the competent authority ordered the return.

<sup>11</sup> Published in the Official Gazette, Part I, no.201/18.08.1992

<sup>12</sup> Published in the Official Gazette, Part I, no.189/04.03.2004

The premise situation is represented by the waste return order previously issued by the competent authority. The material element lies in the refusal to return the waste to its country of origin, which can be done either by an action or by omission. Equally, we appreciate that an essential requirement is attached to the material element, and that consists of the purpose of importing the waste, which must be other than its elimination. If the waste was imported with the purpose of disposal, even if the competent authority issued an order to return, the conduct will not fit the incrimination, because the essential requirement is not fulfilled.

The fifth normative variant, found in article 63, paragraph 1, letter e incriminates the action of placing the waste in the country in order to eliminate and/or not used for the purpose for which it has been introduced. The text does not imply the existence of a premise situation. The material element can be achieved by two alternative actions, firstly, the placing of waste on Romanian land and secondly, the lack of using the waste according to the purpose for which it was placed inside the national borders. We appreciate that the foregoing considerations regarding the need to replace the phrase “and/or” with a single conjunction, in this case “or”, are valid for this provision also.

Regarding the first alternative action, consisting in placing the waste inside Romanian borders, we consider that it is irrelevant to determine if the waste was imported in a legitimate or fraudulent manner, as long as the placing on land is done with the purpose of eliminating the waste.

Regarding the second alternative action, consisting in the non-use of waste for the purpose for which it was introduced inside Romanian borders, we appreciate that it is not necessary that the waste was used in another purpose other than that for which it was introduced in the country, because the crime is committed even in the case of non-use, or of storage without the intention of using the waste in any way.

If the waste that constitutes the material object of the crime in this normative variant is introduced inside Romanian borders, and after that it is abandoned, we appreciate that the conduct will fall under the provisions of article 63, paragraph 1, letter c of Law no.211/2011, previously mentioned.

The sixth normative variant is regulated by article 63, paragraph 1, letter f of Law no.211/2011, and incriminates the acceptance by operators of deposits/incinerators for disposal of waste of smuggled waste and/or of waste brought into the country for purposes other than disposal and which could not be used for the purpose for which they were introduced.

As a particularity we observe that the premise situation is also alternative: firstly, it consists in the action to smuggle, namely illegally introduce waste inside the borders of Romania and secondly the legal introduction of waste inside the borders, with a specific purpose other than disposal, if the waste could not be used for the original purpose.

For the same reason as earlier discussed, we believe that the phrase “and/or” must be replaced with “or”, because the acceptance of smuggled waste is not cumulative with the acceptance of legally introduced waste, both being alternative ways, autonomously incriminated by the text analyzed.

The action of accepting waste for disposal implies the agreement of the operator of waste deposits or incinerators. We appreciate that it is not necessary for the operator to proceed to waste disposal for the action to be punishable, because the conduct fits the incrimination if the operator simply accepts the waste, if the premise situation is fulfilled.

The immediate consequence, for all six normative variants is a state of danger caused to social relations regarding environmental protection and public health.

The causality link between the material element and the immediate consequence is directly determined by the material conduct, resulting *ex re*.

The form of guilt required by law, as article 16, paragraph 6 of the Criminal Code states, is the intention, either direct or indirect of the perpetrator, which we find suitable for all six variants of article 63, paragraph 1. The motive and purpose of the perpetrator are relevant only in the judicial individualization of punishment.

Although preparatory acts are possible if the material element is done by an action, they are not incriminated. The attempt is criminalized for each variant normative under article 63, paragraph 2 of Law no.211 / 2011, but we appreciate that it is possible only if the conduct of the perpetrator consists of an action.

### 3. Conclusion

In these final paragraphs, we have cumulated our proposals for improving the legislation, which will be stated separately for each normative variant.

In order to effectively enforce the provisions of article 63, paragraph 1, letter a, *de lege ferenda*, we consider it necessary that the legislator establishes a basis for determining the category of prohibited waste import by regulating its content either by an amendment to Law no.211/2011 or in a distinct normative act, expressly determined by Law no.211/2011.

In order to apply the provisions of article 63, paragraph 1, letter b, we appreciate that the legislator must promptly define the concept of “hazardous waste” by law, possibly by setting up the reference system for this type of waste under Annex 4 of the Law no.211/2011, which would not imply other legislative changes. By our appreciation, the easiest way to fix this deficiency would be to re-enact the last version of Annex 4, before it was repealed.

In what concerns the regulation found in article 63, paragraph 1, letter c, we appreciate that *de lege ferenda*, the legislator must replace the confusing manner of incrimination with an accurate provision, that will not raise issues of predictability, therefore, we

propose the replacement of the term “and/or” with a single conjunction, namely “or”.

The same considerations apply for the provisions of art. 63, paragraph 1, letter e where we propose the replacement of the term “and/or” with a single conjunction, namely “or”, because the purpose of the legislator was not to cumulate two prohibited actions in order for the perpetrator to be held liable. We believe that the only reasonable interpretation is to accept that the text incriminates two distinct, alternative conducts, therefore, the phrase “and/or” must be replaced with a single conjunction, namely “or”.

With a slight amendment, the same considerations are valid for the provisions of art. 63,

paragraph 1, letter f, where the acceptance of smuggled waste cannot be seen as cumulative with the acceptance of legally introduced waste, in order for the conduct to fit the incrimination, but this interpretation must not lead to plural offenses if both types of waste are accepted by the operator.

As we have managed to show, the regulation of article 63 of Law no.211/2011 is far from being functional at this moment, and an intervention of the legislator is necessary. Equally, some of the issues analyzed, that made the legislative proposals earlier mentioned possible, are an effect of uncorrelated legislative changes in the past.

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