

Criminal Proceedings Transfer Effects on the Insurance Seizure

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Abstract

In order to avoid parallel proceedings, if it is established that criminal proceedings concerning the same facts and involving the same person are pending in a member state of the European Union or in a third country, the Romanian judicial authorities shall consult with the judicial authorities of the state concerned for the exercise and continuation of a single criminal proceeding in Romania or in another state.

If it is established that the criminal procedure is exercised and continued in another state, it is necessary to establish which are the activities that the Romanian judicial authorities carry out in the situation in which the measure of insurance seizure was ordered in the case.

The purpose of this paper is to clarify, as far as possible, which are the activities that Romanian judicial authorities must carry out, in cooperation with competent foreign authorities, in order to recover the damage caused to Romanian state by the foreign citizens who did not pay the customs duties for the goods introduced in Romania.

That is why I consider that it is necessary to know how the damage will be recovered, in the situation where the measure of insurance seizure is not maintained.

Key words: criminal proceedings transfer, insurance seizure, damage, smuggling crime, customs duties

J.E.L classification: K14

1. Introduction

If there are reasonable grounds to believe that criminal proceedings are taking place in another state concerning the same facts and involving the same person, the prosecutor or the court may contact the competent authority of the other state directly or, in the case of non-member states, through the competent central authority, to confirm the existence of such parallel procedures, in order to initiate consultations (art. 125 alin. 1 from Law no. 302/2004 on international judicial cooperation in criminal matters).

The purpose of these consultations is to reach a consensus aimed to avoid the negative consequences that could result from such parallel proceedings, which may, where appropriate, lead to the exercise and continuation of a single criminal proceeding in the Romania or in another state (art. 125 alin. 4 din Law no. 302/2004)

If it is established that the criminal procedure is exercised and continued in another state, the Romanian judicial authorities should finish the criminal action having the obligation to rule, if there are precautionary measures in question, if they maintain or lift the precautionary measure that was taken during the trial in order to recover the damage caused by committing the crime.

I consider that it must be clarified how the damage caused by committing the crime will be recovered if the criminal procedure will be carried out in another state, and the precautionary measure that guarantees its recovery will stop by right.

If for the citizens of the member states applies the provisions of the fiscal procedure code for recovering the damages caused, in the case of crimes committed by third-country nationals, with which Romania has not concluded an agreement on tax law, appears a problem in recovering this damage.

Which is why I will perform the analysis from a theoretical perspective, but especially in terms of aspects of judicial practice.

2. Theoretical background

One of the concepts used is transfer of criminal proceedings which is a European instrument used by member states, on the basis of mutual trust, to organize the prosecution of crimes at international level with the purpose to punish all those who have committed crimes, but also to avoid the risks that may arise as a result of conflicts of competence.

An other concept used in this paper is the one of the insurance seizure which is a measure taken by the competent authority during the criminal investigation to serve as a guarantee of the execution of the fine or legal costs or to repair the damage caused by the crime.

The most important references used in this research are the Law no. 302/2004 on international judicial cooperation in criminal matters which is the national law governing the international judicial cooperation in criminal matters activity in Romania, Romanian Criminal Procedure Code, the Law no. 86/2006 on the Romanian Customs Code published and the Law no. 207/ 2015 - regarding the Fiscal Procedure Code.

In addition I used the Decision no. 1336/2019 of 12/30/2019 HUSI Court to highlight some aspects of judicial practice in the transfer of criminal proceedings effect on the precautionary measure of the insurance seizure.

3. Research methodology

The research methods used to achieve the research objectives are:

- The quantitative method for drawing up a synthesis of normative acts and relevant judicial practice in the research domain;
- Secondary analysis consisting in the own interpretation of all data and information from national and European normative acts, as well as of the situations from the judicial practice in the researched domain;
- Performing an analysis in the light of the national and European legislation and European jurisprudence and after that the application of the allegations obtained in a case judged by the Romanian court.

4. Results

4.1. The transfer of criminal proceedings conditions

Thus, the Romanian judicial authorities may request the competent authorities of another state to initiate or continue criminal proceedings, when the exercise by the requested foreign state serves the interests of a good administration of justice or promotes, in case of conviction, social reintegration and one or more incidents several in certain cases expressly and exhaustively provided by law which suppose certain conditions that concern both the investigated person and the committed fact.

Regarding the person under investigation it is required to have a residence in the requested state, to execute a custodial sentence, to be the subject of a criminal investigation for the same or related acts and

the execution of a possible conviction in the requested state is likely to improve the possibilities of her social reintegration.

Regarding the committed fact it is necessary that the transfer to be justified by the interest of discovering the truth and, in particular, if the most important evidence is found in the requested state. Also, the presence of the investigated person at the hearings in the criminal proceedings investigated by the Romanian judicial authorities cannot be ensured, even when there would be the possibility of being heard by videoconference, but can be ensured in the requested state and in case of a conviction could not be enforced in Romania, even when there is a possibility of making an extradition request or issuing a European arrest warrant, the requested state being able to do so (art. 126 alin.1 din Law no.302/2004).

4.2. Insurance seizure

The competent authority to take the precautionary measure of seizure is the prosecutor during the criminal investigation, respectively by reasoned decision by the judge of the preliminary chamber or the court, ex officio or at the request of the prosecutor, in the preliminary chamber procedure or during the trial, then when there is a reasonable suspicion as to the existence of a concrete danger to hide, destruction, alienation or evasion of the pursuit of property which may be subject to special confiscation or which may serve to guarantee the execution of the fine or legal costs or to repair the damage caused by the crime(art. 249 Romanian Criminal Procedure Code).

The court must decide on the goods it seized, either ordering their confiscation or seizing them. If he has not decided on the seizure, it shall stop by right, when the trial is finished.

The rules on assistance for the recovery in Romania the claims established in another member state, or the debts established in Romania are provided by the Romanian tax procedure code (art. 310 - Law no. 207 / 2015 - regarding the Fiscal Procedure Code).

Therefore, for the purpose of recovering this claims, the requested authority shall provide any information which it considers relevant to the requesting authority. (art.314 - Law no. 207 of July 20, 2015 - regarding the Fiscal Procedure Code).

Thus, if it is permitted by its national law and in accordance with its administrative practices, at the demand of the requesting authority, the requested authority shall take the necessary precautionary measures to ensure recovery if the claim or title permitting enforcement in the requesting authority is contested at the time the demand is made or if the claim is not yet the subject of a title permitting enforcement in the requesting authority, to the extent that precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the requesting authority.

However, according to tax law in relation to third countries, with the respecting of the agreement with the third country concerned, if the competent authority in Romania receives from a third country information that is predictably relevant for the administration and application of Romanian tax legislation, the competent authority in Romania may communicate this information to the competent authorities of the member states for which it may be useful and to any applicant authority in another member state (art. 307 - Law no. 207 of July 20, 2015 - regarding the Fiscal Procedure Code).

4.3. Criminal proceedings transfer – cause that prevents the initiation of criminal proceedings or the exercise of criminal proceedings

The transfer of criminal proceedings is provided as a preventive cause initiating criminal proceedings according to the Criminal Procedure Code (art.16 lit. j).

If there is a transfer of criminal proceedings, the criminal action is extinguished, for which, if it occurs during the criminal investigation, the prosecutor will order the dismissal and if it takes place during the trial, the court will order the acquittal.

4.4. Resolving civil action in criminal proceedings

In trial, the court decides by the same decision on both the criminal action and the civil action. If a transfer of proceedings with another state occurs and the criminal action is extinguished, the court leaves the civil action unresolved. In order to continue the civil action, the civil part has the possibility to address the civil court.

4.5. Insurance seizure in the case of goods for which customs duties must be paid

The European Court of Justice has decided that, in the case involving goods for which customs duties are paid, in a civil proceedings, in order to eliminate customs debts, the seizure of goods illegally brought into the customs territory of the European Union must take place at the first customs office situated within that territory.(The decision from 02.04.2009 given in criminal case C-459/7 - www.curia.europa.eu, accessed at 01.06.2020)

At the same time, an unlawful introduction into the territory of the community of goods subject to import duties cause a customs debt.

Last but not least, a customs debt is the mandatory to be paid by a person for the amount of import or export duty.

The European Court of Justice decision in case 24-68 of 1 July 1969 having as parties the Commission of the European Communities and Italy, stated that all duties, whatever their application, which are imposed unilaterally on goods borders, without the strict customs regime, are duties with equivalent effect. Any pecuniary obligation, regardless of the size, destination and method of application, which is imposed unilaterally on domestic or foreign goods, for the simple reason that they cross a border and which is not a customs duty in the strict sense of the word, is a tax with equivalent effect.

As a result, it follows that the European Court of Justice decision refers also to the excise duty and value added tax applied on goods introduced in Romania through the Romanian border are duties with an effect equivalent to customs duties, being included in import duties.

In accordance with art.206 / 5 letter b of Law 571/2003 on the Fiscal Code, excisable products are subject to excise duties at the time of their import into the territory of the European Union and excise duties become due at the time of release for consumption and release for consumption represents the import of excisable products even irregularly.

According to the article 131 letter a of Law 571/2003 on the Fiscal Code the import of goods represents the entry into the territory of the Community of goods that are not in free circulation within the meaning of Article 24 of the Treaty establishing the European Community. (www.eur-lex.europa.eu, accessed at 01.06.2020)

According to art.136 paragraph 1 of Law 571/2003 on the Fiscal Code, it is provided that if at import the goods are subject to customs duties, agricultural taxes or other similar community taxes established as a result of a common policy, the generating fact and the chargeability of the value added tax shall occur on the date on which the chargeable event occurs and the chargeability of those community taxes.

The fact of confiscation of the goods that were the object of the crime does not equate to the extinguishment of the customs debt, born as a result of their introduction in Romania and implicitly on European Union.

In this sense, it follows according to art.224 of Law 86/2006 on the Romanian customs code that the customs debt on importation arises from the illegal introduction in Romania of goods subject to import duties, which arises when the goods are introduced illegally .

Regarding European legislation, Union Customs Code, in art.202 shows that an illegal introduction into the customs territory of the community of goods subject to import duties causes a customs debt.

4.6. Judicial practice aspects

Regarding precautionary seizure, its application in criminal cases involving the crime of smuggling is essential, given that such an offense involves a customs debt on import caused by the unlawful introduction into the customs territory of the European Union of goods subject to import duties.

In the event of a transfer of criminal proceedings with another state in a criminal case involving the smuggling crime and in which the seizure of insurance has been instituted in order to ensure recovery of the damage caused to state budget, it must be decided if the measure of precautionary seizure it is maintained after the transfer has taken place.

At the same time, I consider it necessary to establish, in the situation where the measure of insurance seizure is not maintained which is the way of ensuring the recovery of the damage caused.

Specifically, by the request registered at the Huși District Court on 07.05.2019, the plaintiff S.C. DTS - S .RL, (in contradiction with the defendant REGIONAL GENERAL DIRECTORATE OF PUBLIC FINANCES IAȘI - as a civil party in the criminal proceedings in which investigations were carried out under the aspect of committing the crime of smuggling) brought an action for legal termination of the precautionary seizure measure applied by the prosecutor's order. (Decision no. 1336/2019 of 12/30/2019 HUȘI Court- www.lege5.ro, accessed at 20.04.2020)

In fact, the applicant stated that the defendant HV, a Moldovan citizen, former administrator of the company had been investigated for smuggling crime.

Thus, it was established that the defendant H. V. organized a number of four acts of smuggling, on which occasion, quantities of smuggled cigarettes were illegally introduced in Romania, which caused a damage in value of 1,307,817 lei.

In order to recover the damage, the case prosecutor instituted the measure of insurance seizure on the defendant's property, and the Iași Regional Customs Directorate became a civil party in the criminal proceedings instituted against him.

However, by conclusion, the Huși District Court admitted the request for transfer of the criminal procedure of the authorities from Republic of Moldova to continue the investigations against the defendant HV, fact for which, the prosecutor attached to the Huși district court ordered the case to be closed and transferred to the authorities of the Republic of Moldova.

The prosecutor's order did not make any mention regarding the maintenance of the measure of precautionary seizure against the defendant HV, although it is mandatory to indicate if the precautionary measure that was taken during the criminal investigation it is maintained or not after that the proceeding transfer took place.

In this case, the prosecutor's order did not order the maintenance of the measure of previous insurance seizure also established in the file.

Also, there is no evidence in the file that the injured person would have become a civil party, nor that he would have addressed the civil court within 30 days from the communication of the dismissal solution.

For these reasons, the court admitted the request made by the plaintiff and found that the precautionary seizure measure instituted by the prosecutor's order attached to the Huși District Court on the defendant's property had stopped.

5. Conclusions

As a result of the research I identified issues the Romanian legislation did not defined regarding the form of judicial cooperation analyzed and which have a decisive influence on his validity, that is why I consider it appropriate to amend the legislation and to add legal possibility to recover the damage when a proceeding transfer took place.

Therefore, in the event of a criminal proceedings transfer, the Romanian judicial authorities have to finish the criminal action, having, at the same time, the obligation to decide if the precautionary measure that was taken during the criminal proceeding it is maintained after that the proceeding transfer took place.

If the investigators does not decide on the measure of precautionary seizure, the person concerned may apply to the civil court that have to order that the measure has no longer effect.

Regarding the guarantee of recovery of the damage caused to the Romanian state by committing the crime in case the precautionary measure guaranteeing its recovery will stop, the national legislation establish only a solution for the citizens of the member states of the European Union to which can be applied the provisions of the Fiscal Procedure Code for the recovery in Romania of claims established in another member state of the European Union, as well as assistance for the recovery in another member state of the European Union of claims established in Romania

The problem in recovering the damage arises in the case of crimes committed by third-country nationals, with which Romania has not concluded an agreement on tax law, for which there is no legal possibility to recover the damage in this case.

6. Reference

- * * * *Commented on Criminal Procedure Code*, 3rd edition revised and added. Bucharest: Hamangiu Publishing House, 2017;
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