

Harmonization of Albanian legislation in smuggling as a customs violation with the EU Acquis

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Abstract

Albania entered into a Stabilization and Association Agreement with the European Union (SAA) in 2006. It requires that legislation and legal policies in Albania be approximated with the EU acquis. Article 97 of the SAA specifically requires this approximation in the fields of customs, a process which Albania has started in years. The current Albanian Customs Code adopted in 2014, is generally in line with the Union Customs Code. It should though be considered that the part of legislation regarding customs violations cannot occur, as far as the Union Customs Code contains no provisions regarding customs violations. This is still considered in the jurisdiction of Member States and is regulated through internal national legislation. EU has still adopted two important laws to protect its financial interests: the Irregularity Regulation and the Community Fraud Convention. Also, a recent Directive (EU) 2017/1371 foresees the substitution of the Community Fraud Convention in the near future. This article provides some insights of the existing regulation in Albanian of smuggling as one of the main types of frauds, compared to these acquis.

Keywords: Criminal Code, Customs Code, fraud, smuggling, harmonization, EU acquis.

Introduction

With political and economic changes in our country after 90's, major changes occurred in trade relations. Economic needs and gaps demanded the development of trade relations, Customs relations also needed to be developed to be capable to cope with the flow of the increasing trade.¹

In parallel with the development of trade, sophisticated illegal actions took place in the area of customs, in order to create wealth benefits. These actions cause financial damage to the state and 'pockets' of citizens². They also cause to the state and society non-financial damage and an incalculable moral damage. These violations have existed in rich and poor countries, in economically consolidated and in transition countries, in countries with a market economy and centralized one, capitalist and

¹ On a history of Customs development in Albanian' see: Jano J., 'Historia E Doganave: Politikat Doganore të Shtetit Shqiptar në vitet 1912-2002', Publishing House ASD, Tirana, 2002.

² For instance, '2020 Status Report on IPR Infringement' states that: "according to a study carried out by the EUIPO and the Organisation for Economic Co-operation and Development (OECD) in 2019, estimates of IPR infringement in international trade in 2016 could reach as much as 3.3 % of world trade. Up to 6.8 % of EU imports, or EUR 121 billion per year, are fake goods. Both sets of figures are significantly higher than those found in the previous edition published by the two organisations in 2016, indicating that the problem has become even more serious in recent years." See: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/m_observatory/doc_uments/report_ms/2020_Status_Report_on_IPR_infringement/2020_Status_Report_on_IPR_infringement_en.pdf, published by European Union Intellectual Property Office, 2020, ISBN 978-92-9156-277-0.

communist countries, in democracy and dictatorship. Its forms and dimensions vary. The stronger becomes the fight of the state against this phenomenon, the more sophisticated become the ways of achieving it.³

It is the functional duty of the Albanian Customs Administration, tax structures, police, prosecutors and judiciary to implement the legislation in force in order to strengthen the fight against such phenomena detrimental to the economy, welfare and political stability of the country. To achieve this goal as better as possible, numerous efforts took place to amend the legislation. Significantly important efforts are those on aligning the native legislation with that of the European Union's (EU) customs legislation. Especially after the Stabilization and Association Agreement with the EU (SAA), approximation of the legislation and legal policies in Albania with those of the EU is a legal obligation.⁴

The obligation for approximation in the customs field is foreseen in Article 97 of the SAA, which reads:

"The Parties shall establish cooperation in this area with a view to guaranteeing compliance with the provisions to be adopted in the area of trade and to achieving the approximation of the customs system of Albania to that of the Community, thereby helping to pave the way for the liberalization measures planned under this Agreement and for the gradual approximation of the Albanian customs legislation to the acquis.

Cooperation shall take due account of priority areas related to the Community acquis in the field of customs"

Albania was supported through several projects in this cumbersome process.⁵ Regional agreements, including CEFTA protocols (i.e. such as the Additional Protocol 5), require harmonization with EU legislation, in support of the customs policy harmonization of the legislation.⁶

The country had already started the legal approximation even before the entrance into force of the SAA. The *First approximation* of the Albanian Customs Code occurred in 1999, Law no. 8449, of 27 January 1999 "Customs Code of the Republic of Albania",⁷ with the Community Customs Code.⁸ The *Second approximation* of the customs legislation started with reference to the Modernized Customs Code (MCC) of the EU,⁹ which remained as a draft considering that the MCC never entered into force.¹⁰ The *last approximation* is that of the Albanian Customs Code currently into

³ For instance, the narco trafficking criminal organizations are using submarines for cocaine trafficking. See: "Rare Electric Narco Submarine Seized in Colombia" by: H I Sutton, November 16, 2020 (link: <https://news.usni.org/2020/11/16/rare-electric-narco-submarine-seized-in-colombia>) and "Colombia's narco-submarines - a photo essay" (link: <https://www.theguardian.com/world/2020/mar/23/colombias-narco-submarines-a-photo-essay>).

⁴ Law No. 9590, dated 27 July 2006 "On the Ratification of Stabilization Association Agreement between Republic of Albania and European Communities and their Member States" (Official Journal 87, 14.8.2006).

⁵ See as an example: http://www.dogana.gov.al/doc/Projekt_binjakezimiRI.pdf.

⁶ <https://cefta.int/legal-documents/>

⁷ Published in the Official Journal 4, dated 19.02.1999.

⁸ Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (Official Journal L 302, 19.10.1992).

⁹ Regulation (EC) No 450/2008 of the European Parliament and Council, dated 23 April 2008 on the Community Customs Code (Official Journal L 145, 4.6.2008)

¹⁰ The Modernized Customs Code of the EU, although it has been adopted by the Regulation (EC) No 450/2008 of 23 April 2008, never entered into force in EU member states. It was recast by the Union

force¹¹ with the Union Customs Code (UCC).¹²

The approximation process should not only be considered a legal obligation, but also indispensable due to many reasons, including:

- the tendency of customs procedures is going to fully electronic processing
- increasing measures aiming at facilitating trade,
- the application of simplified procedures is required,
- Customs are transforming from a simple revenue collection agency towards a national security one.

It must be emphasized that the process of approximation generally consists of aligning customs procedures, *i.e.* technical aspects of customs operation, although this is not true for all aspects. The part of legislation regarding customs violations cannot occur, as far as the UCC contains no provisions regarding customs violations. This still is considered as the jurisdiction of Member States and is regulated through internal national legislation.¹³ If we analyze the structure of the Albanian Customs Code we see that it generally corresponds to the structure of the UCC, but with one important difference: the Union Customs Code lacks provisions regarding violations of the customs area. This means that the Albanian legislation, in the section that deals with the customs violations at the time of its drafting, had not been reviewed from the perspective of the Union Customs Code¹⁴. Customs violations is a critical part of the legislation that needs revision, and this should be done taking into consideration the Albanian reality. The customs' relations violations is analyzed below both from an administrative as well as criminal perspective. Analysis of 'necessary criteria' to be adopted in the process of the legal revisions in this regard are presented from the perspective of the approximation process with the European *acquis*.

2. Customs violations regulations in EU – minimal conditions to be respected

2.1. Customs violations according to the EU customs legislation

The functioning and development of international trade has been a priority of EU member states. With the creation of the European Common Market, the elimination of internal borders of member states was assured, giving thus a great incentive to the free movement of goods and citizens. Elimination of internal barriers (this should not be understood only as elimination of borders), and also the limitation of administrative barriers, allowed EU member states to develop their trade and act as a 'single state'. The application of a common external tariff in relation to third parties

Customs Code.

¹¹ Law No 102/2014 "Customs Code of the Republic of Albania", as amended, published in the Official Journal no. 134, dated 22.08.2014.

¹² Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (Official Journal L 269, 10.10.2013).

¹³ Article 42 of the Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code. See at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0952&from=EN>

¹⁴ However, the draft Directive of the European Parliament and the Council 'On the legal framework of the Union for customs offenses and sanctions' (COM (2013) 884) served as reference for drafting provisions on administrative customs misdemeanours. See: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0884R\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0884R(03)&from=EN)

and those of the same procedures enabled that.

The Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (UCC) is the legal basis necessary to determine all procedural rules related to the importation, exportation, transit, etc., thus defining the functioning of the EU as a 'single state' in relation to foreign trade. These Union procedural rules replaced different national rules, stipulating thus a common position in this regard. As mentioned above, the Union Customs Code does not contain provisions relating to customs violations. As per Article 42, point 1, of the Regulation "*each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive,*" leaving this competence to EU Member States. Similarly, Article 44 'Right of appeal' (Title VI 'Appeals') of the UCC, while providing for the right of any person '*to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually*', states that such '*appeal must be lodged in the Member State where the decision has been taken or applied for*'. Clearly, it is entirely in the competence of each EU Member State to apply national legislation on both customs violations and court procedures (whether administrative or criminal). This has been the case even when with the previous Community and Modernized Customs Codes; the UCC changed nothing in this regard.

The UCC, in Section 5 "Penalties", Article (21) entitled "Application of penalties" provides that "*Each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive*". While many novelties are foreseen in the Union Customs Code to modernize customs procedures,¹⁵ this is not the case for customs offences and this seems not to be in the near future plans. EU member states have special laws on customs issues, which also regulate customs violations in detail. As a result in customs violations, the place at which the customs violations occur plays an important role, as the penalties are governed by the law of that Member State.¹⁶ For example, in addition to the criminal legislation which in all EU member states provide regulates financial crimes, in Italy this law is the Testo Unico delle disposizioni Legislative in materia Doganale (T.U.L.D.),¹⁷ in Bulgaria it is the Customs Act,¹⁸ or in Germany these are the German Customs Administration Act (Zollverwaltungsgesetz, ZollVG)¹⁹ and the German

¹⁵The UCC provides for a range of facilities for economic operators, regarding to the simplified procedures, authorized economic operators, electronic customs processing declaration, therefore, creating more convenience for the economic operators and the development of customs procedures. As a result, present customs procedures are considered to be as the 'old fashioned' and they are very complicated and are based on the use of written documents.

¹⁶ See also: 'Customs Penalties in Germany', by Lux M., Möller Th., Pickett E. & Retemeyer A., published at Global Trade and Customs Journal, Volume 13, Issue 7&8, 2018, Kluwer Law International BV, The Netherlands.

¹⁷ Legislative Decree of the President of Republic No. 43 dated 23 January 1973, "Testo Unico delle disposizioni Legislative in materia Doganale" (Official Journal 80, 28.03.1973).

¹⁸ Customs Act, 'Закон за митниците', SG 15, dated 6 February 1998 (Official Journal dated 1.01.1999).

¹⁹ <https://www.gesetze-im-internet.de/zollvg/BjNR121250992.html>.

Fiscal Code (Abgabenordnung, AO)²⁰. Finally, it can be said that even though the European Union does not regulate the area of customs violations, two conventions are adopted in EU for the purpose of protecting Union interests in a higher level than that embodied in each Member State legislation.

2.2. Two EU conventions on community offences

Regarding the issue of Community offences two Conventions were approved, the Council Regulation on the protection of the European Communities financial interests (the Irregularity Regulation)²¹ and the Community Fraud Convention on the protection of the European Communities' financial interests (the Community Fraud Convention)²². A recent development on the fight against fraud to the Union's financial interests by means of criminal law is that of the adoption of Directive (EU) 2017/1371 foreseeing the substitution of the Community Fraud Convention once member States take required measures to adopt their legislation in compliance with the Directive.²³

The Irregularity Regulation regulates administrative penalties and it is issued under Community pillar I, which mainly includes the Customs Union, Internal Market, Common agriculture policy and Common commercial policy. The Community Fraud Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relates to the criminal penalties. It is issued under Community pillar III, which includes cooperation in judicial and internal matters and is based on the cooperation among the Member States governments. Before the Community Fraud Convention entered into force, the provision creating obligations to the Member States in respect of tackling frauds affecting the financial interests of the Community was Article 209a of the Treaty establishing the European Community.²⁴ After the Amsterdam Treaty, the matter in question is regulated by Article 280(2), which reads that *Member States shall take the same measures to counter fraud affecting the financial interests of the Community*

²⁰ https://www.gesetze-im-internet.de/englisch_ao/.

²¹ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, (published in No L 312/1995 of the Official Journal of the European Communities). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995R2988>.

²² Referring the Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (published in No C 316/1995 of the Official Journal of the European Communities), at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31995F1127%2803%29>.

²³ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'On the fight against fraud to the Union's financial interests by means of criminal law'. See at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=EN>.

²⁴ See: <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001> or Official Journal C 191 of 29.7.1992.

"Article 209a

Member States shall take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests.

Without prejudice to other provisions of this Treaty, Member States shall coordinate their action aimed at protecting the financial interests of the Community against fraud. To this end they shall organize, with the help of the Commission, close and regular cooperation between the competent departments of their administrations."

as they take to counter fraud affecting their own financial interests',²⁵ stipulating a principle of similar protection.

2.2.1 Irregularity regulation

The Irregularity Regulation covers both the European Communities' own resources (primarily equal to customs duties) and the export refunds under the Common agricultural policy. The regulation requires that administrative checks, measures and penalties shall be effective, proportionate and dissuasive to ensure the correct application of Community law in order to provide an adequate protection of the Communities financial interests. One of the important principles included in the Irregularity Regulation is the prevention of (unreasonable) cumulation of administrative penalties and criminal penalties. Article 6, paragraphs 1 and 4 of the Regulation stipulate that:

"... the imposition of financial penalties such as administrative fines may be suspended by decision of the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts.

*... The same situation is repeated when the criminal proceedings have been terminated, except cases when this is excluded because of general legal principles adopted. However, in cases where administrative procedure resumes, administrative authorities should ensure/observe that the penalty be set at least at the same level as those provided in the Community, which should take into account any punishment imposed by judicial authorities to the same person and on the same facts."*²⁶

The Irregularity Regulation is a so called framework instrument including a broad definition of an irregularity, the most important types of the administrative penalties and the provisions on control. The meaning is that the Community rules on administrative penalties would be accomplished in different sectors but, so far, these rules lack in the customs sector.

While it is indisputable that the Customs Community and Common agriculture policy belong to the competence of the Community, discussions might take place on the extent in which the competence on the customs penalties belong to the latter. The fact is that in the customs sector, Member States apply their sanctions, confirming what is foreseen in the Community Customs Code (replaced now by the Union Customs Code), that this falls under their competence. When the Community rules on the administrative penalties in the customs sector lack, the main importance of the Irregularity Regulation is that it stipulates the principle of the prevention of cumulation or *ne bis in idem*, as an important principle regarding the application of sanctions. Also, another point worth mentioning is that of the difference between administrative penalties and withdrawal of the wrongly obtained advantage. These are separately regulated in the Irregularity Regulation, respectively Article 5 and Article 4. This separation is important to notice because a withdrawal of the wrongly obtained advantage is not considered as a penalty.

²⁵ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF> or Official Journal C 321 E of 29.12.2006.

²⁶ See at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995R2988>

2.2.2 Community fraud convention

The purpose of this Convention is to ensure that the criminal laws of signatory states contribute effectively to protect the financial interests of the European Communities. Article 1(1) includes the definition of a fraud affecting the European Communities' financial interests. Both the expenditure (in practice export refunds under the Common agricultural policy) and revenue (in practice customs duties) are taken into account. This Convention obliges Member States to certain specific legislative measures (Articles 1(2) and (3) and Article 2).²⁷

According to the Convention, each member state should take appropriate and necessary measures to include the preceding paragraph in their national criminal law in such a way that the act referred to it constitutes a criminal offense. Also, member states are required to take necessary measures to ensure that the intentional preparation or presentation of misleading statements or documents, incorrect or incomplete that the effects described above, constitute a criminal offense unless it is already provided for in national legislation. Of course, this requires an analysis of current domestic legislation in light of Article 1(1) of Community Fraud Convention. Each member State should take the necessary measures to ensure that the conduct referred to above are punishable by effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition. Serious fraud shall be considered to be fraud involving a minimum amount to be set in each Member State, which may not be exceeding the ECU 50,000. However in cases of minor fraud involving a total amount of less than ECU 4,000 and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type from those laid down above, so administrative penalties. While the definition of the financial fraud remains the same in the current Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'On the fight against fraud to the Union's financial interests by means of criminal law', these limits are set to the amounts of EUR 100 000 and EUR 10 000.²⁸

2.2.3 Approaches to the Albanian customs code with the community fraud convention

Albania needs to harmonize its legislation with the *acquis*, including the Community Fraud Convention or the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'On the fight against fraud to the Union's financial interests

²⁷The definition of a violation of Community financial interests, is as follows:

"For the purposes of this Convention, fraud affecting the European Communities' financial interests shall consist of:

(a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- the misapplication of such funds for purposes other than those for which they were originally granted;

(b) in respect of revenue, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,
- non-disclosure of information in violation of a specific obligation, with the same effect,
- misapplication of a legally obtained benefit, with the same effect".

²⁸ See Article 7 of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'On the fight against fraud to the Union's financial interests by means of criminal law'.

by means of criminal law', as the result of the legal approximation required in the course of EU integration process. This harmonization has already started. In the light of such harmonization, it is also to be considered that, where the Criminal Code, as well as customs legislation, has specific provisions for violations that adversely harm the financial interests of the state, the field of application of these provisions (because of the principle of assimilation requiring that EU interests should be protected, at least, with the same efficiency as the national financial interests) should be extended in order to handle those violations where the EU financial interests are adversely affected.

The Albanian legislation, depending on the type of smuggling carried out, uses sanctions such as a fine or imprisonment. The Albanian Criminal Code regulates fraud in its Article 143,²⁹ and smuggling in Articles 171 - 179/ç. As that the later articles constitute *lex specialis* in smuggling cases, those are applicable in customs related crimes of smuggling. As per the Criminal Code, smuggling is punished with imprisonment up to maximum 10 years, with punishments varying in different forms.³⁰ In addition, the Albanian Customs Code regulates smuggling in its articles 266-267.³¹ This Code foresees that administrative sanctions are applicable in cases of smuggling disregarding the criminal sanctions. Article 272 of the Albanian Customs Code stipulates that administrative sanctions are applicable in cases when damages are less than a limit value of 5 million ALL and the party has requested the administrative settlement of smuggling, in addition to other conditions foreseen. Thus, the Albanian legislation is more or less in line with the maximum limit of 50,000 ECU provided for in the Convention on Protection of the European Communities financial interests, although it can be argued that this legal provision does not take into consideration internal conditions and situation in Albania, where, referring to the administrative practice in the customs administration this amount is a high one.³² Albanian Article 2(1) of Community Fraud Convention does not foresee any adjustment to special provision in domestic legislation for serious behavior. It would be enough for customs frauds to abstain in the amount of at least ECU 50,000 to make possible member states to apply criminal punishment with imprisonment, applying so, directly the community provision. Also, if the article requires that member states will be provided a provision to fix the serious fraud, it can also predict a different limit, but not more than 50,000 ECU. Finally, it should nevertheless be noted that this is not in line with the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 'On the fight against fraud to the Union's financial interests by means of criminal law', where this limit is even higher. As this Directive is not yet applicable in EU, Albania is not under the obligation to harmonize it.

Article 2(2) of the Community Fraud Convention foresees that in cases of minor fraud when the amount of (unpaid) customs duties is less than 4,000 ECU and not involving particularly serious circumstances under its laws, a Member State may provide for penalties other than criminal ones; therefore in this case administrative sanctions would be sufficient. This limit is not regulated either in the Albanian

²⁹ Section II – Fraud, Art.s 143-150 of the Albanian Criminal Code.

³⁰ See Articles 171 - 179/ç of the Albanian Criminal Code.

³¹ <http://www.dogana.gov.al/dokument/1179/ligj-nr-102-2014-date-3172014-i-ndryshuar>

³² See the number of criminal proceedings and the type and the duration of sanctions published by Ministry of Justice at Annual Statistical Reports 2004 to 2019 (<https://www.drejtesia.gov.al/statistika/>).

Customs Code or in the Criminal Code. Article 272 of the Albanian Customs Code only sets the maximum limit value of 5 million ALL for administrative settlement of smuggling. The limit of 4,000 ECU of the Community Fraud Convention is not taken into account by the legislator when drafting Article 272 of the Albanian Customs Code. The absence of this limit makes it highly difficult to distinguish between a violation that can be classified under the Customs Code and one that can be classified under the Criminal Code, therefore giving space to unnecessary interpretations, both in customs administration and judicial practice. In order to be in line with the EU *acquis*, and to clearly set the borderline lays between administrative and criminal sanctions, Albania needs to include clear legal criteria for these situations.

Conclusions

In the fight against customs violations, our country should improve customs legislation and practices. The approximation with the EU is recommendable and the process is required by the SAA. The analysis shows that the EU has no general arrangements of customs violations. Its member states have discretion to determine the deployment of customs violations and penalties related to these violations. There is no reference model on the way of estimating the violations in customs legislation, criminal or combined, as the reality varies from one country to another, and there is no EU recommendation on this issue but guidelines on the implementation of the minimum limits of administrative and criminal sanctions. In principle, Albania has discretion into adopting its rules or policies on customs violations, still the minimum requirements of the Community Fraud Convention as substituted by the Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law.

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