

Anti Illicit Trade (“AIT”) – main laws existing in Romania and their application¹

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This short analysis² will briefly present the main national legislation in force regarding AIT (as of March 2012), with a focus on those provisions of the Fiscal Code and Customs Code on the matter, as well as on the provisions of the legislation in force sanctioning corruption crimes.

Main national primary³ legislation with respect to AIT (including corruption crimes):

- Romania’s Customs’ Code (“Customs Code”);
- Romania’s Fiscal Code (“Fiscal Code”);
- Government Emergency Ordinance no. 104/2002, as subsequently modified, on marketing of goods under duty free regime (“GEO 104/2002”);
- Law no. 241/2005, as subsequently modified, on prevention and fight against fiscal evasion (“Law 241/2005”);
- Law no. 656/2002, as subsequently amended, on money laundering (“Law 656/2002”).
- Law 39/2003, as subsequently modified, on the prevention and fight against organized crime (“Law 39/2003”).
- Law no. 78/2000, as subsequently modified, regarding the prevention, discovery and sanctioning corruption (“Law 78/2000”).
- Penal Code of Romania, as actually in force (“Penal Code”).

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² The scope of this summary is to briefly present the main national legislation in the field of AIT, with applicability in Romania, with a focus on the provisions of the Customs Code and Fiscal Code on the matter, as well as on those referring to corruption crimes. This article shall not therefore make reference to breaches of duty free legal regime, to fiscal evasion or to organized crime.

This summary shall not enter into a detailed analysis of the legal regime of AIT in all its aspects, focusing on rather outlining the most important issues of the legal AIT regime in Romania.

Along this line, this summary refers only to the national legislation in the AIT area, not also to the community and international one, with direct applicability in Romania.

³ In addition to the main, primary national legislation against AIT, there are a series of secondary legislation, enforced for the application and implementation of the primary legislation, such as Regulations, Methodological Norms, etc.

1. Smuggling crimes

1.1 Typical "smuggling" crime

The Customs Code of Romania sets the legal sanctioning regime of the smuggling actions and qualifies "smuggling" as a crime.

According to article 270 par. (1) of the Customs Code, as modified by the Government Emergency Ordinance no. 54/2010, smuggling represents any action consisting in the introduction into or out of the country, by any means, of any goods or merchandise through other places than those established for customs control, and is punishable with imprisonment for 2-7 years and interdiction of certain rights.

It is also a crime of smuggling, punishable with the same penal sanction as above, the activity consisting also in:

- introduction into or out of the country, through the places established for customs control, by avoiding customs control, of any goods or merchandise which must be placed under a customs procedure, where the customs value of goods or of merchandise smuggled is more than 20,000 RON for those products subject to excise duty and more than 40,000 RON for other goods or merchandise;
- introduction into or out of the country twice within one year, through places set for customs control, by avoiding customs control, of any goods which must be placed under a customs procedure, where the customs value of smuggled goods or merchandise is less than 20,000 RON for excisable products and less than 40,000 RON for other goods or merchandise;
- alienation of any form of merchandise in customs transit.

According to the same article, there will be assimilated with smuggling and will be punished according to par. (1) of article 270 also those activities consisting in: collection, possession, manufacture, transport, acquisition, storage, delivery, marketing and sale of goods which must be placed under a customs procedure, knowing that these come from smuggling or are intended to committing it.

1.2 Smuggling related crimes

i.)

Customs Code regulates two different crimes, strongly related to the typical smuggling crime, as follows:

According to article 272, using, when at the customs authority, of customs documents of transportation or commercial documents which refers to other goods or merchandise or other goods quantities than those presented to customs, constitutes the crime of using false

documents and shall be punished with imprisonment from 2 to 7 years and interdiction of certain rights.

Under article 273, using, when at the customs authority, of false custom documents of transportation or documents of commercial use constitutes the crime of using counterfeit documents and shall be punished with imprisonment from 3 to 10 years and interdiction of certain rights.

Under article 274 of the Customs Code, the acts referred to in art. 270 to 273, committed by one or more armed persons or two or more persons together, are punished by imprisonment from 5 to 15 years and interdiction of certain rights.

The attempt to the crimes mentioned in art. 270-274 shall be punished, as stated in article 275 of the same Code.

ij)

In addition to sanctioning the smuggling activities as crimes punishable with imprisonment under the above mentioned distinctions, smuggling activities generate a series of additional legal sanctions, some of them criminal (smuggling activities may generate or imply the perpetration of distinct crimes), while other may be fiscal and/or just contraventional (or all of them at the same time).

Considering that the special sanctioning regime regulated by the Customs Code is completed by the general provisions in the Penal Code, it results that the smuggled goods shall always be confiscated as a complementary criminal sanction (article 118 letter a) from the Penal Code, corroborated with articles 277 and 278 of the Customs Code).

Depending on its complexity and perpetration facets (number of participants, perpetration modalities, the act of smuggling may at the same time be qualified also as, or may further involve, fiscal evasion crimes (under Law 241/2005, articles 4, 5, 7, 9), money laundering crimes (under Law 656/2002, article 23), special crimes regulated by the Fiscal Code (article 296¹) or a conjuncture of all of part of these specially regulated crimes, together with the smuggling crime itself, regulated as such under article 270 of the Customs Code.

For example, according to article 296¹ of the Fiscal Code, the act of holding, by any person, outside the fiscal deposit, or the act of trading trade made with excisable products subject to marking, without being marked or with false markings, above a certain limit (e.g. 10,000 cigarettes, 400 cigars, etc.) represents a crime and is punishable with 1 to 4 years of imprisonment.

If the smuggling activities are perpetrated in such a way that the perpetrators can be framed into what Law 39/2003 qualifies as "organized criminal grouping" then the forming of such grouping itself is sanctioned as a crime, apart from the actual perpetration of the smuggling crimes.

II. Corruption crimes

i) History – "corruption crimes" before Law 78/2000

Before the enactment of Law 78/2000 on May 18th, 2000, the crimes that are now considered “corruption crimes” were regulated and sanctioned by the currently in force Penal Code, enacted on April 16th, 1997, which replaced the previous Penal Code, enacted on April 23rd, 1973 (articles 254-257).

Articles 254-257 of the Penal Code are located in Title VI – Chapter I, named “Crimes on duty or having relation with the duty”, and sanction the following crimes:

- Article 254 – the crime of taking bribe;
- Article 255 – the crime of offering bribe;
- Article 256 – the crime of receiving unjust benefits;
- Article 257 – the crime of influence traffic⁴.

The only substantial modification to the initial form of these crimes was brought by Law 65/1992 (before the passing of the currently in force Penal Code), which for the first time mentioned them as “corruption crimes”, however without changing the name of the Chapter in the Penal Code accordingly (a Chapter which is to be seen also in the actual Penal Code with the same name as in the previous one, enacted in 1973).

⁴ According to article 254:

*“The official’s act who, directly or indirectly, claims or receives money or other benefits that are not due to him or accepts the promise of such benefits or doesn’t reject it, in order to perform, not perform or delay the accomplishment of an act concerning the duties of his service or to make an act contrary to these duties, shall be punished with imprisonment from 3 to 12 years and interdiction of certain rights.
The act referred to in paragraph. 1, if committed by an official with control attributes, shall be punished with imprisonment from 3 to 15 years and interdiction of certain rights.
The money, values or any other goods that have been the object of bribes will be confiscated, and if they are not found, the convict is obliged to pay their equivalent in money”.*

According to article 255:

*“The promise, the offering or giving money or other benefits, in the ways and purposes stated in Article. 254, shall be punished with imprisonment from 6 months to 5 years.
The act provided in the preceding paragraph is not an offense when the briber was compelled by any means by the one who took bribe.
The briber is not punished if he announces the offense to the authority before the prosecution body has been seized for that offense.
The provisions of Art. 254 Paragraph 3 shall apply accordingly, even if the offer was not followed by acceptance.
The money, values or any other goods are returned to the person who gave them, in the cases shown in par. 2 and 3.”*

According to article 256:

*“he receipt by an official, directly or indirectly, of money or other benefits, after having performed an act in virtue of his position and that was bound by it, shall be punished with imprisonment from 6 months to 5 years.
The money, values or any other goods received shall be confiscated and if they are not, the convict is obliged to pay their equivalent in money.”*

According to article 257:

*“Receiving or claiming of money or other benefits or accepting promises of gifts, directly or indirectly, for himself or for another, committed by a person who has influence or allows to believe that he has influence over an official to induce him to do or not to do an act that falls within his duties, shall be punished with imprisonment from 2 to 10 years.
Provisions of Art. 256 paragraph. 2 shall apply accordingly”*

The “active subjects” of these crimes (save for the crime of offering a bribe and influence traffic) could only be, before the enactment of Law 78/2000, the “clerks”, as such social category was defined under article 147 of the Penal Code, namely any person that exercises, permanently or temporary, with any title, in any position, any duty, paid or not, in the service of a public institution from the ones mentioned under article 145 of the Penal Code (“public clerks”).

Further on, these crimes may be perpetrated also by private clerks and not just public clerks, such last category being defined by article 147 paragraph 2 as comprising any person from the category of public clerks, as well as any other employee of any legal entity, other than those mentioned under article 145 of the Penal Code.

ii) Corruption crimes under Law 78/2000

With only few exceptions, Law 78/2000 does not regulate the corruption crimes as distinctly individualized crimes, but refer to a certain category of crimes that are provided and sanctioned by the Penal Code (under articles 254-257, mentioned above, as well as some other articles) or by other special legal enactments.

Such “basic” crimes are regulated in a more sophisticated way by Law 78/2000 (amended in its turn several times in order to improve the sanctionatory regime related to corruption), in order to meet the evolution of crime and to offer the prosecution bodies more efficient tools to fight corruption in its all intricacies.

Such crimes become “corruption crimes” in consideration of the fact that they are perpetrated by a certain category of persons (detailed by Law 78/2000 in a more detailed, complex way than in the Penal Code, considering the with today’s realities, compared with article 147 of the Penal Code), so that such crimes become more dangerous for the social values protected against such crimes, from the perpetrator’s perspective.

Mentioned should be made that Law 78/2000 shall preeminently apply instead the penal Code, as it is a special law compared to such, in case the “active subject” of the crime falls under the area of application of this Law⁵.

The categories of persons who can perpetrate corruption crimes (as an aggravated form of the “typical” crimes regulated by the Penal Code and other special enactments) are mentioned under article I of Law 78/2000, namely:

- persons holding a public mandate/service in public authorities/institutions;
- persons that have a position of authority within publicly held companies, *regies autonomouses*, other public services;
- persons exercising control attributions, according to the law;

⁵ In this regard, according to article 6 of Law 78/2000:

“Crimes of bribery - under Art. 254 of the Penal Code, bribery - referred to in art. 255 of the Penal Code, receiving undue benefits - referred to in art. 256 of the Penal Code and traffic of influence - referred to in art. 257 of the Penal Code, are punishable by law according to those texts”.

- persons providing specialized assistance to the public bodies mentioned above or who participate in the decision making process or can influence such process;
- persons that have influence, can control or provide specialized assistance, if they participate in operations like: banking activities, currency exchange or loan operations, commercial transactions, either domestic or international;
- persons holding a position in political organizations, syndicate, patronal organization, non-commercial association or foundation.

This enumeration is not exclusive, as there are particular cases where Law 78/2000 mentions about other “public functions” that, once used by the perpetrator in order to commit the crime, frame such crime into a “corruption crime”.

The crimes that are considered as “corruption crimes” by Law 78/2000, from the perspective of the persons perpetrating such crimes, are the following

- “Typical” corruption crimes:

Article 6¹ of Law 78/2000:

“(1) The promise, offering or giving money, gifts or other benefits, directly or indirectly, to a person who has influence or allow to believe that he has influence over an official, to induce him to do or not do to an act entering that enters his duties, shall be punished with imprisonment from 2 to 10 years.

(2) The offender is not punished if he denounces to the authority the offense before the prosecution body has been seized for that fact.

(3) The money, values or any other goods which have been the object of the crime referred to in paragraph (1) shall be confiscated and if they are not found , the convict is obliged to pay their equivalent in money.

(4) The money, values or any other goods are returned to the person who gave them as in the case referred to in par. (2).”

Article 7 of Law 78/2000:

“(1) The act of bribery as provided in art. 254 of the Penal Code, if committed by a person that, under the law, is responsible for finding or sanctioning violations, prosecution or for trial of offenses, are sanctioned with the punishment provided under Article 254 paragraph 2 of the Penal Code concerning the offense made by an official with control attributions.

(2) The act of bribery committed against persons referred to in paragraph one. (1) or against an official with control duties is punishable under Article 255 of the Penal Code, whose maximum is increased by two years.

(3) If the offense referred to in art. 256 and 257 of the Penal Code and offenses under art. 6¹ and 8² of this present law were committed by a person referred to in paragraph. (1) and (2), the special maximum of the punishment is increased by two years.”

Article 8 of Law 78/2000:

"It is a crime under articles 254-257 of the Penal Code, art. 6¹ and 8² of this present Law the crimes in these texts committed by managers, directors, managers, auditors and others with control attributions at commercial companies and national companies, state and any other business".

Article 8¹ of Law 78/2000:

"The provisions of art. 254-257 of the Criminal Code and Art. 61 and 82 of this Law shall apply accordingly to the following persons:

- a) officials or persons operating under a contract of employment or other persons exercising similar functions in a public international organization of which Romania is a party;*
- b) members of parliamentary assemblies of international organizations to which Romania is a party;*
- c) civil servants or persons operating under a contract of employment or other persons exercising similar powers in the European Communities;*
- d) persons exercising judicial functions in the international court whose jurisdiction is accepted by Romania, as well as officials from the grafts of these courts;*
- e) officials of a foreign state;*
- f) members of parliamentary assemblies or administrative authorities of a foreign state."*

Finally, according to article 8² of Law 78/2000:

"The promise, offering or giving, directly or indirectly, money or favors to an official of a foreign state or public international organization, in order to perform or not to perform an act concerning the duties of their employment, to obtain a useful undue in the case of international economic transactions, shall be punished with imprisonment from one to seven years."

Apart from these typical crimes, Law 78/2000 states that some crimes are assimilated to corruption crimes, while others are considered to be "directly related" to corruption crimes, as follows.

- Assimilated corruption crimes:

We will refer in this report to the crimes perpetrated by the persons who have supervision and control attributions over private economic agents.

According to article 11 of Law 78/2000:

"The act of the person who, by virtue of his/her position, attribution or given task, has the duty of supervising, controlling, or liquidating a private economic agent, or to perform for such agent a certain task [...], if his/her deed brings him/her direct or indirect unjust benefits, is punishable by imprisonment from 2 to 7 years".

- Crimes in direct relation with corruption crimes:

A third distinct category of crimes regulated by Law 78/2000 is the one concerning crimes that are in connection with the corruption crimes.

These are regulated by article 17 of Law 78/2000 as follows:

- Hiding the goods resulted from crimes regulated by this Law;
- Association with the purpose of committing the crimes regulated by this Law;
- False and use of false in the view of hiding the perpetration of one of the crimes committed under this Law;
- Smuggling goods resulted from the perpetration of the crimes regulated by this Law, or in the view of realizing the scope sought by such crimes;
- Fiscal evasion committed in relation to corruption crimes;