



The Crime of Fraudulent Crossing of the State Border in Romanian Criminal Law

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Abstract. The criminalization of the fraudulent crossing of the state border protects the inviolability of the border of a particular state. In this paper, the author analyses the object, the subjects, the objective and the subjective aspects of the crime of fraudulent crossing of the state border. Among other things, the possibility of apprehension of the co-perpetrator of this crime, the possibility of apprehension of a concurrence of crimes in the situation when the offender commits the crime both in the form of illegal entry and illegal exit from the country, and the relationship of this crime with other crimes, such as identity fraud, are analysed. The aggravated variants of this crime, which may be committed, inter alia, when the active subject is a foreigner who has been declared inadmissible or who has committed the act in order to evade criminal liability or the execution of a sentence, are also presented. Finally, a ground for non-punishment is presented, taking into account that the crime of fraudulently crossing the state border is not punishable under Romanian criminal law if committed by the victim of trafficking in human beings or minors.

Keywords: state border, co-authorship, forgery of identity, foreigner declared inadmissible, victim of trafficking in human beings or minors

1. Introduction

The crime of fraudulent crossing of the state border was not regulated in Law no. 15/1968 on the old Criminal Code, the crime being criminalized by Art. 70 of the Emergency Ordinance no. 105/2001. On 1 February 2014, Law no. 286/2009 on the new Criminal Code became effective, regulating the crime of fraudulent crossing of the state border in Art. 262.

The crime is regulated in a standard version provided by Art. 262 para. (1) of the Criminal Code, it has two aggravated variants provided for by Art. 262 para. (2) of the Criminal Code, and a cause of non-punishment is regulated in Art. 262 para. (4) of the Criminal Code when the crime is committed by a victim of trafficking in human beings or minors.

2. Presentation of the Crime

2.1. Legal Object

The legal object of the crime is the social relations related to the inviolability of Romania's state border.¹

2.2. Material Object

The crime of fraudulently crossing the state border has no *material object*.

2.3. Subjects of the Crime

The active subject of the crime of fraudulently crossing the state border, in the standard version, is not circumstantial, and it can be any person, Romanian or foreign citizen. In the aggravated version provided for by Art. 262, para. (2) of the Criminal Code, the active subject is circumstanced, being a person who either evades criminal liability or the execution of the sentence, or is a foreigner declared inadmissible or who has been denied the right to enter or stay in Romania. Participation is possible only in the form of instigation and complicity. Co-authorship is not possible given that the crime is a single-perpetrator offence, so if several persons together constitute the material element of the crime, each of them will be liable as perpetrator.² Likewise, if several persons help each other to carry out the material element, there will be no co-authorship, but each perpetrator will be an accomplice or instigator to the act of another perpetrator, each committing a real concurrence of crimes.³

The passive subject is the state, represented by the authority exercising surveillance and control of state borders.

1 Bodea and Bodea, 2018, p. 311; Brutaru et al., 2016, p. 54; Gorunescu, 2013, p. 153.

2 Brutaru et al., 2016, p. 55.

3 Brutaru et al., 2016, p. 55.

2.4. The Objective Side

The material element is the entry into or exit from the country. The act constitutes a criminal offence if the entry into or exit from the country is done through places other than those intended for travellers or, although the entry or exit is done through the State border crossing points, it is done fraudulently.⁴

The crime of fraudulent crossing of the state border implies the existence of special regulations concerning the entry or exit from the country, which contain rules that must be followed (e.g. rules on documents to be presented on entry or exit, rules on mandatory passage through certain control devices and checkpoints).⁵

It has been decided that when a person commits the crime of fraudulent crossing of the state border both by means of entry and by means of exit, they commit two distinct concurrent crimes.⁶

If the entry or exit from the country is made through places other than those intended for travellers, it is irrelevant for the existence of the crime whether the defendant possesses legal travel documents or not.

If the entry or exit is made via the state border crossing points, the crime can be committed by physical concealment of the person or by concealment of their identity (e.g. by presenting false documents to the competent authorities).⁷ In the latter case, the crime of fraudulent crossing of the state border will be committed in conjunction with one or more crimes of forgery⁸ (e.g. forgery of identity, forgery of official documents). Thus, it has been decided that the crime of obtaining a forged passport by replacing the passport holder's photo with his own and attempting to cross the state border into Hungary with the forged passport, fulfils the constitutive content of the crimes of forgery of official documents, attempted forgery of identity, and fraudulent crossing of the state border.⁹

It has been indicated that the place of commission of the crime represents a constitutive element of the crime. Thus, the crime in question can be committed only in the area of the state border, and it is irrelevant whether the land, air, or water border is crossed.¹⁰

4 Bodea and Bodea, 2018, p. 311.

5 Brutaru et al., 2016, p. 56.

6 Timișoara Court of Appeal, Criminal Division, Decision no. 257/1994, *apud* Brutaru et al., 2016, p. 56.

7 Bodea and Bodea, 2018, p. 311; Brutaru et al., 2016, p. 57.

8 Bucharest Court of Appeal, Second Criminal Division, Decision no. 1845/2003, *apud* Bodea and Bodea, 2018, p. 312. For the same conclusion, see Gorunescu, 2016, p. 100.

9 High Court of Cassation and Justice, Criminal Division, Decision no. 1928/2004, *apud* Bodea and Bodea, 2018, p. 312.

10 Brutaru et al., 2016, p. 56; Diaconescu, 1996, p. 104.

The analysed crime can also be identified in a situation where a person has legal documents for transit through the Romanian territory, but, after entering the country, did not continue his journey and remained illegally in the Romanian territory.

It was rightly pointed out that in the situation where the passage through a place other than the one established for control was made in order to pass certain goods with the purpose of evading border control, a concurrence between the crime of fraudulent crossing of the state border and the crime of contraband under Art. 270 of Law No. 86/2006 will be considered.¹¹

The immediate consequence is represented by a state of danger for the state authority in the activity of supervision and control of the crossing of the state border.¹²

The link of causality results *ex re*, from the materiality of the act.

2.5. Subjective Aspect

The crime of fraudulent crossing of state borders is committed with direct or indirect intent. The aggravated variant provided for by Art. 262, para. (2) letter a) of the Criminal Code is committed only with direct intent, requiring the pursuit of a special purpose on the part of the defendant.¹³

2.6. Forms of the Crime

The crime is consummated at the moment of crossing the state border.¹⁴

The attempt is punishable under Art. 262, para. (3) of the Criminal Code.

The crime may be committed in a continuous form.

2.7. Aggravated Variants

2.7.1. *Committing the Crime for the Purpose of Evading Criminal Liability or the Execution of a Sentence or an Educational Measure Involving Deprivation of Liberty [Art. 262, para (1) letter a) of the Criminal Code]*

In the case of this aggravated variant, the harsher punishment of the defendant is justified by the fact that, by committing the crime, he pursues a particular aim, namely to evade criminal liability or the execution of a sentence or an educational measure involving deprivation of liberty. I believe that the purpose of ‘evading

11 Gorunescu, 2016, p. 100; Gorunescu, 2013, p. 157.

12 Brutaru et al., 2016, p. 57; Diaconescu, 1996, p. 103.

13 Bodea and Bodea, 2018, p. 314; Brutaru et al., 2016, p. 57.

14 Diaconescu, 1996, p. 102; Gorunescu, 2013, p. 158.

criminal charges' must be interpreted as meaning that it is not necessary, in order for the aggravated version to be caught, for criminal proceedings to have been brought against the offender at the time of the commission of the crime. Thus, this special purpose is fulfilled both where the perpetrator has committed a criminal offence and fraudulently crosses the state border in order to evade criminal charges before the criminal prosecution authorities have been notified of the crime, and where the perpetrator has been prosecuted or sentenced and, by committing the crime of fraudulent crossing of the state border, they are seeking to evade criminal charges. Where the crime of fraudulent crossing of the state border is committed with a view to evading a sentence or educational measure, a final judgment by which the defendant has been sentenced to a penalty or measure involving deprivation of liberty is required.

2.7.2. Committing the Crime by a Foreigner Who Has Been Declared Inadmissible or Who Has Been Forbidden in Any Way from Entering or Staying in the Country [Art. 262. para. (1) letter b) of the Criminal Code]

In the case of this aggravated variant, the active subject is a 'foreigner', i.e. a person who does not have Romanian citizenship, has the citizenship of another state, or has no citizenship at all.

According to Art. 86, para. (1) of the Emergency Ordinance no. 194/2002, 'the declaration as inadmissible is the measure ordered against a foreigner who has carried out, is carrying out or there are reasonable indications that he intends to carry out activities likely to jeopardize national security or public order'.

Against a foreigner who has committed a crime on the territory of Romania may be ordered on the basis of Art. 66, para. (1) lit. c) of the Criminal Code the additional penalty of prohibition to stay in the territory of Romania, which is enforced on the basis of Art. 99 of Emergency Ordinance no. 194/2002.

According to Art. 8, para. (1) of Emergency Ordinance no. 194/2002:

Foreigners shall not be allowed to enter the territory of the Romanian State if: they are reported by international organizations to which Romania is a party, as well as by institutions specialized in the fight against terrorism that they finance, prepare, support in any way or commit acts of terrorism; there are indications that they are part of organized criminal groups of transnational character or that they support in any way the activity of these groups; there are serious grounds to believe that they have committed or participated in the commission of crimes against peace and humanity or war crimes or crimes against humanity, provided for in international conventions to which Romania is a party.

2.8. Penalties and Procedural Aspects

The standard version of the crime of fraudulent crossing of the state border is punishable by imprisonment from 6 months to 3 years or a fine. The aggravated version provided for by Art. 262, para. (2) of the Criminal Code is punishable by imprisonment from 1 to 5 years. Criminal proceedings are initiated *ex officio*.

The provisions of Art. 262, para. (4) of the Criminal Code regulate a ground of non-punishment. Thus, the act referred to in Art. 262, para. (1) of the Criminal Code, committed by a victim of trafficking in human beings or minors, is not punishable. It has been explained that the rationale for this ground for non-punishment is the protection that must be provided to victims of trafficking in human beings or minors who, when they manage to escape from the oppression and deprivation of liberty to which they are subjected, are in a situation where they have no other option available to them for returning home than to cross the state border illegally.¹⁵ At the same time, I would also add that in the situation where the victim of trafficking in human beings or minors is transported abroad for the purposes of exploitation, for example, by kidnapping or misleading, and later being caught or released by the authorities, it is found that they have previously crossed the Romanian state border fraudulently, it is not morally or fairly punishable for the crime of fraudulent crossing of the state border, when the exit from the country was against the victim's will or their consent was vitiated by fraud.

3. Conclusions

The crime of fraudulent crossing of the state border is currently covered by Art. 262 of the Criminal Code. This crime protects social relations relating to the inviolability of Romania's state border. If the crime is committed in the form of entering or exiting through the state border crossing points, the real identity of the person being concealed, it will be held in concurrence with a forgery crime, such as forgery of identity. If the crossing of a place other than the one designated for control was made in order to smuggle certain goods for the purpose of evading border control, the crime of fraudulent crossing of the state border and the crime of contraband shall be considered concurrent. Where a person commits the crime of fraudulent crossing of the state border both by means of entry and by means of exit, he commits two separate concurrent crimes. The crime provided for in Art. 262, para. (1) of the Criminal Code, committed by a victim of trafficking in human beings or minors, is not punishable.

15 Brutaru et al., 2016, p. 58.

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