

ANALYSIS OF OFFENCES RELATED TO ILLICIT DRUG USE IN ROMANIAN LEGISLATION

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Abstract

The study carries out an analysis of the offences related to illicit drug use stipulated by Articles 4, 5, 8 and 10 of Law no.143/2000 on preventing and combating trafficking and illicit drug use. For the purpose of this analysis, the provisions of Article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 and the provisions of Article 2 of Council Framework Decision 2004/757/JHA of the Council of the European Union laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. At the same time, the study aims to establish whether the provisions of Articles 4, 5, 8 and 10 of Law no.143/2000 on preventing and combating trafficking and illicit drug use have adapted to the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 and the provisions of Council Framework Decision 2004/757/JHA of the Council of the European Union laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

Keywords: *illicit drug use, offences, drugs.*

1. INTRODUCTION

Related to the general drug type, they can be classified into two broad categories

[1]:

- Psychotropic substances, which may be subclassified according to the substances from which they derive, their natural, semi-synthetic or synthetic origin, and depending on the risks to which the psycho-physical effects may arise, and so on.
- Psychoactive substances, most commonly encountered in drug addicts (natural, semisynthetic and synthetic) can also be classified into nine key categories:
 - Alcohol
 - Opiate drugs: latex, morphine, heroin and others
 - Cocaine and its derivatives.
 - Cannabis, marijuana.
 - Hallucinogens.
 - Tranquilizers, sedatives, hypnotics (barbiturates and benzodiazepines).
 - Organic solvents.

- Psychic stimulants (amphetamines).
- Drugs used as medicines.

Another drug classification is the following [2]:

- a. Natural drugs: opium extracted directly from papaver somniferum, morphine, codeine and thebaine, extracted from opium.
- b. Semisynthetic drugs: heroin (diamorphine), hydromorphone (dihydromorphone), dilaudide, oxycodone (Eucodal).
- c. Synthetic drugs with strong effects: methadone (Sintalgon), meperidine, pethidine, demerol (Mialgin).
- d. Synthetic drugs with weak effects: dextropropoxyphene (Darvon), pentazocine (Fortral).

The main drug categories commonly encountered in drug trafficking are the following [3]:

- Opium is the leaked and coagulated latex due to the incision of the capsule of opium poppy - Papaver Somniferum - the drug itself, being the source of most analgesic narcotics (morphine, heroin, codeine). In contact with the air, opium gets brownish to brown. After harvesting, the opium is gathered in lumps or in the form of blocks, and after drying it becomes crumbly, with its soft interior. It has a bitter taste and a smell like ammonia.
- Morphine, the main opium alkaloid, was obtained chemically from crude opium and can be extracted directly, thus without passing through the middle phase of opium production. It is in the form of a fluffy powder, having a colour ranging from dirty white or yellow to brown. Morphine is also a bitter, moisture-soluble substance. Morphine can also be found in tablets or cubes of different sizes.
- Heroin is the most powerful opium alkaloid. It is obtained either by synthesis from morphine or directly from the capsules of papaver somniferum. It is in the form of a very fine, crystalline white powder with a bitter taste, soluble in water and alcohol. At present, heroin is no longer lawfully produced in any country in the world because of the World Health Organization (WHO) ban to be used for therapeutic purposes but continues to be manufactured in clandestine laboratories located in South-East Asia, Western Europe and Mexico, dominating the illicit drug market.

- Cannabis is the plant from which the most popular hallucinogenic drug is obtained, marijuana. The marijuana preparation is a mixture resulting from the extensive maceration of the leaves, flowering heads and fruits of female and male plants of cannabis that have been dried beforehand. Secretion of the female fertilized cannabis plant, a sticky resin, is known as hashish, and from the unfertilized peak of the flower is obtained sinsemilla.
- Cocaine is a powerful stimulant drug of the central nervous system, extracted from Erythroxyton coca leaves, presented as a white, crystalline substance, soluble in alcohol, ether and chloroform. When presented in the form of a powder, it can be consumed by nasal administration but is often administered by intravenous injections. Cocaine can be recognized because it affects the tongue or the tissues of the nasal mucosa, causing it to feel cold, and because of local anaesthesia these tissues are blackened.
- LSD - lysergic acid diethylamide - is a very strong hallucinogenic drug, less than 25 micrograms being sufficient to cause visual hallucinations that may take about 12 hours. Pure LSD is presented in the form of a colourless, odourless and insipid liquid, but by illicit trafficking appears as a dirty white powder, tablets or capsules of different sizes and colours.

At international level, the most important legal instruments to fight drug-related crime are the following: the United Nations Convention on Narcotic Drugs, 1961, the United Nations Convention on Psychotropic Substances of 21 February 1971 and the United Nations Convention against illicit trafficking in narcotic drugs and psychotropic substances of 20 December 1988. The offences related to drug trafficking are provided under article 3 point 1 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

At the European Union level, the most important legal instrument in the fight against drug trafficking is Framework Decision 2004/757/JHA of the Council of the European Union laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. In Article 2 of Framework Decision 2004/757/JHA provides for offences related to drug and precursor trafficking, which resume offences under Article 3 of Convention United Nations against the illicit trafficking of narcotic drugs and psychotropic substances in 1988, with a major difference: the

Framework Decision 2004/757/JHA excludes from its scope the actions that are committed exclusively for the personal consumption of their authors.

The offences related to illicit drug use are provided in Article 4, Article 5, Article 8 and Article 10 of Law no.143/2000 on preventing and combating trafficking and illicit drug use of Chapter II, entitled Penalties for trafficking and other illicit operations with substances under national control.

The text of Article 4 of the Law no.143/2000 provides: “(1) Cultivation, production, manufacture, experimentation, extraction, preparation, transformation, purchase or possession of risk drugs for their own consumption without right shall be punished by imprisonment from 3 months to 2 years or by fine. (2) If the acts provided at paragraph (1) concern high-risk drugs, the penalty is imprisonment from 6 months to 3 years”.

The text of Article 5 of the Law no.143/2000 provides: “Making available, knowingly, with any title, of a dwelling or a place or any other arranged venue in which the public has access for illicit drug use or the toleration of illicit consumption in such places, shall be punished by imprisonment from 2 to 7 years and prohibition of certain rights”.

The text of Article 8 of the Law no.143/2000 provides: “The supply, for consumption, of toxic chemical inhalants to a minor shall be punished by imprisonment from 6 months to 2 years”.

The text of Article 10 of the Law no.143/2000 provides: “The instigation to the illicit high-risk drugs use by any means is punishable by imprisonment from 6 months to 3 years”.

2. THE LEGAL ANALYSIS OF OFFENCES RELATED TO ILLICIT DRUG USE

2.1. *The pre-existing conditions*

- The object of the crime

The special legal object of the four offences related to illicit drug use consists in social relations regarding public health, and the secondary legal object refers to the social relations regarding the physical and mental health of the person in the case of the offence provided by Article 8 of the Law no.143/2000, regarding the minor’s health.

The material object of the offences related to the illicit drug use provided by Article 4 and Article 5 of Law no.143/2000 is constituted by the risk drugs and high-risk drugs

subject to national control. The material object of the offence of supply, for consumption, of toxic chemical inhalants to a minor, provided by article 8 of the Law no.143/2000, is composed of substances that are included in the group of toxic chemical inhalants and which are regulated by Order of the Minister of Health [4]. Regarding the offence of instigation to illicit use of high-risk drugs, provided by Article 10 of Law no.143/2000, in the literature [5] it was underlined that it is not material in nature, and agrees with this point of view because the action by which the material element is performed is not exercised against high-risk drugs of material existence.

□ The subjects of the crime

The active subject of offences related to illicit drug use can be any person who fulfils the general conditions of criminal liability. Criminal participation is possible in all its forms: co-author, incitement and complicity. We highlight that the offence of possessing risk drugs and high-risk drugs for own consumption, provided by Article 4 of Law no.143/2000 cannot be committed in the form of a co-author, as this is a personal offence [6].

The illegal drug use offences can also be committed by a legal person as an active subject of the offence, except for the offence stipulated by Article 4 of Law no.143/2000.

On the offence of possessing risk drugs and high-risk drugs for own consumption, we emphasize that the active subject is qualified, being a natural person consumer or drug addict consumer. Law no.143/2000 makes a distinction between the notion of consumer and the addict consumer. Pursuant to Article 1 (h) of Law no.43/2000, the consumer is “the person who administers or allows the illicit administration of drugs by ingestion, smoking, injecting, nasal administration, inhalation or other means by which the drug may reach the body”. According to Article 1 (i), addict consumer means “a consumer who, as a result of repeated and under necessity or need administration of the drug, has physical and psychological consequences according to medical and social criteria”.

The offences related to illicit drug use have a main passive subject and a secondary passive subject. The main passive subject is the Romanian State, as the general representative of society, protecting the health of its members.

The secondary passive subject is the drug-using individual whose health is affected or can be affected as a result of the offence committed. In the case of the offence of supply, for consumption, of toxic chemical inhalants, provided by Article 8 of Law no.143/2000, the passive subject is qualified, the person whose health is endangered being a minor.

2.2. The constitutive content

The objective side

In the case of the illicit drug use offence provided by Article 4 of Law no.143/2000, the material element of the objective side refers to the following nine activities under para.1 of Article 4: cultivation, production, manufacture, experimentation, extraction, preparation, transformation, purchase or possession of risk drugs or high-risk drugs for their own consumption. We note that these ways of realizing the material element are also found in the offence of domestic drug trafficking, provided by Article 2 of the Law no.143/2000. With regard to the material element, we note that the difference between the offence referred to in Article 2 and the offence referred to in Article 4 consists precisely in the purpose of committing one of the actions incriminated, for own consumption. The offence of internal drug trafficking, provided by Article 2 of Law no.143/2000 and the offence of illicit drug use, provided by Article 4 of Law no.143/2000 are usually committed in real crime contest, these illegal acts being committed both for the purpose of trafficking and for own consumption purposes. The second essential requirement for the existence of the material element of the illicit drug use offence set forth in Article 4 of Law no.143/2000, is that the nine activities are committed without right. We highlight the fact that some drugs can be consumed legally only on medical prescription, which are being consumed only for medical purposes.

In the case of the offence of making available a place for the illicit drug use provided by Article 5 of the Law no.143/2000, the material element of the objective side consists in committing one of the two alternative ways: making available, knowingly, with any title, a dwelling or a place or any other arranged venue in which the public has access to illicit drug use; tolerating the illicit drug use in such places where the public has access.

By making available, knowingly, by any title, of a dwelling or of a place or any other arranged venue in which the public has access, it is understood to offer, for a fee or free

of charge, to one or more persons a dwelling, or any arranged venue for use for illicit drug use.

By tolerating illicit drug use in such places where the public has access means the acceptance or permission of the owner or of the person who only administers that space, of illicit drug use.

In order to exist the offence provided by Article 5 of Law no.143/2000, several conditions must be fulfilled cumulatively [7]:

- the dwelling, the place or any other arranged venue must be open for public access; even in the case of a home, which has an intimate character and is not open to the general public, by making it available to the public, even on an occasional basis, this gets the feature to be open to public access;
- to exist activities of illicit drug use;
- illicit drug use activities must be carried out with the consent or permission of the owner or person who only administers that space;
- people who are offered the venues for meetings have to be illegal drug users.

The offence of making available a space for illicit drug use, provided by Article 5 of Law no.143/2000, is often committed in crime contest with the offence of domestic drug trafficking, provided by Article 2 of Law no.143/2000.

In the case of the offence of supply, for consumption, of toxic chemical inhalants to a minor, provided by Article 8 of the Law no.143/2000, the material element of the objective side consists of doing only one activity, namely the supply of toxic chemical inhalants to a minor for consumption. The activity of delivery can be done free of charge and for a fee. Supply activity should have as object the inhalant toxic chemicals. In accordance with the provisions of Article 1 (f) of Law no.143/2000, the toxic chemical inhalants are “substances established as such by order of the Minister of Health”.

For the existence of the illicit drug use offence stipulated by Article 8 of Law no.143/2000, we are of the opinion that the following conditions must be met cumulatively [8]: the secondary passive subject must be a minor; the material object of the offence must relate to toxic chemical inhalants; supply activity should follow the consumption of toxic chemical inhalants by a minor.

In the case of the offence of instigation to the illicit high-risk drugs use by any means, provided by Article 10 of Law no.143/2000, the material element of the objective side consists of a single action, namely the instigation to the illicit high-risk drugs use by any means.

Instigation is done either orally, through phrases, requests, gestures, by offering money, or is done in writing, or by any means.

The immediate consequence of the offences referred to in Article 4, Article 5, Article 8 and Article 10 of the Law no.143/2000 consists in creating a state of danger for the health of the natural person consuming drugs, which may also be a minor, or the possibility of becoming a drug user.

There must be a causality link between the activity of the offender and the consequence that results from the materiality of the crime.

□ The subjective side

The offence of illicit drug use, provided by Article 4 of Law no.143/2000, is committed only with the guilt form of direct intention, the criminal activity being carried out for own use of risk drugs or high-risk drugs.

The offence of making available a space for the illicit drug use, provided by Article 5 of Law no.143/2000, is committed under the form of guilt of intention, both direct intention and indirect intention. So, in the case of the provision of a space for illicit drug use, the form of guilt with which the offence is committed is only the direct intention, and in the case of tolerance of illicit drug use, the form of guilt with which the offence is committed is direct intention, as well as indirect intention.

The offence of supplying, for consumption purposes, toxic chemical inhalants to a minor, provided by Article 8 of Law no.143/2000, is committed only with the form of guilt of direct intention, since the offender must know the purpose of the supply, this being own consumption.

The offence of instigation to the illicit high-risk drugs use, by any means, provided by Article 10 of Law no.143/2000 is committed only with the form of guilt of direct intention, as the offender foresees and pursues the production of the result by committing the instigation for the illicit drug use.

2.3. The forms of the offence

The preparatory acts are possible, but they are not criminalised and thus they are not punishable.

The attempt is possible and is punished according to the Article 12 of the Law no.143/2000. We note that the attempt is possible and is punished only in the case of the offence under Article 4 paragraph 2 of Law no.143/2000, and in the case of the other offences related to illicit drug use (Articles 5, 8 and 10 of Law no.143/2000), the attempt is not punished.

The consumption of the offences related to illicit drug use takes place at the moment when the material element of the objective side was achieved, which is composed of a series of actions and the immediate consequence happened. Therefore, the offences are consumed when the material element is carried out and the socially dangerous result is produced.

The exhaustion of the crimes related to illicit drug use occurs at the time of committing the last act criminalised by law. The offence can be committed in continued or continuous form.

We note that the offence of illicit drug use, provided by Article 4 of Law no.143/2000, also contains an aggravated form, within paragraph 2 of Article 4, the deed having a more serious character if the material object of the offence is made up of high-risk drugs.

Another aggravating form of the offences related to illicit drug use, only from the Article 8 and Article 10, is that provided by Article 11 of the Law no.143/2000, when the two offences caused the death of the victims.

2.4. Modalities

The offence under Article 4 of Law no.143/2000 presents the following nine normative modalities: cultivation, production, manufacture, experimentation, extraction, preparation, transformation, purchase or possession of risk drugs or high-risk drugs for their own consumption, without right.

The offence provided by Article 5 of Law no.143/2000 presents the following normative modalities: to make available, knowingly, by any title, a dwelling or a place or any other arranged venue in which the public has access for illicit drug use; tolerance of illicit drug use in such places where the public has access.

The offence provided by Article 8 of Law no.143/2000 presents the following normative modality: supply, for consumption, of toxic chemical inhalants to a minor.

The offence provided for in Article 10 of Law no.143/2000 presents the following normative way: instigation to the illicit high-risk drugs use by any means.

2.5. Sanctions

For the offence provided by Article 4 of the Law no.143/2000, the punishment provided by law is imprisonment from 3 months to 2 years or a fine in the case of the variant-type and imprisonment from 6 months to 3 years, in the case of the aggravating variant.

In the case of the offence referred to in Article 5 of the Law no.143/2000, the punishment provided by the law is imprisonment from 2 to 7 years and the prohibition of certain rights.

In the case of the offence referred to in Article 8 of the Law no.143/2000, the punishment provided by the law is imprisonment from 6 months to 2 years.

In the case of the offence referred to in Article 10 of the Law no.143/2000, the punishment provided by the law is imprisonment from 6 months to 3 years.

3. PROCEDURAL ASPECTS

The criminal prosecution initiates ex officio.

4. CONCLUSIONS

Following the carried-out analysis, we found that the text of Article 4 of Law no.143/2000, concerning possession of risk drugs and high-risk drugs for their own consumption, has fully adapted to the provisions of the text Article 3 (2) [9] from United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances of 20 December 1988. We also noticed that the texts of Articles 5, 8 and 10 of Law no.143/2000 adapted to the provisions of the text of Article 3 (2) of the United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances of 20 December 1988. We also point out that the text of Article 3 (1) (c) (iii) [10] of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 was transposed into Article 8 of Law no.143/2000.

We also point out that the text of Article 13 [11] of Law no.143/2000, on aggravating circumstances, adapted to the provisions of Article 3 (5) [12] of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

We also want to point out that the provisions of Article 3 (1) (c) (iv) [13] of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 were transposed into Article 12 of Law no.143/2000, which refers to the criminalization of the attempt.

Unlike the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the European Union legislators through the Council of European Union Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, excluded from its scope the acts that are committed solely for the personal consumption of their authors [14]. Therefore, the Romanian legislators, through Law no.143/2000, did not take into account the provisions of the Framework Decision 2004/757/JHA, even though this European legal instrument is binding on national law, transposing into the national legal framework only the provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Substances psychotropic, on the criminalization of acts in connection with the illicit drug use.

Given the serious nature of the offences related to illicit drug trafficking and illicit drug use and the frequency of these offences, we believe that the European Union legislators should, in the near future, amend or supplement the provisions of the Framework Decision 2004/757/JHA, to include in its scope, also the acts that are committed exclusively for the personal consumption of their authors.

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- [9] Article 3 (2) from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 stipulates: "Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention".
- [10] Article 3 (1) (c) iii) from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 stipulates: "Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly".
- [11] Article 13 from the Law no.143/2000 on preventing and combating trafficking and illicit drug use stipulates: "The following situations constitute aggravating circumstances: (1) a) the person who committed the offence was serving a function involving the exercise of public authority, and the deed was committed in the exercise of this function; b) the deed has been committed by a healthcare professional or a person who is responsible under the law in the fight against drugs; c) the drugs were sent or delivered, distributed or offered to a minor, a mentally ill person, a person placed in a therapeutic program or have performed such other activities prohibited by law with respect to one of these persons or if the deed has been committed in an institution or education, medical, military unit, prison, welfare centres, re-education or medical-educational institutions, places where pupils and students, carry out educational, sports, social activities or in their vicinity; d) the use of minors in the commission of the deeds referred to in Articles 4, 5, 8 and 10; e) the drugs were mixed with other substances that they have increased the danger to the life and integrity of persons; (2) in the case of the aggravating circumstance, stipulated in (1)c), related to the perpetration of deeds in an educational institution or in places where pupils, students and young people carry out educational, sports, social activities or in their vicinity, at the special maximum stipulated by the law may add an increase that may not exceed 5 years in the case of imprisonment or the general maximum in the case of the fine".
- [12] Article 3 (5) from the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 stipulates: "The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as: a) The involvement in the offence of an organized criminal group to which the offender belongs; b) The involvement of the offender in other international organized criminal activities; c) The involvement of the offender in other illegal activities facilitated by commission of the offence; d) The use of violence or arms by the offender; e) The fact that the offender holds a public office and that the offence is connected with the office in question; f) The victimization or use of minors; g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities; h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party".
- [13] Article 3 (1) (c) iv) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 stipulates: "Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article".
- [14] Article 2 of the Council Framework Decision 2004/757/JHA of the Council of the European Union laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking stipulates: "1. Each Member State shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: (a) the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs; (b) the

cultivation of opium poppy, coca bush or cannabis plant; (c) the possession or purchase of drugs with a view to conducting one of the activities listed in (a); (d) the manufacture, transport or distribution of precursors, knowing that they are to be used in or for the illicit production or manufacture of drugs.

2. The conduct described in paragraph 1 shall not be included in the scope of this Framework Decision when it is committed by its perpetrators exclusively for their own personal consumption as defined by national law”.