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LEGAL NATURE OF SMUGGLING IN HUNGARY AFTER JOINING THE EUROPEAN UNION

Some borders of Hungary became inner borders of the European Union after Hungary joined the European Union on the 1st of May 2004 as a member state (borders between Austria and Hungary, and between Slovakia and Hungary). In the practice of the Hungarian prosecutor's offices are the smugglings committed on these borders before the 1st of May 2004 not to punish any more after Hungary joined the EU. The argument is, that these criminal actions are not crimes any more. In the criminal cases the prosecutor's offices dismiss the case, or withdraw the charges in first instance, or make a proposal to a verdict of not guilty in second instance of the court trial. This legal opinion and practice of the Highest Prosecutor's Office of Hungary is erroneous!

Hungary joined the European Union on the 1st of May 2004. In the moment of joining the EU became the law of the European Union effective in Hungary. The activities of the European Union cover three main categories. So the European Union consists of three columns.

In the first column there is the European Community (former name: European Economic Community) and EURATOM. The EC is an international legal organisation with a special legal character, a legal entity. The institutions of the EC (Council, Committee, Parliament) enact laws in the legislative powers which are assigned from the member states.

The European Community has legislative powers in relation with the **economic integration**. The legislative powers contain the basis of the economic integration, the *customs law*, or *customs politics*. The European Community has no legislative powers on *criminal procedure law* or *substantive criminal law*.

Second column of the European Union is the **Common Foreign and Security Policy**, third column is the **Police and Judicial Cooperation in Criminal Matters**. In the subjects of these columns the EU has no legislative powers like in the 1. column. In the 2. and 3. column there is only an *intergovernmental cooperation*.

It can be seen, that in the moment Hungary joined the EU, **there was no European law becoming effective, which would change the rules of the Hungarian substantive criminal law**. However the Hungarian Criminal Code rules smuggling in a skeleton rule. The customs law defines the content of the skeleton rule. Customs rules were changed considerably in Hungary by joining the EU. *So it generated serious changes of the rules of smuggling when Hungary joined the EU*. Our next step is to analyse what this change of the rules mean.

One essential component of the European Community is, that it is based on **customs union**. Customs union means, that the member states *don't apply customs duties* on the *common internal borders* of the European Community. On the *external borders* of the EC *are applied uniform community customs duties*. When Hungary joined the European Community together with other European countries, **the customs borders were changed enormously**. Between the member states of the European Community and Hungary, there are no customs duties to pay by crossing the border with goods after the 1st of May 2004. The change of effective customs law by joining the EU, which fills the skeleton rule of smuggling of the substantive criminal law, *brought only the change of customs borders*. **This change itself doesn't result the change of legal nature of the criminal actions committed before the 1st of May 2004**. The practice of the Highest Prosecutor's Office of Hungary, that they dismiss the criminal procedures by smugglings committed before the 1st of May 2004 on the borders being common internal borders after the 1st of May 2004, is against the law. The Highest Prosecutor's Office *interprets the law improperly*.

Article 2. of the Criminal Code declares, that the rule of the criminal code effective by deciding the criminal case can be then applied in the criminal procedure, when the subject action is not a criminal action any more by the new rule of the criminal code, or it is softer to punish. Article 312. section (1) point

a) of the Criminal Code says, that "*smuggling is committed by a person, who hides customs goods by the customs control, or makes false declaration about facts relevant by determining or collecting customs duties or customs cautions*". The already mentioned customs law defines the rules of customs control and customs duties. The change of customs law after joining the EU doesn't mean, that the customs controls or customs duties would be abolished as institutions of customs law. The change means only, that only the customs duties and customs controls on the internal borders of the EU are abolished. It doesn't mean the abolition of the customs duties or customs controls, which are continuously effective on the external borders of the EU. ***Therefore smuggling can be committed also after the 1st of May 2004 as well.***

So it is not the case that the codifier would want to change the legal nature of smuggling with the change of customs law, which fills the skeleton rule. Legal subject of the criminal act is the effectiveness of the financial interests and customs politics of the state, with other words the interest of the state to collect the legal customs duties. ***The legal subject exists after the 1st of May 2004 with the same content, and it is protected the same way by the substantive criminal law.*** Customs goods are also an existing category today. ***Decision Nr. 1/1999. of the High Court of Justice of Hungary for the uniform legal practice*** declares, that the rule being effective by deciding the criminal case can only be applied, when the change of rules was so important, that *the protection by the substantive criminal law will be abolished*. The protection by the substantive criminal law exists with the same content ***on the changed customs borders***. The person, who hid *customs goods by the customs control, or made false declaration about facts relevant by determining or collecting customs duties or customs cautions before the 1st of May 2004 on the borders being internal borders of the EU after the 1st of May 2004 (border between Austria and Hungary, or border between Slovakia and Hungary)*, is to punish because of this criminal action after the 1st of May 2004 as well. After the 1st of May 2004 cannot be committed smuggling on the internal borders (for example on the borders Austria-Hungary or Slovakia-Hungary) of the European Union. This is, because this state borders are not customs borders any more after the 1st of May 2004. The goods transferred on this borders are not customs goods, on this state borders there is no customs control, there is no customs duties or customs cautions to pay on these borders.

It is also very important, that smuggling ***can only be committed premeditatedly***. The perpetrator knows by committing smuggling, that he hides customs goods by a customs control, or that he makes false declaration *about facts*

relevant by determining or collecting customs duties or customs cautions. Before the 1st of May 2004 the borders between Hungary-Slovakia and Hungary-Austria were customs borders, the goods transferred through these borders were customs goods, after the customs goods there were customs duties or customs cautions to pay. So the person committing smuggling on these borders knew, that he was committing a criminal action, he hid the customs goods or made the false declaration in order to escape or to reduce his obligation to pay customs duties or cautions. If the perpetrator did not know about the circumstances mentioned above, then he didn't commit the crime, because there was no premeditation of committing the crime, so the person is not to punish by the Criminal Code because of *mistake of fact*.

This is also the opinion of the Highest Court of Justice of the Republic Austria (OGH). The OGH declared in his decision Nr. 13Os55/96 (1996), that "*the abolishment of the customs duties in a later time does not make the already committed smuggling unpunished.*" („*Ein späterer Entfall der Abgabepflicht macht einen bereits begangenen Schmuggel nicht straflos.*“) The practice of the Austrian crime fighting authorities is uniform and clear in this question: The persons, who committed smuggling on the border between Austria and Hungary before of the 1st of May 2004, will be punished also after the 1st of May 2004.

The cause of the false interpretation of law by the Highest Prosecutor's Office of Hungary can be the lack of adequate knowledge of the European community law. The question to decide in this case is, whether the legal subject of the substantive criminal law was abolished through the change of customs law filling the skeleton rule of the Criminal Code or not. The legal subject was not abolished, there was only a change with not controversially enormous economic meanings, but from the point of view of the substantive criminal law, this change is only a *technical change of customs borders*. Violating the obligation to pay the customs duties is to punish also after Hungary joined the European Union.

Smuggling is one of the many crimes that are committed also by organized groups. The tools for fighting don't seem to be enough to solve the problem of organized crime. It is very sad to see that there are some possibilities to punish many of the perpetrators, and to fight organized crime, and the authorities don't use these tools. Moreover they leave the perpetrators go because of inadequate interpretation of law.