

Chapter IV

Cigarette smuggling

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1. Legal basis.

Cigarette smuggling is regulated by the National Customs Code (Law 2960 / 2001) with reference to the general part of the Greek Penal Code. The Greek Penal Code does not contain provisions regarding the criminalization of cigarette smuggling.

The National Customs Code refers to a set of codified laws and provisions concerning the customs and customs clearance of goods, the control of the legal process of imports and exports, the prosecution of offenses and smuggling and the responsibilities of the accredited control bodies. It provides for the regulation of customs regarding cigarettes in its Third Part and the criminalization of cigarette smuggling (among others) in its Fifth Part.

In particular, Greece adheres to a general customs legislation for all “goods” in customs duties and a more specific prohibition of smuggling in order for prosecution authorities to be able to deal with such offences more efficiently.

Historical Background: The first Greek Customs Code was introduced in 1918 and entered into force by law 1165 on 17 March 1918 under the title "Law Regarding the Customs Code", as subsequently amended by a series of separate laws and decrees, parts of which are still in force. The Code included 144 articles in 18 chapters in which all the customs legislation that had been enacted so far was methodically classified.

The National Customs Code refers generally in Art. 94 to manufactured tobacco, to which cigarettes are included. This provision also includes cigars and cigarillos, fine-cut smoking tobacco intended for the rolling of cigarettes and other tobacco smoke. A special Consumption Tax is imposed upon these products, in accordance with Article 53 of the Code.

2. *International and European instruments: harmonization; National implementation and enforcement.*

Art. 180 of the National Customs Code provides for the following: "1. Presidential decrees issued on a proposal from the Minister of Finance may adapt the provisions of this Act to acts of the competent bodies of the European Communities [now European Union] which are mandatory and which relate to matters regulated in a different way from this Code. 2. Decisions of the Minister of Finance, published in the Official Gazette, shall lay down the necessary arrangements for adapting customs procedures to the corresponding procedures as defined by acts of the Community Institutions [now European Union Institutions]."

As a result, the National Customs Code includes the relevant European Directives and Regulations as long as they are implemented through the applicable procedures, mainly the issue of Presidential decrees.

The harmonization procedure of the National Customs Code includes all the relevant European Directives and Regulations. Amongst them, the most important are the Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code and the more recent Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

Moreover, the Common Customs Tariff, along with the Integrated Tariff are applicable to all goods imported from non-EU countries. Goods moving freely within the EU must comply with the rules of the internal market and with certain provisions of the Common Commercial Policy.

3. Criminal offence and the protected interest.

The definition of smuggling in Greek Legislation is provided for in Art. 155 para. 1 of the National Customs Code. According to this provision, smuggling is defined as “(a) *the importation or export within the customs territory of goods subject to customs duties, taxes and other charges levied on the Customs without the written permission of the competent Customs Authority or in any other place or place specified by it; and (b) any action intended to deprive the Greek State or the European Union of the duties, taxes and other charges to be levied therefrom on imported or exported goods, even if*

they were collected in a time and manner other than those prescribed by law.”

This definition covers smuggling of goods provided for in the National Customs Code, except for smuggling of specific goods that are covered by other provisions (such as cars).

Article 155 para. 1 provides for the description of the criminal offence of smuggling and a hint of the protected interest of the relevant legislation. Specifically, lit (b) refers to “any action intended to deprive the Greek State or the European Union of the duties, taxes and other charges to be levied therefrom on imported or exported goods”. Taking this into account, it becomes evident that the protected interest is the financial interests of both the Greek State and the European Union, which are threatened by the unregulated importing and exporting of goods in general, and cigarettes in particular.

Furthermore, it is accepted that contraband cigarettes generally avoid restrictions and health regulations, such as requirements for health-warning labels in the local language, regulations on additives, and others. To the extent that health-warning labels and other policies reduce smoking by informing potential smokers about the health consequences of smoking, the lack of appropriate local warnings can lead to increased consumption and its consequences. As a result, it can be supported that another protected interest been offended by the acts of cigarette smuggling are the rights to life, health and physical integrity.

4. Conduct(s).

As it was already mentioned above, smuggling is defined as “(a) the importation or export within the customs territory of goods subject to customs duties, taxes and other charges levied on the Customs without the written permission of the competent Customs Authority or in any other place or place specified by it, (b) any action intended to deprive the Greek State or the European Union of the duties, taxes and other charges to be levied therefrom on imported or exported goods, even if they were collected in a time and manner other than those prescribed by law.”

Para. 2 of the same provision further stipulates that smuggling includes the following acts: (a) the release for consumption without the written permission of the competent customs authority and payment of the import duty, tax and other charges, of goods imported under a law or contract free of charge or with reduced charges for certain specific uses or the use of such goods for uses other than certain specific ones; (b) the export or importation of goods which, by law or decision of the competent authority, are prohibited from being exported or imported unless, by way of derogation from a prohibition by the competent authority; (c) any shortage of goods from warehouses for the purpose of depriving the State of the duties, taxes and other charges, unless the total of the customs, duties and other charges corresponding to the missing goods exceeds one thousand five hundred EURO (1,500) and the due within 48 hours of the discovery and certification of the deficit, in which case the act is classified as a mere customs offense according to the provision of paragraph 3 of Article 148 of the Code; (d) the presence of goods on ships irrespective of the capacity which docks on the coast and/or are directed to a Greek port without being

indicated on the ship's log; (e) the existence of goods, whether inscribed on the manifest, on board a ship, boat or floating vessel of any capacity which has docked, without force majeure, in a port or bay of the State; [...] (i) under-pricing or over-pricing of imported or exported goods, if it involves the loss of duties, taxes and other charges; [...] (k) the release for free circulation of goods in Community transit.

Moreover, Art. 156 states that “1. In accordance with paragraphs 1 and 2 of the previous Article, a written permission of the competent authority shall not exclude the smuggling when the license was issued without a lawful issue or without the legal formalities required for such publication; and payments. 2. The civil servant, who thus issued the license, is punished as a smuggler if he acted fraudulently / intentionally.”

The **aforementioned general provisions are applicable to cigarette smuggling** since the National Customs Code does not differentiate this crime from smuggling of goods that their circulation is regulated by the same law.

It must be noted that according to Article 106 para. 1 of the National Customs Code, the lawful circulation of manufactured tobacco consumed within the country is evinced by the official tax bundles affixed to the packages or the smallest packaging available to consumers. Moreover, according to Article 53 of the Law 2960/2001, the validity of which started on 1 January 2002 under Article 185 of the National Customs Code, special excise duty on mineral oils, alcohol and alcoholic beverages and manufactured tobacco is imposed and the for the production, processing, possession, movement and control of such products in accordance with the provisions of the Customs Code.

Pursuant to Art. 118 para. 5, the, in any way, escape or attempt to evade the payment of taxes and other charges due, and failure to comply with the formalities provided for in Part Three of the National Customs Code for the purpose of non-payment of the above taxes and other charges are classified and punishable as administrative and criminal penalties as smuggling in accordance with the provisions of article 142 et seq. of the Code and impose the imposition in any way of the participants actions referred to in Articles 142 and Articles 152 and 155 of the National Customs Code fines and fees.

In order to determine the degree of *mens rea* that the relevant legislation requires to characterize an act as smuggling, recourse to the general provisions of the Penal Code is needed.

The provision of Art. 27 indicates that the notion of intent [*mens rea*] is manifested in the following three variations: 1. Purpose (or direct intent of first degree - *dolus malus*) The offender acts in order to bring about the consequences of his illegal behaviour. 2. Direct Intent (or direct intent of second degree – *dolus directus*) The offender is not aiming at the materialization of the constitutive elements of a crime but visualizes them as the necessary consequences of his behaviour and, nevertheless, accepts it. In these cases, the offender accepts the commission of the offense as a necessary side effect of his intended aim. 3. Indirect or Eventual Intent (*dolus eventualis*) The offender is aware or visualizes as probable the materialization of the constitutive elements of the offense as a result of this action but, nevertheless, accepts it. In these cases, the offender accepts the commission of the offense as a probable side effect of his intended aim.

It becomes evident from the relevant smuggling provisions that the required *mens rea* of the crime of

[cigarette] smuggling is any degree of intent, as described above, since the relevant provisions are of a general character and do not contain provisions regarding degree of intent.

With respect to negligence, Art. 28 of the Greek Penal Code defines it as the lack of attention (care), which the offender “owed” under the circumstances and which he could have exercised and, because of which, either he did not envisage the criminal consequences of his action or he did envisage them but believed that they would not materialize. It is clear that the crime of [cigarette] smuggling cannot be committed by negligence. In this vein, Art. 156 demands that the civil servant, who thus issued the license, is punished as a smuggler if he acted fraudulently / intentionally”.

5. Defendant(s).

Defendant of the crime of [cigarette] smuggling is whoever committed the acts described above, provided that he acted fraudulently / intentionally.

6. Victim(s) of the crime.

Since the relevant criminalization and penalties regarding smuggling are applied through the context of customs legislation, there are no *stricto sensu* victims of these crimes. It is accepted that the crime of cigarette smuggling is committed against the Greek State and the European Union, to which duties, taxes, tariffs and other charges are owed.

7. Other elements of the criminal offences.

The National Customs Code does not include provisions regarding a further specialization of the crime of cigarette smuggling.

8. Sanctionary measures: criminal penalties and administrative sanctions.

The National Customs Code includes both criminal penalties and administrative sanctions against smuggling, including the smuggling of cigarettes.

The criminal penalties are provided for in Art. 157. According to Article 157 paragraph 1, smuggling under Article 155 of this Code is penalized:

(a) With imprisonment of at least six (6) months. However, if the smuggling has no significant value and is intended for individual use or for exhaustion, the minimum penalty is reduced to one sixth.

(b) With imprisonment of at least one (1) year in the following cases:

- if committed repeatedly,
- if committed in full or in combination with three or more,
- if the duties, taxes and other charges deprived of the State or the European Union amount to at least thirty thousand (30,000) euro or more; and
- if the perpetrator used particular tricks.⁹

⁹ A particular trick is any action invented by human inventiveness in order to deprive the Greek State of the possibility of receiving a legal import duty, tax or other right for any imported or exported goods. Areios Pagos Case no. 766 / 2017.

c) With term,¹⁰ if the duties, taxes and other charges deprived of the State or the European Union exceed the amount of one hundred and fifty thousand (150,000) euro.

Furthermore, paragraphs 2 and 3 of Article 157 respectively provide that in the event of a repetition of the offense, a penalty less than that previously imposed may never be imposed and that in the event of an attempt of commission the penalty imposed is the penalty imposed on the act of smuggling and the accomplices may be subject to the same penalty imposed on the perpetrators.

Moreover, Art. 160 of the National Customs Code, provides that all the smuggled goods will be confiscated by the competent authorities. Also, animals, wagons, vehicles, ships of any capacity, logistic boats and any other means of transport used to carry the smuggled goods are being confiscated. If, for whatever reason, it was made impossible to confiscate the smuggling items referred to in this article, the penalty shall be penalized equal to the CIF value thereof, in addition to any other penalty imposed under the Code.

Importantly, the confiscation according to the aforementioned article occurs irrespective of the participation in the offense having any right over the property except in the case that he / she proves lack of participation or knowledge of the offense committed.

The confiscated goods, after the final decision of the Criminal Court, which adjudicated upon the crime of smuggling, become the property of the State and are disposed of in accordance with the provisions of the Code and the relevant legislation.

¹⁰ Type of imprisonment applicable to felonies.

As of the administrative penalties, these are provided for in Articles 153 and 154. According to the first provision, when a Customs Authority finds smuggling or frauds which, according to a Special Audit Report, reveals that more than one hundred and fifty thousand (150,000) euros of duties, taxes and other charges have been avoided to the State or the European Union, it is forbidden to the competent Public Financial Services to receive statements or to provide the certificates or certificates required by the applicable provisions and requested by the offender for the preparation of notarial deeds for the transfer of property elements. The above measures shall be taken to the detriment of the perpetrators and accomplices of the offenses.

However, these measures and penalties are compulsorily lifted when the offender pays more than seventy percent (70%) of the amounts of duty, taxes and other charges to be paid to the State and their statutory surcharges. For the application of the preceding provisions, the offender shall submit a request to the Head of the competent Customs Service, who shall be obliged within two (2) months to issue a provisional or partial imputation act. An appeal against this act does not invalidate the measures taken. If, within this period, no action has been taken by law to impose the above amounts or additional charges for establishing such amounts, the consequences and prohibitions set out in this Article shall be automatically revoked.

The provision of Article 154 states that the Administrative Court of Appeal, in the same decision, ruling on the evasion of duties, taxes and other charges, amounting to more than one hundred and fifty thousand (150,000) euro, and imposing the multiplication fees provided for by the

applicable provisions, imposes to the perpetrator at least one of the following sanctions:

a) Loss of the right to participate in public auctions, Public Law Bodies, Public Benefit Institutions and Public Benefit Organizations for a period of one (1) year.

b) The prohibition for a period of three (3) years of the conclusion of a contract with the State or other Public Organizations or Agencies.

c) The loss for a period of three (3) years of the right to obtain a loan with the guarantee of the State or public subsidies or government credits.

The penalties provided for in this Article shall be imposed irrespective of the chargeable duties levied and the multiple charges and fines provided for by the provisions in force.

9. Corporate liability.

Articles 161-163 of the National Customs Code provides for the civil liability of persons regarding smuggling of goods. These provisions do not differentiate between individuals and legal entities. As a result, the provision of Art. 162 which states that “The Criminal Court may also, declare jointly and severally liable to the owner of the ships, cars, wagons or aircraft of the convicted person for payment of the financial penalty and the costs incurred by him as civil claimant and the claim he has suffered, land, air or air transport companies, as well as any agents or agents of these or owners of ships, cars, wagons or aircraft, hotel managers and any other category of cafés or other shops accessible to the public and even when they are not criminally liable for smuggling when committed within or through the above means of transport or

under the direction of the shops or by using them either to commit smuggling or to facilitate it in any way or to conceal the objects of smuggling, except in the case where the above were not able to have knowledge of the smuggling committed probability”, is accepted that it refers to both individuals and legal entities.

However, according to Art. 163 the above persons or entities have the right to take over the money paid by the convicted persons and the agents or representatives of shipping companies or shipowners or owners of other means of transport from the companies and owners they represent.

10. Concurrence with other crimes.

Concurrence with other crimes is not regulated through the National Customs Code and as a result the general provisions of the Greek Penal Code are applicable. Specifically, Articles 94-98 of the Greek Penal Code are applicable in cases of concurrent crimes. Specifically, in Art. 94, the Penal Code distinguishes between “real” and “ideal” concurrence of offences. The former could be defined as the commission of two or more offences which were perpetrated through two or more criminal acts. The latter refers to the situation whereby the offender, by perpetrating a single criminal act, commits two or more offences. Moreover, the Penal Code distinguishes between concurrence of custodial sentences (Art. 94) and concurrence of pecuniary sanctions (Art. 96). The distinction between “real” and “ideal” concurrence of offences applies to both.

11. Other facts relevant for the criminal liability.

A key provision in the Greek Penal Code regarding criminal liability is that of Art. 187 which provides for the participation in a criminal organization as an aggravating circumstance.

In accordance with Art. 187 of the Greek Penal Code “up to 10 years' imprisonment is punishable by anyone who forms or joins as a member in a structured and sustained group of three or more persons (organization) seeking to commit more offenses in connection with [...] avoidance of payment of a lawful tax, duty, duty or other charge when buying, selling, receiving, delivering, transporting, transit, marketing, holding, stocking, importing or exporting goods [...]” This provision clearly refers to the relevant customs regulations as provided for in the National Customs Code, even though it does not mention it.

Furthermore, according to para. 2 of the same provision “Anyone who provides essential information or material means to facilitate or assist the organization of the preceding paragraph for the commission of the alleged felons is punished by imprisonment for up to ten years”. In addition, para. 3 states that “Any person who directs the organization of the first paragraph shall be punished by imprisonment for at least ten years. The same penalty is punishable by the member of the organization if, at the time of the offense referred to in the second paragraph of the first paragraph, he was a civil servant or an official within the meaning of Article 263a of the Greek Penal Code”.

Importantly, para. 7 of Art. 187 sets out that “the provisions of this Article shall also apply where the offenses referred to therein have been committed abroad by a national or were directed against a Greek citizen or against a legal person

domiciled in Greece or against the Greek State even if they are not punishable under the laws of the country in which they were executed.”

12. Focus on specific issues.

12.1. Is smuggling of cigarettes sanctioned more heavily than other crimes of smuggling?

As it was mentioned earlier, Greece adheres to a general customs legislation for all “goods” in customs duties and a more specific prohibition of smuggling. As a result, smuggling of cigarettes is sanctioned in the same manner as smuggling of other goods in accordance with the relevant provisions of the National Customs Code.

12.2. Territorial and extraterritorial validity of the criminal provisions.

The National Customs Code does not contain any provision on the territorial limits of the application of the Code. Consequently, recourse to the general rule on territorial limits of penal laws is necessary. Pursuant to Article 5 (Crimes committed within the Greek territory) paragraph 1 of the Greek Penal Code, Greek penal laws apply on all acts committed within the Greek territory, even when committed by aliens. Also, under paragraph 2, Greek vessels and aircrafts are considered part of the Greek territory wherever they are situated, unless they are subjected to foreign law in accordance with international law.

13. Judicial decisions.

While smuggling of various products subject to excise duty is widespread and the dockets of the Criminal Courts are full of relevant cases, those relating specifically to cigarette smuggling are comparatively limited since the entry into force of the revised National Customs Code in 2002. As already stated, although smuggling in its basic form is punishable as a misdemeanor, in addition to criminal penalties, administrative fines are also imposed - multiple charges-, which subsequently are brought before the competent Administrative Courts.

13.1. Structure and purpose of the criminal offence

According to “Areios Pagos”, the Supreme Civil and Criminal Court of Greece (E’ Criminal) in the Case No. 267/2009 smuggling is considered to be the purchase, sale and possession of goods imported or released for consumption in a manner constituting the offense of smuggling. In the latter form, both the provisions of the previous Customs Code and the provisions of the applicable Customs Code, the object of smuggling consists in the purchase, sale or possession by persons other than of the importer, goods subject to import duty, tax duty, imported into the frontier of the Greek State, without the permission of the customs authority.

Furthermore, intent is required, which in knowing at the relevant time that the commodity which the perpetrator has bought, sold or held is the product of the smuggling in the above sense and his wish to deprive the Greek State of the due duty, fee or right. Therefore, the crime of smuggling when in possession of a particular product resulting from smuggling if the holder knows this origin, without any further information being required.

Moreover, in the case of Article 53 of Law 2960/2001 “National Customs Code”, “Special Consumption Tax” is imposed on petroleum products, on alcohol and alcoholic beverages and manufactured tobaccos and determine the production, processing, possession and circulation of such products in accordance with the provisions of this Code and, in accordance with the provision of Article 118 (5) thereof, the escape or attempted escape of payment of those due taxes and other charges and non-compliance with the formalities provided for in Part Three of this Code for the purpose of non-payment of such taxes and other charges are classified as smuggling in accordance with the provisions of Article 142 et seq. of this Code, and as a result the special fee due even if the elements of the crime of smuggling are not met. It follows from those provisions in conjunction with that of Article 155 of the Law which defines the concept of smuggling that under that new Customs Code or in any way escaping or attempting to escape the payment of the debt owed manufactured tobacco for excise duty is a criminal offense characterized as smuggling and punishable by the penalties provided for by that law.

13.2. Conduct(s)

According to “Areios Pagos”, the Supreme Civil and Criminal Court of Greece (G’ Criminal) in the Case No. 766/2017, the relevant *actus reus* consists in the purchase, sale or possession by a person other than the importer of goods which are subject to import duty, tax or duty and which have

been imported into the frontier of the Greek State without the permission of the customs authority.¹¹

The One-Member Court of Misdemeanors of Thebes expounded this matter in its ruling in the Case No. 1717/2018 concerning the “Repeated commission of the act of smuggling”.¹² The Court applied the relevant law as follows: “Pursuant to Article 2(1)(b) of the Decision of the Council of the European Communities of 24 June 1988, approved by virtue of No 76742/1397/23-8-1988 [Government Gazette Issue B '622/25-8-1988] and ratified by article 37 of Law 1828/1989 the duties applicable to trade with non-member countries of the Communities and already of the European Union are considered as resources of the European Communities.

Furthermore, Article 2(3) provides that Member States withhold 10% of the duties to be paid in accordance with the provisions of paragraph 26. In addition, Article 2(1) of Law 2127/1993 “Harmonization of the tax regime for petroleum

¹¹ Summary of the Case: The defendants received a container by a Chinese company containing cigarettes, carefully hidden, that did not carry the special excise tax cigarette film and were imported into Greece without the permission of the competent Customs Authority. The conviction for smuggling is correct and justified. Any escape or attempt to escape the payment of excise duty on a range of products, including tobacco, is characterized and punished as smuggling, which is also penalized by the Greek Customs Code.

¹² Summary of the Case: The defendant was found to be in possession of cigarettes and quantity of tobacco and was thereby accused of having imported them in a manner constituting the offense of smuggling, ie goods subject to import taxes and other charges levied on the Customs without the written permission of the competent Customs Authority. Innocence of the defendant - It has not been proved that the cigarettes referred to in the indictment were unlawfully imported from a non-EU country in order to have the offense of smuggling committed.

products, alcohol and alcoholic beverages and manufactured tobacco with Community law” states that excise duty shall be assigned to domestically produced tobacco, which comes from other Member States or is imported within the country. Importation is to be understood as the entry of these products from third countries into the country. This provision is also found in Article 53 of Law 2960/2001 “National Customs Code”.

Finally, according to article 155(1)(2) of Law 2960/2001 “National Customs Code”, smuggling constitutes, *inter alia*, any action which deprives the Greek State or the European Union of the customs duties receivable by the imported goods, as well as the purchase, sale and possession of such goods.”

Consequently, the Court ruled that it follows from the combination of the above provisions that smuggling is committed when the non-tariff goods have been imported from third countries which are not members of the European Union and not from Member States. Additionally, in this case the Greek State is deprived of only 10% of the non-imposed duties and not the entire amount thereof. On the contrary, import from States-Members of the European Union constitutes only a simple customs offense.

In order to establish the crime of smuggling, a necessary element is the existence of will, which consists in the knowledge at the relevant time of the perpetrator that the commodity which he has bought, sold or held is the product of smuggling and his wish to deprive the Greek State or the European Union of duty, fee or royalty and other charges on such goods and merchandise.¹³

¹³ “Areios Pagos”, the Supreme Civil and Criminal Court of Greece (G’ Criminal) in the Case No. 766 / 2017

There is, in principle, no need to justify the existence of intent, because it is inherent in the intent to proceed with action which constitutes the actus reus of the crime and it is understood that in each particular case the occurrence of these incidents is forthcoming unless the law requires additional information for the offense, such as the fact that the act was knowingly committed or the purpose of obtaining a certain additional effect, such as cases of smuggling. Thus, the Supreme Court in the Case No. 766/2017 considered that the intent of the perpetrators was sufficiently proved taking into account the fact that they stored large quantities of cigarettes in knowledge of their origin as products of smuggling.¹⁴

13.3. Defendant(s).

Apart from the case where the defendant is the sole perpetrator, according to Article 45 of the Criminal Code, if two or more have jointly committed a criminal offense, each is penalized as the perpetrator of the act. “Areios Pagos” (E’ Criminal) in the Case No. 267/2009 has interpreted that the term jointly means objective involvement in the execution of the principal act and subjectively common intent, that is to say, each participant wants or accepts the realization of the actus

¹⁴ Similarly: “Areios Pagos”, Supreme Civil and Criminal Court of Greece (E’ Criminal), Case No. 1322/2015 (Summary of the Case: Any escape or attempted escape of the excise duty provided for products such as cigarettes, as prescribed by law, is characterized and punished as smuggling. A crime of smuggling exists only on possession of a particular quantity of smuggled product if the holder *knows its origin* without any further information being required. The accused and his co-defendant used a leased property as a transshipment place and owned cigarettes imported from an unknown non-EU country within the Greek territory without prior permission of the competent customs authority thereby resulting in the loss of the corresponding fees and duties by the Greek State.)

reus of the committed crime, knowing that the other participants also commit the same crime. The involvement in the execution of the principal act may consist in or in the fact that each person carries out the whole *actus reus* of the crime or that the crime is carried out by concurrent individual acts of the parties, concurrent or successive, without the necessity of specifying the actions of each perpetrator.

13.4. Victim(s) of the crime.

Relevant jurisprudence confirms the provision of Article 155 of the National Customs Code, according to which the victims of the crime are the Greek State or the European Union.¹⁵

14. Sanctionary measures: criminal and non-criminal sanctions.

As already illustrated, smuggling is perceived as both a criminal and an administrative offense. Thus, for the same offense-illegal behavior one can be ‘punished’ twice. This issue is of major importance in the light of the basic *ne bis in idem* principle: “No one can be prosecuted or convicted by the courts of the same State for an offense for which he has already been finally acquitted or convicted by a judgment”.

The current case-law of the Council of State (Supreme Administrative Court) has been addressing the application (or not) of the *ne bis in idem* principle in the context of the relationship between criminal proceedings and administrative proceedings and the procedure for the recovery of tax offenses

¹⁵ e.g. Case No. 1104/2017 of the Three-Member Court of Misdemeanors of Thebes.

and the imposition of corresponding sanctions since 2009 (decision no. 1734/2009). The first phase (case-law of 2009-2015) is characterized by the refusal of the Court to accept the application of the *ne bis in idem* principle in that context, either by invoking Articles 94 and 96 of the Greek Constitution and the principle of legal certainty or on the basis of the assessment that administrative penalties for breaches of tax law are not “criminal”.

The second phase, which corresponds to the case law of 2016-2017, which was produced following the convictions of the ECtHR in the cases of *Kapetanios and others (2015)* and *Sismanidis (2016)*, the Court of First Instance complied *stricto sensu* with the said ECtHR judgments, accepting the applications for reopening the appeals of Anglope and Sismanidis. On the other hand, by ruling on pending appeals, it adjusted its case-law by holding, in a series of judgments, that the *ne bis in idem* principle, as enshrined in Article 4 of the seventh Protocol of the ECHR, is in principle applicable to a multiple-smuggling case for which an irrevocable criminal court decision has been issued, without such application being in breach of the Constitution (Council of State decisions 2987/2017, 1777/2017, 3470-1/2017, 3449/2017, 3447/2017, 3174/2017, 2346/2017, 2569-70/2017, 3174-5/2017). The Council of State, however, maintains its case-law that, in light of the provision in Article 5 (4) of the Code of Administrative Procedure, the administrative court is not required to examine *proprio motu* the question of the existence of an irrevocable criminal court decision for the same person and the same substantial violation (Council of State decisions 2403/2015, 1993/2016, 2926-2928/2017).

The third phase concerns the case law since 2018 which, on the one hand, incorporates the recent CJEU case-law in *Menci*

(C-524/15), *Garlsson Real Estate* (C-537/16) and *Di Puma & Zecca* C-596/16 & C-597/16), in relation to Article 50 of the Charter, and interprets the new provision of Article 5 (2) in the light of the *ne bis in idem* principle, as enshrined in European law.

Specifically, Council of State decision no. 1102/2018 concerned a multiple fee for participation in smuggling of cigarettes. The criminal court first seized terminated the criminal proceedings with a final court order. The Council of State in its decision underscores that the *ne bis in idem* principle is a manifestation of the fundamental principles of the rule of law, proportionality, *res judicata* and constitutional principles. Hence, the *ne bis in idem* principle also acquires constitutional basis. The existence of parallel proceedings and sanctions against the same person for the same offense raises issues of disproportionate infringement of the offender's legal assets, leaving him in a precarious situation that is not finalized after the end of one of these procedures. With regard to the fight against tax evasion, the struggle against tax evasion must not result in decisions that are too protective for the taxpayer's interests and at the same time excessively burdensome for the public interest.

Thus, if the criminal proceedings are terminated by an irrevocable order to end the prosecution for a period of limitation or by an irrevocable decision of a criminal court, a penalty of such a slight degree will not lead to effective prevention or even suppression of the offending conduct. In order to trigger the principle, the acquittal must be based on sufficient investigation and assessment of the substance of the case. An irrevocable decision by a court of magistrates to definitively cease prosecution due to a limitation of the criminal offense is not an irrevocable decision by which the

offender has been “acquitted” because it is not based on an assessment of the commission of the offense, but on the elimination of the crime by statutory limitation. A different approach would necessarily involve an expansive interpretation of the notion of acquittal, and the *res judicata* of the order does not cover the commission of the offense or not.

Consequently, the Council of State with its recent Decisions seems to be in line with the European Court of Human Rights (ECHR) judgments on this fundamental legal issue.

15. Literature.

Unfortunately, academic literature in Greece has not addressed extensively the smuggling of cigarettes, nor other goods. Most academic pieces occupy themselves with an analysis of the relevant legislation and recent judicial decisions.

However, part of the academic literature has dealt with the issue of confiscation of the means of transport of smuggled goods, which is provided for in Art. 160 of the National Customs Code. Judicial decisions, for example the Case No. 321 / 2000 adjudicated by Areios Pagos, have stated that: It follows from that provision (i.e. Art. 160 of the National Customs Code) that the confiscation bears a mixed character of ancillary punishment and compensation, and is obligatory, whether the accused is convicted or acquitted or definitively ceases to bring proceedings against him for limitation, provided that only proof that there is smuggling, namely that it was objectively established and that confiscated objects are its object.

However, Greek scholars¹⁶ are of the opinion that confiscation has the character of an ‘incidental penalty’, which means that it can only be imposed as a result of the principal sentence, that is, the conviction of the owner of the object or means of smuggling. In this academic view, the confiscation of the means of transport imposed on the owner, even though not being one of the perpetrators of the smuggling crime, runs counter to the provisions of the Constitution protecting property as well as other constitutional institutions such as the *nulla poena sine lege* principle and the principle of equality.

Essential bibliography on the smuggling of cigarettes:

Papachristou V., *Smuggling and Customs Offenses: Theory-Judicial Decisions*, Sakoulas (1989).

Kaiafa-Gbadi M., *Criminal Laws: Smuggling*, Sakoulas (1998)

Adamou O., *Smuggling*, 2nd ed., Nomiki Vivliothiki (2018)

16. Reform proposal(s)

Since the National Customs Code is fully harmonized with the relevant EU legislation, including both Regulations and Directives, there are little to be done regarding reforms of the existing legislation. The aspects of the criminal offence, as provided for in the National Customs Code and the Greek

¹⁶ Androulakis, “Private Opinion (Ιδιωτική Γνωμοδότηση)”, ΠονΧΡ ΚΗ’, p. 361, Christoforidis, Smuggling and Confiscation of transportation means, (Λαθρεμπορία και δήμευση μεταφορικών μέσων),” ΠονΧρ ΜΔ’, p. 1327, Charalampakis, *Summary of Criminal Law: General Part, Penalties*, Sakoulas (2012), pp. 124-125.

Penal Code are deemed to be in conformity with relative rules and standards of Constitutional, European and International Law, which have primacy over such Law. However, one has to take into account, the discussion about the application of the *ne bis in idem* principle, which was analyzed in the relevant chapter.

17. Criminal Procedure Law.

17.1. International cooperation.

Greece has signed and ratified a number of bilateral and multilateral Conventions regarding Police and Judicial Cooperation.

According to the official database of the Greek Police,¹⁷ the bilateral agreements on Police and Judicial Cooperation which cover, amongst others, cooperation on the suppression of smuggling of cigarettes, or more generally, on money laundering are the following:

Greece and Albania (Athens, 17/07/1992, ratified by Greece in accordance with Law 2147/1993, Official Gazette No. 96 A' /16-6-93)

Between Greece and Bulgaria (Athens, 08/07/1991, ratified by Greece in accordance with Law 2096/1992, Official Gazette No. 188-A'/92)

Between Greece and China (Beijing, 05/06/2007, ratified by Greece in accordance with Law 3963/2011, Official Gazette No. 99 A' /29-4-11)

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http://www.astynomia.gr/images/stories/2015/pinakas_symf_ell.pdf

Between Greece and Turkey Ankara, 21/01/2000, ratified by Greece in accordance with Law 2926/2001, Official Gazette No. 139 A'/27-6-01)

Between Greece and Slovenia (Ljubljana, 27/09/2002, ratified by Greece in accordance with Law 3269/2004, Official Gazette No. 186 A'/11-10-04)

Between Greece and Serbia (Athens, 17/10/2008, ratified by Greece in accordance with Law 3935/2011, Official Gazette No. 55 A'/21-3-11)

Between Greece and Russia (Athens, 06/12/2001, ratified by Greece in accordance with Law 3215/2003, Official Gazette No. 311 A'/31-12-03)

Between Greece and Romania (Athens, 06/06/1992, ratified by Greece in accordance with Law 2138/1993, Official Gazette No. 84 A'/28-5-93)

Between Greece and Malta (Valletta, 24/05/2001, ratified by Greece in accordance with Law 3125/2003, Official Gazette No. 63 A'/14-3-03)

Multilateral treaties covering police and judicial cooperation against a number of issues and crimes, including cigarette smuggling and money laundering are the following, according to the same source:

Protocol for the enhanced trilateral cooperation in combating crime and especially trans-border crime (Sofia, 8/9/1998, ratified by Greece in accordance with Law 2814/2000, Official Gazette No. 69 A' /10-3-2000)

Additional Protocol to the Agreement among the Governments of the Black Sea Economic Cooperation participating States on cooperation in combating crime, in particular in its organized forms (Corfu, 2/10/1998, ratified by

Greece in accordance with Law 2933/2001, Official Gazette No. 150 A' /10-7-2001)

Convention of the Southeast European Law Enforcement Center (SELEC) (Bucharest, 9/12/2009, ratified by Greece in accordance with Law 4054/2012, Official Gazette No. 45 A' /7-3-2012).

5.2. INTERPOL, WCO and regional agreements

INTERPOL maintains a National Central Bureau (NCB) in Athens which works with police forces across the globe in tackling the transnational crime groups which operate on its territory, sharing intelligence, monitoring emerging trends and working together in targeted regional police operations. The NCB is part of the national police, sitting structurally in the International Police Cooperation Division at the Police Headquarters in Athens.

Greece is a member of the World Customs Organization and a party to several conventions adopted under its auspices, and namely: the Convention establishing a Customs Co-operation Council, the International Convention on the simplification and harmonization of Customs procedures (Kyoto Convention) as amended, the Convention on Temporary Admission (Istanbul Convention), the Customs Convention on the temporary importation of pedagogic material, the Customs Convention on the temporary importation of professional equipment, the Customs Convention concerning facilities for the importation of goods for display or use at exhibitions, fairs, meetings or similar events, the Customs Convention on the ATA carnet for the temporary admission of goods (ATA Convention), the Customs Convention on the temporary importation of scientific equipment, the Customs Convention concerning welfare material for seafarers, and the International

Convention on the Harmonized Commodity Description and Coding System.

17.2. Confiscatory measures.

According to Article 373 of the Code of Criminal Procedure, in its final judgment, the Court orders the return of the things confiscated to the owner and the confiscation of the items to be confiscated. Furthermore, according to the provisions of Article 76 (1) and (3) of the Criminal Code, objects produced by felony or misdemeanor arising from deceit, as well as the price of these and those acquired with them, as well as items which served or were destined for such an act may, if belonging to the perpetrator or one of the participants, be confiscated. In any case of confiscation, the Court decides whether the things that have been confiscated must be destroyed. Also according to the provision of paragraph 1 of a. 1602/2960/2001, in all cases of smuggling, the objects which are the subject of it are confiscated. In this vein, the One-Member Court of Misdemeanors of Thebes in Case No. 1717/2018 ordered the confiscation and destruction of 241 packages of cigarettes which did not bear the special excise tax film.