


ILLEGAL TRADE IN CRIMINAL LAW

ABSTRACT: Trade, as a form of commodity-money relations, has a long history. It begins with the first forms of exchange of goods for money and other valuables. Given that the purpose of trade is the acquisition of profit based on the sale and purchase of goods and services, this activity undoubtedly enabled the commercial class of society to accumulate significant wealth. This is why merchants are considered to be among the wealthiest people in the society, from the beginning of the first states, up to the present day. However, trading often represents an ‘ideal’ way of acquiring illegal gains, which can rapidly increase if it is carried out over a long period of time. The suppression of various forms of illegal trade is carried out at the legal and institutional level.

Hence, regulations in this field can be classified into basic ones (governing trading activities), criminal ones (specifying particular criminal offenses), and misdemeanor ones (prescribing penalties for legal entities and individuals). The legal peculiarity in regulating trade, including its legal forms, lies in the extensive catalog of different procedures. In the field of criminal law, there is an independent criminal offense of the same name with multiple forms. In our country, judicial practice is full of various cases in which the criminal ingenuity of the actors of illegal trade is especially manifested. The inspection authorities are the society’s first line of defense against various forms of illicit trade. In the process of carrying out regular and extraordinary supervision, they observe and initiate investigation into the responsibility for offenses in the domain of illegal trade. In the field of

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criminal law, there is an independent criminal offense of the same name, which has several forms. Consequently, this paper gives an overview of the legal mechanisms for suppressing illegal trade in our country.

Keywords: *illegal trade, trade in goods, criminal offense, misdemeanor, court.*

1. Introduction

Trade, as one form of the various relationships based on the exchange of commodity and money between people, is a faithful companion of the development of human society. In its initial stages, the simplest forms of trade existed, which were reduced to commodity exchange expressed through a certain value equivalent. This way, people made up for the lack of certain goods that were in the possession of other people. At the same time, the exchange took place according to the parity principle, which avoided the possibility of an unequal income ratio between traders. The appearance of money provided a new input in the development of trade, both within one country and among merchants who traded goods on the territory of two or more countries. At first, money was expressed in gold, so its value was determined based on purity and weight, which, as a rule, was the measure used to determine the quantity and value of certain goods that were the subject of trade. Aware of this, merchants tried to express their profit as much as possible in gold or other goods (e.g. precious stones). They measured their wealth according to the possession of these goods and the ability to trade them by buying and selling large quantities of product and other goods.

Trading and the gradual formation of a trading class in society soon began to exhibit negative phenomena and different forms of their manifestation. These refer to various types of abuse, smuggling, fraud regarding the value and quantity of goods, robberies of trade caravans, etc. The language of modern economy and law denotes illegal trade as all aforementioned forms of trade as well as numerous other forms of trade related business. It represents a special phenomenon that is classified as an incriminating activity. Consequently, illegal trade is actively suppressed by criminal law in every country. This includes the determination of the misdemeanor and criminal liability of individuals and legal entities that participate in illegal trade.

The specificity of criminalizing illegal trade in criminal law is reflected in the fact that it is a flexible form of criminal activity. Every day, practice shows the criminal ingenuity of traders who, in a covert and/or insidious way, try to

make illegal trade legal. That is why the regulations dealing with this field must be permanently adjusted and adapted to this new reality. An additional circumstance is the fact that radical changes in the socioeconomic relationships in our country, embodied in property transformation and adaptation of the economy to market conditions, contribute to the fact that regulations must be coordinated with European legal instruments. Thus begins the process of harmonizing our internal legislation with European standards that are present in the regulations of the European Union. In addition to the basic regulations in the field of trade, the harmonization of regulations also covers the field of criminal law. Some of the traditional punishments are abolished while, at the same time, significantly more mild punishments are introduced characterized by a much more accommodating attitude towards the perpetrator.

A new momentum in expanding criminal law was made by the introduction of criminal liability of legal entities into our legislation. This was done by adopting a completely new legal act, which clearly sets the normative framework, the content and the scope of criminal liability of legal entities. Knowing that legal entities are an indispensable participant in the trade of goods and the provision of services, our legislator tried to clearly incriminate their responsibility. Its introduction did not neglect the misdemeanor and economic criminal liability of legal entities in our country. So to speak, our legislation now follows the lines of modern normative solutions in which illegal trade is considered a negative product.

The peculiarity of the matter dealing with trade, as a form of entry of legal entities and natural persons into mutual business relations, is reflected in the specific manifestations of its illegal forms in practice. Their (un)recognizability is the main obstacle to preventing various types of speculative business in trade. Therefore, since there is no proactive form of suppression of illegal trade, the government is forced to apply repressive mechanisms in the two segments of criminal law protection, namely:

- a) The first, at the same time somewhat more mild, is a misdemeanor type of punishment for illegal trade of legal entities and natural persons. It is within the penal provisions of the current law that regulates trade in our country.
- b) The second, significantly more repressive, is the criminalizing method of suppressing illegal trade. It is an independent criminal act, within the group of criminal acts against the economy, the focus of which contains several forms of manifestation.

2. Trade as an independent activity

Trade, as a form of independent economic activity, is aimed at the acquisition of material profit for its participants. For this reason, a whole catalog of business activities related to the purchase and sale of goods, as well as the provision of services with the aim of achieving financial benefits, is being established and further developed among traders. Trade is done as (Article 11-12 of the Law on Trade, 2019):

1. Wholesale trade (wholesale) is the purchase of goods for resale and/or provision of services to legal or natural persons registered in the appropriate register.
2. Retail trade (retail) is the sale of goods and/or the provision of services to consumers in order to satisfy personal or household needs.

Legal frameworks established in this way provide wider opportunities for trading activity. In the area of wholesale in our country, statistical data show significant variations – both increase and decrease in sales of certain products. For example, the value of sales and purchases of agricultural, forestry and fishing products in the Republic of Serbia in the first quarter of 2023, compared to the same period in 2022, is 6.8% lower in current prices, while the constant prices are lower by 26.0% (Statistical Office of the Republic of Serbia, 2023).

Retail trade, i.e. retail sale of goods and/or provision of services to consumers, shows oscillating trends in practice. Based on statistical indicators, expressed in absolute and relative values, the turnover of goods in retail trade in the Republic of Serbia in May 2023 compared with the same month of the previous year was higher in current prices by 5.7%, and lower in constant prices by 6.2% (RSZ, 2023). Periods of stagnation in the retail sector are partially reflected in the shortcomings of the existing system and economic policy, which companies cannot directly influence. Therefore, in order to exit the crisis and improve the business of retailers, an efficient and adequate reaction of the government is needed. That is why it is necessary to implement appropriate institutional, economic, and political adjustments that would affect the future behavior of consumers and investors (Roca, Milićević & Vukmirović, 2014, p. 57).

Trade, as an independent activity, includes a wide range of jobs the manifested forms of which are constantly expanding. According to the territorial principle, trade can be divided into international (regional) and internal. The process of globalization initiated the internationalization of the legal order. International trade law is being established in the sphere of trade,

which entails the process of adopting unique and harmonized legal regulations that would be applied throughout the world (Vukadinović, 2012, p. 341).

International trade includes many types of sale of goods and services. It depends on the quantity and the type of goods and/or services that are the object of international exchange, as well as the place where the trade is carried out. Consequently, international trade is manifested in the following: sale of goods upon seeing the goods in their entirety; sale of goods after direct trade negotiations; sale of goods through representatives; sales at international fairs; sales at international auctions; sales on stock exchanges; sales through Off-shore companies; sale by auction; sale by sample. The accelerated development of ecology has enabled a special form of trade in transferable permits (*cap and trade*). It comes down to the transferability of pollution rights through transferable permits. Therefore, any form of violation of these rules is considered a form of illegal trade in international business law (Munitlak Ivanović, Raspopović & Mitić, 2014, pp.116-117).

Even though international trade law contains a system of legal regulations which regulate cross-border trade, they are not the only source to determine the presence of (il)legal trade. As far as this part is concerned, a significant place belongs to the autonomous international codification of law, the main protagonists of which are drafting agencies and various expert groups. This type of codification of international business law rests on the autonomy of the will of the interested subjects in order to achieve greater uniformity of relevant rules, without formal unification of state law (Mijatović, 2018, p. 172).

The mutual connection of international, regional, and domestic business law is also reflected in the field of electronic commerce. “Besides the global plan, the harmonization of the rules of electronic commerce takes place at other levels, with different importance and coverage. On the regional level, relevant EU rules are of primary importance, where the most important role in regulating electronic transactions on the internal market between member states is played by the Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) from 2000. It primarily aims to contribute to the proper functioning of this market by ensuring free movement of information society services between member states, in order to ensure legal security and consumer trust” (Divljak, 2018, p. 914).

Although essentially non-economic, the Church and other religious communities participate in trade. In this manner, they conduct economic activity that ranks them among commercial entities. However, their business

and legal position is somewhat specific as they have numerous tax benefits. In European communitarian law, we can see the determination of the European Union to establish in principle the economic position of the Church and other religious communities. However, member states must specify in more detail the ways of participation of religious entities in trade in their internal regulations. The legal specifics of these legal solutions must follow the lines of European solutions and the needs of our society to enable the (legal) unimpeded functioning of the Church and other religious communities.¹

3. Illegal trade in criminal law

Criminal law is a term that denotes penal law in a number of countries. There, the basic legal regulations in the legal area of criminal law are called 'penal'. In our country, we have specific legal situation, where the term 'criminal law' is used in valid constitutional norms. In the very title of Article 34 (Constitution, 2006), the term 'legal certainty in criminal law' is used. As a result, the distinction between permitted and prohibited trade is sanctioned within misdemeanor law and criminal law. Using our constitutional legal terminology, in this paper we will use the term 'criminal law' for the field incriminating illegal forms of trade in the aforementioned branches of law.

A) Illegal trade in misdemeanor law

Misdemeanors represent special form of illegal acts for which a misdemeanor sanction is prescribed by law or other regulation of a competent authority (Article 2 of the Law on Misdemeanors, 2013). Misdemeanors are prescribed by law or ordinance, or by local self-government decisions when there is a justified need for it (Article 4, paragraph 2 of the Law on Misdemeanors, 2013). Given that trade is an activity aimed at obtaining economic profit, it is understandable that its illegal forms must be subject to misdemeanors law. Hence, our legislator has specifically prescribed the possibility of misdemeanor liability of legal entities and natural persons for engaging in commercial activity in an illegal manner. In this way, the

¹ "In Austria, the business of churches and religious communities is regulated by general economic regulations, and tax exemption or reduction depends on whether the Church has the status of a legally recognized entity under public law (which is not the legal status of all churches and religious communities, but some of them have the status of an association), whether the business was carried out for the purpose of the church, as well as whether it meets the same conditions as corporations that act for the purpose of public benefit or charity" (Đurić & Trnavac, 2018, p. 93).

legislator provided the possibility of conducting misdemeanor proceedings and imposing misdemeanor penalties.² This was done within the framework of penal provisions of the current Law on Trade, where in the Article 67 it was prescribed that a fine of RSD 100.000 will be imposed on a legal entity for a misdemeanor:

1. If trade records are not kept in a complete and prescribed manner (Article 30);
2. If data regarding the trader, the service provider or data on the sales facility are not visibly posted (Article 32);
3. If the working hours are not visible posted or marked working hours are not adhered to (Article 33);
4. If goods are sold with improper or incomplete declaration (Article 34);
5. If the price is not visibly posted in accordance with Article 35 of this Law;
6. If the entity fails to submit data in accordance with Article 44 of this Law.

Apart from this, for actions referred to in paragraph 1 of this article, a natural person or a person responsible in a legal entity shall be fined RSD 10 000. For the actions referred to in paragraph 1 of this article an entrepreneur shall be fined RSD 40 000.

Considerably stricter fines, in the range of RSD 500 000 to RSD 2 000 000 are prescribed for legal entities if they (Article 68 of the Law on Trade, 2019):

- 1) Conduct trade at a sales facility that is not determined by an act of the competent body of the local self-government unit in accordance with Article 14, paragraph 5 of this Law;
- 2) Carry out trade by personal offering contrary to the provisions of Article 16 of this Law;
- 3) Perform the activities of a fair, organizer of economic exhibitions and traditional events, market, wholesale market or auction house, contrary to Art. 20-24 of this Law;
- 4) Perform trade contrary to Article 26 of this Law;

² It is important to note that the meaning and essence of the existence of misdemeanor sanctions consists in the necessary limitation of the rights of legal entities and natural persons in order to achieve their purpose. At the same time, respect for the principle of legality in terms of their type and measure must not be questioned (Martinović, 2014, pp. 196-197).

- 5) The decision of the Government on prices is not respected in accordance with Article 28, paragraph 3 of this Law;
- 6) Do not possess appropriate documents accompanying the goods in the manner prescribed (Article 29);
- 7) Do not keep trade records (Article 30);
- 8) Issue or or express a trustmark contrary to Article 31 of this Law;
- 9) Sell goods without declaration (Article 34);
- 10) Offer goods or services to consumers with special sales incentives contrary to Art. 36 and 37 of this Law;
- 11) Advertise sales incentives contrary to Article 38 of this Law;
- 12) Do not comply with temporary market protection measures in accordance with Article 39 of this Law;
- 13) Carry out speculation (Article 42);
- 14) Organize, perform, advertise, or encourage pyramid trade (Article 43);
- 15) Act contrary to the measure prohibiting the trade of certain goods, i.e. the performance of a certain service, or disposing of the goods, i.e. continue the performance of the service, until the market inspector confirms during extraordinary inspection that the reasons for the prohibition of trade of certain goods or the performance of a certain service have been removed, or that the goods have been permanently removed from the market (Article 54);
- 16) Act contrary to the measure of temporary close of the sales facility (Article 55);
- 17) Act contrary to the measure of the temporary ban on conducting trade by personal offering (Article 56);
- 18) Act contrary to the measure of temporary ban on remote trade (Article 57).

For the aforementioned actions, a natural person or a person responsible in a legal entity is fined from RSD 50 000 to RSD 150 000 dinars, while an entrepreneur is fined from RSD 50 000 to RSD 500 000.

In addition to the above-mentioned entities, fines in the nominal range of RSD 50 000 to RSD 500 000 are prescribed for natural persons if they trade in goods/services and are not traders or service providers (Article 69 of the Law on Trade, 2019).

In addition to a misdemeanor penalty, a protective measure prohibiting the performance of certain jobs or activities for a certain period of time can be imposed on a legal entity, a person responsible in a legal entity, and a

natural person. In addition, our legislator additionally ensured efficiency in the application of misdemeanor sanctions. This was done in such a way that every person sanctioned for a misdemeanor is registered in the register of sanctions for a period prescribed by law. Certain laws, and even lower legal acts, prescribe the legal consequences of misdemeanor sanctions (Drakić & Milić, 2018, p. 124).

B) Illegal trade in criminal law

Effective protection of society from various forms of illegal trade is not possible without criminal law. At the same time, it is the ultimate means of protection (*ultima ratio*) that exists when it is not possible to protect the economy of a country by the norms of other branches of law. Our legislator has provided a special criminal offense of illegal trade in the provisions of Article 235 (Criminal Code, 2005). This is a criminal offense that consists of blanket provisions expressed through multiple forms (Ruling of the Supreme Court of Cassation no. 178/2022 of March 22, 2022).

The *basic form* of this criminal offense (paragraph 1) is committed by a person who, without an authorization for trading, procures goods or other objects of a substantial value for the purpose of sale, or who without authorization and to a substantial degree engages in trade or in mediation in trade, or engages in representation of organizations in domestic or foreign movement of goods and services. Therefore, several forms of this act of criminal offense are foreseen, which differ in content and character. They are connected by the permanent nature of the offending act, which is reflected in the long-term involvement in illegal trade in the manner described in more detail. However, our legislator does not determine the minimum time necessary for performing these activities, which leaves it to judicial practice to be evaluated in each criminal case. In addition, the concept of things, in terms of this criminal offense, should be understood much more broadly than in civil law (Stojanović, 2012, p. 707).

The *first serious form* of criminal offense (paragraph 2) is committed by a person who engaged in the sale of goods the production of which he has illegally organized. This practically means that the perpetrator of the criminal act has a double role, taking at the same time the role of manufacturer and the trader.

The *second serious form* of this criminal offense (paragraph 3) is committed by a person who unlawfully sells, buys or barter goods or objects the movement of which is prohibited or restricted. The perpetrator of this form

of illegal trade has several trading roles. In them, he appears as a seller, buyer or exchanger of goods that are subject to partial or complete restrictions of movement. However, this offense also exists when the turnover of these times was carried out only once, while several successively undertaken actions, as a rule, constitute a prolonged criminal offense (Lazarević, 2011, p. 774).

The *most serious form* of this criminal offense (paragraph 4) is committed by a person who, engaging in illegal trade in previously mentioned forms, organizes a network of dealers or middlemen, or has acquired material gain exceeding four hundred and fifty thousand dinars. Based on the legal description of the qualifying elements, it is clear that our legislator, guided by special reasoning, specifically criminalizes the two most serious forms of illegal trade, namely: a) organized trade through the use of a network of dealers or middlemen and b) acquiring property benefits exceeding the value of four hundred and fifty thousand dinars.

Analyzing the punishments prescribed, we can notice a certain leniency of our legislator. It is reflected in the prescription of a fine that does not affect the perpetrators of this crime to the right extent. Prison sentences, although they dominate all forms of illegal trade, are not severe. Since the concept of 'gray economy' was the basis for the development of the concept of illegal trade, and the legal term of illegal trade, the perpetrators of this crime, as a rule, have a somewhat longer criminal record (Matijašević & Zarubica, 2021, p. 32). Therefore, in our opinion, it is necessary to make the span of penalties more severe, especially in case of imprisonment, in the sense of raising the special minimum and special maximum.

Mandatory imposition of a security measure of seizure of objects is proscribed. It includes the seizure of the entire catalog of goods and objects that were involved in illegal trade (paragraph 5). In addition to mandatory seizure, the court can order the mandatory destruction of items (Joksić, 2019, p. 407).

4. Conclusion

Trade, as a form of independent activity, represents a specific legal area the frameworks of which are set by international legal instruments and national legislation. In this regard, we have a specific legal situation, expressed through the relationship between basic regulations in the field of trade, and criminal regulations, which incriminate the forms of its illegal activity. Therefore, penal norms have a blanket character and thus are purposefully aimed at the basic legal regulations in the field of trade. This contributes to a more effective suppression of illegal trade within and outside national borders.

The fight against illegal trade in criminal law happens by establishing the misdemeanor and criminal liability of natural persons and legal entities. Liability for a misdemeanor is provided within the penal provisions of the current Law on Trade. Fines are prescribed, the nominal ranges of which are adapted to the nature of the offender. In the field of criminal law, there is a special criminal offense of illegal trade (Article 235 of the Criminal Code, 2005). It contains several forms (basic, serious and the most serious), which additionally indicates the need of our legislator to set clear frameworks in which the court should move when determining the criminal responsibility of the perpetrator (natural person and/or legal person) of this criminal offense.

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NEDOZVOLJENA TRGOVINA U KAZNENOM PRAVU

REZIME: Trgovina, kao oblik robno-novčanih odnosa, ima svoju dugu istoriju. Ona započinje sa prvim oblicima razmene robe za novac i druge dragocenosti. S obzirom da je predmet trgovine sticanje dobiti, po osnovu prodaje i kupovine robe i usluga, nesumnjivo je ova delatnost omogućavala ostvarivanje velikih prihoda trgovačkom sloju društva. Otuda se trgovci u stanovništvu smatraju jednim od najimućnijih, od nastanka prvih država, pa sve do današnjeg dana. Međutim, trgovina neretko predstavlja „idealan“ način sticanja protivpravne dobiti, koja se rapidno uvećava ako se obavlja u dužem vremenskom periodu. Suzbijanje različitih oblika nedozvoljene trgovine vrši se na pravno-institucionalnom nivou. Zato možemo propise u ovoj oblasti podeliti na osnovne (kojima se reguliše trgovačka delatnost), krivične (propisana je posebna inkriminacija) i prekršajne (propisane su kaznene odredbe protiv pravnih lica i fizičkih lica). Pravni specifikum u regulisanju trgovine, uključujući sve njene zakonske oblike, ogleda se u dugom katalogu različitih postupaka. Sudska praksa obiluje različitim

predmetima u kojima se posebno ispoljava kriminalna domišljatost aktera nedozvoljene trgovine u našoj zemlji. Na prvoj liniji odbrane društva od različitih oblika nedozvoljene trgovine nalaze se inspekcijски organi. Oni u postupku vršenja redovnog i vanrednog nadzora uočavaju i iniciraju utvrđivanje odgovornosti za prekršaje u domenu nedozvoljene trgovine. Na području krivičnog prava postoji samostalno krivično delo istog naziva koje ima više oblika. Sledstveno tome, ovaj rad daje prikaz pravnih mehanizama u suzbijanju nedozvoljene trgovine u našoj zemlji.

Ključne reči: *nedozvoljena trgovina, promet robe, krivično delo, prekršaj, sud.*

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