

CONTROLLED DELIVERY IN COMBATING POSTAL SMUGGLING: BETWEEN PROCEDURAL EFFICIENCY AND THE REQUIREMENTS OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: *The exponential growth of cross-border e-commerce and the rapid expansion of international postal flows have transformed small parcels into a preferred vector for the smuggling of narcotics, tobacco, counterfeit goods and other prohibited items. In this context, controlled delivery, referred to in the legislation of the Republic of Moldova as (controlled delivery) and in Romanian legislation as (supervised delivery), has become one of the most efficient special investigative techniques, enabling the authorities to trace illicit consignments up to their final addressees, rather than seizing them at the customs border. The present study analyses the dual nature of this technique, situated at the intersection between procedural efficiency and the fundamental right to respect for correspondence enshrined in Article 8 ECHR. Drawing upon the legislation of the Republic of Moldova and Romania, EU instruments (Naples II, Regulation 515/97, the 2000 EU Convention) and UN standards (the Palermo Convention, the WCO Nairobi Convention), as well as on the case-law of the European Court of Human Rights (Klass, Malone, Iordachi, Roman Zakharov) and of the national courts, the article identifies the normative safeguards required by the Convention: a foreseeable legal basis, prior judicial oversight, proportionality, subsequent notification, and proposes de lege ferenda solutions for harmonising domestic provisions with the European procedural acquis.*

Keywords: *controlled delivery; postal smuggling; special investigative techniques; Article 8 ECHR; customs offences; judicial cooperation in criminal matters.*

JEL: K14, K33, K42

Introduction

The globalisation of e-commerce and the unprecedented growth in the volume of international postal items have transformed the postal system from a mere means of interpersonal communication into a global logistical channel for commercial exchanges, sometimes of an illicit nature. According to data published by the Universal Postal Union and the World Customs Organization, cross-border flows of small parcels have shown an annual increase of approximately 20% over the past decade, which has substantially heightened the exposure of customs borders to the introduction, through postal items or express courier services, of narcotic substances, untaxed tobacco products, counterfeit goods, weapons and chemical precursors [1]. This reality has brought to the fore the need for special investigative techniques capable of going beyond the traditional logic of border interception and tracing the criminal chain up to its end-beneficiary.

Discussion

Within such an investigative architecture, the technique known in Romanian terminology as *livrarea supravegheată* (supervised delivery) and in Moldovan terminology as *livrarea controlată* (controlled

delivery) constitutes the most efficient instrument for documenting cross-border offences committed through postal items [2]. It enables the national authorities, in cooperation with their counterparts in the States involved, not to seize illicit goods upon initial detection, but to allow them to circulate under surveillance, with or without substitution of the contents, up to the final addressee, thereby creating the possibility of identifying the entire criminal network.

The technique under analysis, however, entails a structural interference with two fundamental rights guaranteed by Article 8 of the European Convention on Human Rights: the right to respect for correspondence and the right to respect for private life. Postal correspondence has been specifically protected ever since the foundational case *Klass and Others v. Germany* [3], and subsequently, in cases such as *Malone v. United Kingdom* [4] and *Iordachi and Others v. Moldova* [5], the Strasbourg Court has set out strict requirements of foreseeability, necessity in a democratic society, and independent judicial oversight.

The motivation for this research lies precisely in this dual valence: on the one hand, the imperative of procedural efficiency in combating a dynamic and transnational criminal phenomenon; on the other hand, the obligation of States to keep interferences with postal correspondence within the bounds of a democratic order.

The specific objectives of the study are the following: the conceptual delimitation of controlled delivery and its positioning within the system of special investigative techniques; the comparative analysis of the regulations in force in the Republic of Moldova and Romania, with reference to European Union instruments and United Nations standards; the assessment of the compatibility of national rules with the requirements of Article 8 ECHR; the identification of the practical problems raised by the application of the technique in postal smuggling cases; and the formulation of *de lege ferenda* proposals.

Methodologically, the research relies on the legal-logical method, on the comparative method and on case-law analysis. The synthesis of the research stage reveals that, although the English-language specialised literature [6] has addressed controlled delivery in the context of cross-border cooperation, the specific approach to its application in customs cases involving postal items remains insufficiently developed in domestic legal scholarship, which justifies the present endeavour.

Controlled delivery is, in essence, a special technique of surveillance and investigation by which the competent authorities knowingly and in a coordinated manner allow the entry, transit or exit from the territory of a State of goods in respect of which there exists a reasonable suspicion of an illicit character, with a view to identifying the persons involved in the criminal chain.

The definition adopted at international level in Article 2(i) of the United Nations Convention against Transnational Organised Crime, signed at Palermo in 2000, enshrines this technique as the method consisting in allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of the competent authorities, with a view to investigating an offence and identifying the persons involved in its commission [7].

In Romanian law, the technique is currently regulated under Article 151 of the Code of Criminal Procedure [8], having been elevated from its earlier status as a special procedure under the law on drug trafficking to the rank of a general institution of criminal procedural law [9]. Its scope of application extends not only to drugs, but also to weapons, explosive and nuclear materials, stolen items, sums of money and any goods resulting from illicit activities or destined for the commission of offences. In the Republic of Moldova, the regulation is contained in Article 138² of the Code of Criminal Procedure, the technique bearing the name *livrare controlată* (controlled delivery), a terminological variant influenced by the post-Soviet legislative model but with a normative content substantially similar to the European one [10].

The substantive condition common to both regulations is the existence of a reasonable suspicion as to the illicit character of the goods and, cumulatively, the impossibility of identifying the persons

involved by other, less intrusive investigative methods, a requirement that reflects the principle of subsidiarity, developed by the European Court in its consistent case-law concerning special measures. From a doctrinal perspective, controlled delivery has a dual legal nature. On the one hand, it is an evidence-gathering procedure, since its results, including the content of conversations intercepted during the operation and the discoveries made upon delivery of the parcel, are used as means of evidence in criminal proceedings.

On the other hand, it constitutes a procedural measure with effect on the circulation of goods, since it functionally suspends the rule of immediate confiscation of illicit goods discovered at the customs border. This dual nature explains why, in both Moldovan and Romanian law, the authorisation of the technique is entrusted to the prosecutor, who verifies both the formal lawfulness and the operational necessity of the measure, while its actual implementation is, as a rule, carried out by police bodies or by customs authorities with investigative competences.

Within this architecture, postal items present specific features which differentiate the controlled-delivery technique applied in this context from that used in road, rail or commercial air transport. The postal item is, by definition, confidential, the secrecy of correspondence being guaranteed both by Article 28 of the Constitution of Romania and by Article 30 of the Constitution of the Republic of Moldova, as well as by the Convention of the Universal Postal Union. Consequently, any interference with the contents of a postal item falls directly within the scope of Article 8 ECHR, since the protection afforded by this Convention provision covers the entirety of correspondence, without distinguishing between the ideational and the material content of parcels [11].

To this is added the fact that the operation requires the cooperation of authorities with distinct legal status, namely the customs authority, which carries out the initial physical and documentary control; the criminal investigation body, which documents the facts; the prosecutor, who exercises judicial control over the measure; and the postal operator (Poșta Moldovei, Poșta Română or private providers such as DHL, FedEx, DPD), which ensures the continuity of the parcel's transport. This multi-institutional architecture raises issues of procedural coordination, including in respect of liability for any incidents occurring in the course of delivery.

The threshold for triggering surveillance has, in the case of postal items, a particular specificity. It is generally activated as a result of the application of risk-analysis criteria to the advance data transmitted to customs by the postal operator, namely the information contained in CN22/CN23 declarations, in the electronic postal manifest and in the Entry Summary Declaration (ENS), regulated at EU level since 1 October 2021. Modern X-ray scanning techniques and specialised detectors, including drug-detection dogs, complete this preliminary analysis.

Thus, unlike other contexts in which controlled delivery is grafted onto an investigation already under way, in postal cases it is frequently initiated *ex nihilo*, on the basis of a suspicion shaped exclusively as a result of routine customs control.

From a technical standpoint, the operation typically comprises several consecutive stages: detection of the suspect parcel and collection of a sample for laboratory analysis, a central element in drug-trafficking cases; total or partial substitution of the illicit content with inert substances, a procedure which raises delicate questions concerning the integrity of the evidence; resealing the parcel and continuing transport to the addressee; interception of communications between the addressee and possible accomplices, including through the use of an undercover investigator acting as courier; surveillance of the actual handover and execution of the subsequent home search on the basis of authorisation by the judge for rights and liberties [12].

At the European Union level, the normative framework for controlled delivery in customs matters is built on several complementary tiers.

The first is represented by the Naples II Convention [13], which entered into force on 23 June 2009 and which regulates expressly, in Chapter IV, controlled deliveries defined as illicit consignments

which are not seized at the border but pursued up to their final destination, and which establishes the obligation of Member States to grant each other mutual assistance.

A second instrument is Council Regulation (EC) No 515/97 [14], subsequently amended by Regulation (EU) 2015/1525, which establishes the Customs Information System and the data-exchange mechanism through Container Status Messages, enabling the European Anti-Fraud Office (OLAF) to coordinate controlled-delivery operations between the customs authorities of the Member States.

A third tier is represented by the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union [15], whose Article 12 enshrines the obligation of each Member State to allow controlled deliveries on its territory at the request of another Member State. The regime was subsequently complemented, in the relations between EU Member States, by Directive 2014/41/EU on the European Investigation Order [16], which permits the issuance of a European Investigation Order for the carrying out of a controlled delivery, with harmonised procedural safeguards.

At the international-law level, the principal pillar is the United Nations Convention against Transnational Organised Crime (Palermo, 2000) [7], whose Article 20 obliges States Parties, to the extent that the fundamental principles of their internal legal systems so permit, to take the necessary measures for the appropriate use of controlled deliveries. The Convention is supplemented by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 1988) [17], which contains similar provisions on controlled delivery of drugs, and, in the customs sphere, by the Nairobi International Convention of 9 June 1977 [18], under the auspices of the World Customs Organization, which enshrines the technique of controlled delivery as a standard instrument of inter-State cooperation. For the Republic of Moldova, in the absence of EU Member State status, these instruments operate predominantly through the EU-Moldova Association Agreement of 27 June 2014 [19] and through bilateral agreements with Member States, while the acquisition of candidate-State status (December 2023) will significantly modify the framework of cooperation in the customs field.

The European Court of Human Rights has developed, over more than five decades of case-law, a consolidated body of jurisprudence concerning interferences with the right to respect for postal correspondence. The foundational judgment is *Klass and Others v. Germany* [3], in which the Grand Chamber held that the mere existence of legislation authorising secret surveillance creates a threat to the freedom of communication between users of postal and telecommunications services, constituting in itself an interference with the rights protected by Article 8.

This principle was subsequently consolidated in *Malone v. United Kingdom* [4], which clarified that the interference is lawful only where there is a basis in domestic law that is accessible to the person concerned and foreseeable in its effects, compatible with the requirements of the rule of law. The most relevant case for our legal area is, however, *Iordachi and Others v. Moldova* [5], in which the Court found that the system of secret surveillance in the Republic of Moldova was, in its own words, at the very least over-used, a fact attributable in part to the inadequacy of the safeguards contained in the law.

Although the judgment concerned the interception of telecommunications, its reasoning applies *mutatis mutandis* to any form of secret surveillance of postal correspondence, since the standard of foreseeability of the law is identical.

In *Roman Zakharov v. Russia* [20] and *Centrum för rättvisa v. Sweden* [21], the Grand Chamber systematised the six minimum safeguards which any law authorising interferences with correspondence must contain: the nature of the offences capable of triggering the measure, the definition of the categories of persons concerned, the establishment of a maximum duration, the procedure for examining, using and storing data, the precautions for communicating data to third parties, and the circumstances in which the data must be erased or destroyed. These standards operate

as a benchmark for assessing the compatibility of any national regulation governing controlled delivery of postal items.

Applying these benchmarks to the Moldovan and Romanian regulations, both systems provide for prior authorisation by the prosecutor rather than by a judge, a solution which may raise reservations from the perspective of the requirement of independent judicial oversight. The case-law of the ECtHR, particularly in *Dumitru Popescu v. Romania* (No. 2) [22], has nevertheless accepted that even a non-judicial authority may qualify as independent if it is sufficiently separate from the executing body, a criterion which the prosecutor satisfies, although with reservations, in systems with a public prosecution service integrated into the executive authority.

A separate issue remains the subsequent notification of the person concerned, since once the operation has been completed and the maintenance of secrecy is no longer necessary, the person should be informed in order for an effective remedy to be possible. In situations where the operation ends without identifying the addressee, the sender frequently remains outside any notification mechanism, even though their correspondence has been the object of an interference [23].

Judicial practice confirms these concerns. In Romania, the Constitutional Court examined, in Decision No. 51/2016 [24], the issues concerning the technical surveillance warrant, ruling that the phrase "or of other specialised bodies of the State" contained in Article 142(1) of the Code of Criminal Procedure is unconstitutional; in Decision No. 244/2017 [25], the Court found the necessity of an effective remedy against technical surveillance measures for persons concerned who do not have the status of defendant.

These decisions, although they do not directly address controlled delivery, configure the procedural safeguards applicable to any special technique involving interferences with private life. As regards smuggling, the High Court of Cassation and Justice, by Decision No. 32/2015 of the Panel for the resolution of legal issues in criminal matters [26], published in Official Gazette No. 62 of 28 January 2016, clarified the notion of "smuggling" used in Article 270(3) of the Customs Code, holding that this notion covers both the introduction of goods through places other than those designated for customs control and their introduction by way of evading customs control, an interpretation relevant to the legal qualification of the facts uncovered as a result of postal controlled-delivery operations.

In the Republic of Moldova, the Prosecutor's Office for Combating Organised Crime and Special Cases has reported a significant increase in the number of authorised controlled deliveries in recent years [27], a trend which reflects both the intensification of international postal flows and the consolidation of operational capacities of law-enforcement bodies. The cases concluded illustrate both the offensive potential of the technique and the difficulties of procedural coordination in a multijurisdictional context, including the controversial issue of the action of Moldovan authorities on territories over which the State does not exercise effective sovereignty, an issue specific to the Transnistrian context.

A critical observation must be made concerning the absence, in both jurisdictions, of decisions of the higher courts in which the compatibility of the regulation of postal controlled delivery with Article 8 ECHR has been expressly analysed, which leaves the interpretive and doctrinal space open.

Such reflections are completed, on the institutional plane, by observations on the way in which procedural cooperation translates into the day-to-day practice of law-enforcement bodies. Effective coordination presupposes not only coherent legislation, but also the existence of permanent communication channels between the customs authorities, the public prosecution, the police and the postal operators, supported by clear inter-institutional protocols. In the recent experience of the two States, it has been noted that, although the normative framework is similar, operational performance differs significantly depending on the degree of digitalisation of data flows and on the quality of professional training of the personnel involved. These differences are visible above all in the speed of reaction, the quality of the evidence administered and the rate of completion of operations resulting in actual indictment.

The analysis of practice reveals, on the operational plane, several recurring problems which affect the efficiency of the technique.

A first problem is that of substitution of the parcel's contents. In both Moldovan and Romanian law, the legislation permits the total or partial substitution of illicit goods, but does not detail the technical standards regarding the integrity of the seal, the chain of custody of the substance extracted for analysis and the resealing procedure. In the absence of normalised procedures, the defence may subsequently invoke, on the basis of Article 6 ECHR, a breach of the right to a fair trial through alteration of the *corpora delicti*.

A second problem is that of refused controlled deliveries, where the addressee fails to appear to collect the parcel either for reasons beyond their control or because of suspicions induced by delays in delivery, a situation which significantly erodes the possibility of identifying the entire criminal chain.

A third challenge is of a technological nature: the increase in the volume of small parcels valued under EUR 150, apparently exempted from complex customs formalities, has transformed this category into a preferred vector for small-scale but frequent trafficking, and current risk-analysis regulations are insufficiently calibrated to detect repetitive flows of small parcels coming from the same sender or destined for the same addressee [28].

To this is added the fact that, in the case of EU Member States, the European Investigation Order mechanism [16] significantly facilitates cooperation, whereas the Republic of Moldova, not participating in this instrument, must resort to bilateral mechanisms or to the European Convention on Mutual Assistance of 1959, with slower and less foreseeable procedures, which creates operational asymmetries that may be exploited by criminal networks.

Conclusions

The analysis carried out allows for the formulation of several conclusions of theoretical and practical value. The first concerns the consolidated legal status of controlled delivery as a special investigative technique that is indispensable in the arsenal for combating smuggling through postal items. The existence of a domestic normative framework in both jurisdictions, namely Article 138² of the Moldovan CCP and Article 151 of the Romanian CCP, coupled with a coherent international framework comprising the Palermo Convention, the Naples II Convention and the EU Convention of 2000, provides the premises for a sound investigative practice.

The second conclusion concerns the structural compatibility of national regulations with the requirements of Article 8 ECHR, with the reservation that the case-law in *Iordachi v. Moldova* [5] sounds an alarm regarding the need for additional safeguards of foreseeability and oversight.

Thirdly, the asymmetry between the Romanian system, integrated into the EU's Area of Freedom, Security and Justice, and the Moldovan one, in the process of harmonisation, generates an additional operational cost for combating smuggling on the Republic of Moldova–EU route, a cost which will progressively decrease as the accession process advances. Fourthly, there is insufficient differentiation, at both normative and doctrinal level, between classical controlled delivery, targeting major commercial transports, and that applied to low-value postal items, even though both raise distinct procedural problems.

On the *de lege ferenda* plane, several adjustments are proposed. The first concerns the introduction, in both Article 138² of the Moldovan CCP and Article 151 of the Romanian CCP, of express provisions on the technical standards for the substitution of parcel contents, including the obligation of video recording of resealing operations, a measure intended to guarantee the integrity of the evidence and to prevent subsequent challenges. The second proposal concerns the establishment of a mechanism for subsequent notification of the parcel sender, in cases where the operation ends without criminal proceedings being initiated against them, in order to ensure compatibility with the case-law in *Pietrzak and Bychawska-Siniarska v. Poland* [23].

The third direction of reform consists in strengthening the framework of cooperation between the customs authority and the public prosecution, through the adoption of joint operational protocols defining objective thresholds for referring suspect parcels to the criminal investigation bodies. Fourthly, the development, in partnership with postal operators, of integrated risk-analysis platforms is required, which would enable the detection of cumulative flows of small parcels with a potentially criminal character.

Among the limitations of the present research are the lack of access to comprehensive statistical data on operations carried out in recent years in the Republic of Moldova, partially classified, and the relative rarity of judgments published *in extenso* on this topic. Future research could deepen, on the one hand, the empirical dimension, through surveys conducted among practitioners, namely prosecutors and customs criminal-investigation officers, and, on the other hand, the comparative dimension, by extending the analysis to the German, French and Italian systems, where the technique has generated consistent constitutional case-law.

Looking ahead, the relevance of the controlled-delivery technique will be dictated by the capacity of national legal systems to adapt to the technological transformations of postal trade. The emergence of globalised e-commerce platforms, the development of crypto-financial payment instruments and the appearance of automated logistical flows call for a rethinking of risk-analysis parameters [29] and of the criteria for triggering special operations. The balance between procedural efficiency and the protection of fundamental rights remains, in these conditions, a permanent objective of the legislator, and compliance with European standards in this matter is not an external constraint, but a benchmark for building an investigative system that remains credible in the eyes of citizens and international partners.

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