Pseudo-Contraband. Controversial Issues Regarding the Interpretation of the Smuggling Offense

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Abstract: The article analyzes the notion of smuggling, as provided in art. 270 para. (3) of Law 86/2006, Romanian Customs Code, the conditions necessary for its legal existence, according to the legislation of the Romanian state in force, compared to the controversial interpretation of the illicit act of smuggling, as generating criminal liability for those correlative facts, provided and sanctioned under the same conditions as the crime of smuggling. On the interpretation of this notion, different opinions were expressed, among which, the opinion of accepting the notion of smuggling "lato sensu", expressed also by Decision 32/2015 of the High Court of Cassation and Justice, the Panel for solving legal issues of criminal law and a second opinion, which belongs in particular to legal practitioners, according to which the notion of smuggling must be interpreted strictly in the form of the crime of smuggling. In this article, we will highlight a series of negative consequences that may arise from an extensive interpretation of the rule of law in the sense of broadening the initial content of the rule of law, in relation to its textual wording. We will also try to highlight the limits of the application of general legal norms in the field regulated by the special law, on the principle of "specialia generalibus derogant", as well as the requirements necessary for the existence of criminal liability in case of assimilated facts. The study was carried out starting from practical aspects of the relevant national jurisprudence, of some concrete cases in which, the coherent and correct application of the legal norms applicable to each of the situations can generate, in our opinion, the reasonable suspicion of committing serious judicial errors, effects on the observance of fundamental human rights and freedoms, the achievement of the purpose of the law in correcting the unlawful conduct of the perpetrator and the subjection of the Romanian state to some unjustified and exaggerated expenses in relation to the seriousness of the facts brought to trial.

Keywords: smuggling; correlative facts; judicial errors; extensive interpretation

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Pseudo-Contraband

Smuggling, as an illegal act committed under the customs regime, was provided by law exclusively in the form of a crime committed in the customs field, both in the previous customs provisions (Law no 141/1997[1]) as well as in the basic form of the Customs Code in force, Law no 86/2006[2]. The essential condition of the legal existence of this crime is the place of the crime, respectively, *in other places than those intended for customs control.*

Any other illicit actions committed in the places intended for customs control having as illicit resolution the introduction / removal in / from the country of some goods or assets by evading the customs control, were considered as contraventions. Therefore, these acts committed by failing to present to the customs control the goods or assets on the occasion of the legal entry / exit of the person through the legally established places, were provided and sanctioned strictly as illegal acts of contravention nature, within the rules of application of the Customs Code[3]. The difference between criminal acts and those of a contraventional nature, in addition to the condition regarding the place of the acts, implied the attribution of the smuggling term only to the facts established by law as crimes.

Following Romania's accession to the European Union, there were significant differences in the prices of some products, especially those subject to excise duties, compared to goods in the same categories in the economic circuit of third countries neighboring Romania, such as Serbia, Ukraine and Moldova.

These differences have had the effect of intensifying the wrongful acts committed at the border control posts committed by failing to present to the customs control the goods or merchandise held or by evading customs control. At the same time, the considerable price differences generated an increase in the value of the damage caused to the Romanian state resulting from committing such deeds, which imposed the need to identify and adopt new legal measures, likely to discourage this growing phenomenon.

[1] Law no. 141/1997, Romanian Customs Code of 1997, Published in the Official Monitor no. 180 of August 1, 1997.
[2] Published in the Official Monitor no. 350 of April 19, 2006, amended and supplemented by Emergency Ordinance no. 96/2020 for the amendment of Law no. 86/2006 on the Romanian Customs Code, published in the Official Monitor of Romania, Part I no. 500 of June 12, 2020.
[3] G.D. no 707/2006, Norms for the application of the Customs Code, Published in the Official Monitor no. 520 of June 15, 2006, amended and supplemented by Emergency Ordinance no. 96/2020 for the amendment of Law no. 86/2006 on the Romanian Customs Code, published in the Official Monitor of Romania, Part I no. 500 of June 12, 2020.

Thus, through a series of successive normative acts, the G.E.O. no. 33 of April 1, 2009[1], Law no. 291 of September 28, 2009[2] and G.E.O. no. 54 of June 23, 2010[3], the legislator proceeded to provide as offenses some contraventions, depending on the customs value of the material object of the deed committed or recidivism in committing customs offenses during a period of 1 year, as well as the regulation as offenses of acts committed by third parties persons who support their commission or obtain any benefit from the result of the commission of smuggling offenses, but without actually participating in their commission - *ex re*.

We note that the purpose of the legislator to adopt such legal measures was to discourage the unlawful conduct of the person, to penalize those unlawful acts with a gravity that exceeds the limits of the contravention and, last but not least, to correct the unlawful conduct of the person, in order to prevent the commission of more serious acts.

Thus, the illicit action initially sanctioned as a contravention according to the provisions of art. 653 par (1) letter a) of G.D. no 707/2006, committed by omission in the sense of evading customs control, if the customs value of the material object of the deed exceeds 20,000 lei in the case of excisable products and more than 40,000 lei in the case of other goods or merchandise, was regulated as a crime, by passing it under the rule of the provisions of the special law with criminal provisions[4] and assigning the name "*smuggling*" to the wrongful act committed in the above conditions.

By the same legislative artifice, the criminal liability for "*contraventional recidivism*" was established within the term of one year from the date of committing a first act of a contraventional nature committed by evading the customs control.

The conclusion deriving from the analysis of the evolution of the normative framework for regulating customs relations, under the aspects presented above, *is that smuggling means the direct intent to commit an illicit act belonging to the customs field, expressly provided by law as a crime and whose legal existence is conditioned by the fulfillment of all the requirements provided by the extra-criminal law with criminal provisions.*

[1] Published in Official Monitor no. 226 of April 7, 2009.
[2] Published in Official Monitor no. 645 of October 1, 2009.
[3] Published in Official Monitor no. 421 of June 23, 2010.
[4] Art. 270 par. (2) lit. a) of Law 86/2006, Romanian Customs Code.

Any other reference to the notion of smuggling, such as the situation of finding the commission of illegal acts of a contraventional nature[1] having the same "modus operandi" as the deed of smuggling[2], but which does not meet the conditions imposed by the extra-criminal law with criminal provisions for the existence of the crime, cannot be considered as smuggling, as this notion belongs exclusively to the customs offense.

At the center of this scientific research is the notion of smuggling, as defined in art. 270, par. (3) of Law no 86/2006, Romanian Customs Code. Specifically, by adopting the E.G.O. no 54/2010 amending the Customs Code, were provided as assimilated crimes "collection, possession, production, transport, takeover, storage, delivery, sale and sale of goods or merchandise to be placed under a customs procedure knowing that they come from smuggling or are intended for its performance"[3].

Thus formulated, the notion of "smuggling" in the text of the law previously presented, has created many controversies regarding the establishment of the legal meaning pursued by the legislator.

Against the background of a non-unitary judicial practice at national level of the courts of first instance, following the notification formulated by the Alba Iulia Court of Appeal - Criminal Section and for cases with minors, on establishing the legal meaning of the notion of "smuggling" in art. 270, para. (3) of Law 86/2006, High Court of Cassation and Justice, Panel for solving legal issues in criminal matters, by Decision 32/2015, "establishes that the notion of "smuggling" used by the legislator in the provisions of art. 270 para. (3) of Law no. 86/2006 on the Romanian Customs Code, in the phrase "knowing that they come from smuggling", refers to smuggling consisting in the introduction into the country of goods or merchandise to be placed under a customs procedure through places other than those established for customs control or the introduction in the country of these goods or merchandise through the places established for the customs control, by evading the customs control".

Therefore, we are in the presence of a "lato sensu" interpretation of the notion of smuggling as a literary definition taken from outside the legislative framework, without considering the legal nature of the wrongful act committed at the time of crossing the state border, the place of consumption of the wrongful act, or the need to meet the conditions required by law for the existence of the standard crime,

[1] Art. 653, para. (1) letter a) of G.D. no 707/2006, Norms for the application of the Customs Code.
[2] Art. 270, par. (2) letter b) of Law 86/2006, Romanian Customs Code.
[3] Point 2 of art. IX of the E.G.O. no. 54 of June 23, 2010, published in Official Monitor no. 421 of June 23, 2010.

specifying that the illicit crossing of a border of goods or merchandise is an essential feature of the existence of smuggling. In our opinion, this legal approach is governed by the extensive interpretation by analogy of the legal norm, in the sense of the application of the criminal law on some facts of contraventional nature similar to those provided by the criminal law.

In the criminal doctrine identified at national level, we encounter different opinions regarding this interpretation of the notion of "smuggling" from the content of art. 270 para. (3) of Law no. 86/2006 on the Romanian Customs Code.

Thus, in support of the above decision, some authors consider that, "it cannot be admitted that the legislator took into account the crime of smuggling in the case of the origin of goods or merchandise to be placed under a customs procedure and, differently, had in view the notion of smuggling in the broadest sense, in the other case when the goods or merchandise to be placed under a customs procedure are intended for smuggling, in the context where no distinction is made in the legal text, and where the law does not distinguish, we must not distinguish (ubi lex non distinguere nec nos distinguere debemus)" thus, "*the notion of smuggling used by the legislator in art. 270, par. (3) of Law no 86/2006 on the Romanian Customs Code, in the phrase knowing that they come from smuggling refers to smuggling consisting in the introduction into the country of goods or merchandise to be placed under a customs procedure through places established other than those established for control customs or the introduction into the country of these goods or merchandise through the places established for customs control, by evading customs control*. (Hotca et. all., 2019, p. 202)

On the contrary, given that smuggling is unanimously accepted as a dangerous act, criminal liability arises from the materialization of the act - *ex re* and not as a result as presented above, in our opinion and in the application of the same legal argument (*ubi lex non distinguere nec nos distinguere debemus*) if the law does not distinguish smuggling in its broadest sense then we should not distinguish otherwise, but we should limit ourselves strictly to the only form of smuggling provided by law: *the crime*.

In another opinion, although in principle the interpretation "lato sensu" of the notion of smuggling in art. 270 para. (3) of Law 86/2006 on the Romanian Customs Code as established by Decision 32/2015 of the HCCJ, correctly conditions, in our opinion, the existence of criminal liability for acts assimilated to the crime of smuggling in the sense that, *"Being a correlative crime, the crime provided in art. 270, para. (3)*

can be assessed as proven only insofar as it proves the existence and the crime (the deed provided by the criminal law) in connection with which it took place, of the crime in the standard variant" (Tudorel, 2018, p. 255).

However, as long as during the debates of Decision 32/2015 of the HCCJ, smuggling was viewed more in terms of highlighting the purpose of committing acts of smuggling and not as a dangerous act that is consumed exclusively when crossing a border, it appears natural confusion between crime and misdemeanor because, both have the same illicit resolution - evasion of customs duties. As regards the approach to the legal interpretation of the act of smuggling, it must be reiterated that it is a dangerous crime and not a result. Thus, the purpose of the illicit action committed under the customs regime cannot be used as a legal argument, as it is not an essential feature or a constitutive element of the committed deed, the criminal liability deriving from the materialization of the illicit action - *ex re.*

As a source of interpretation of the notion of smuggling in art. 270 para. (3) of Law 86/2006 on the Romanian Customs Code, there is a "procedural anarchy" in the application of the laws governing the activity of combating the illicit customs phenomenon.

This aspect stems from the priority, erroneous and biased application of the general rules belonging to the Criminal Code and the Code of Criminal Procedure, contrary to the provisions of the special rules governing the customs field, the Customs Code and its implementing rules, in flagrant violation of the principle "specialia generalibus derogant" according to which the latter should be applied as a matter of priority to the general rules, the general rule intervening only where the special law does not provide or when it makes express reference to the application of the general rule.

In our opinion, the interpretation of the notion of smuggling in art. 270 para. (3) of Law no 86/2006 according to decision 32/2015 of the HCCJ, is based on a series of inaccuracies identified both in the activity of ascertaining the deed and throughout the criminal process carried out in the case of the facts assimilated to the crime of smuggling. This illegal behavior is argued by identifying controversies in the activity of finding the deed, as well as in terms of activities carried out throughout the criminal process in the case of reported smuggling offenses.

A first controversy concerns the activity of ascertaining some illicit deeds of customs nature, regulated by the provisions of art. 17 para. (2) of Law 86/2006[1], according to which "*police bodies and other public authorities that have, according to the law, competences in the field of fiscal control, movement and use of goods on the Romanian customs territory are obliged to immediately notify the nearest customs authority when they find violations of customs regulations; to submit to it the goods which were the subject of those infringements, as well as the proving documents*".

At the same time, in view of the fair inclusion in the customs regulations of the facts ascertained by the representatives of the aforementioned authorities, "*if the customs contraventions are ascertained by the police or other bodies with control attributions, in other places than those provided in par. (1)[2] they must immediately submit the documents to the nearest customs authority together with the goods which are the subject of the infringement."*[3], following that, in accordance with the provisions of par. (3) of the same article, "*after verifying the classification of the deed in the customs regulations, the customs authority shall apply the fine and order, as the case may be, the seizure of the goods for confiscation*".

It follows that, regardless of the place or time of the finding of the act of a customs nature, in places other than the customs premises and in the places where operations are carried out under customs supervision and there are no clear indications that the goods or merchandise which are the material object of the act have been introduced through places other than those mentioned, the police or any other bodies with control attributions, *do not have the functional competence to notify the criminal investigation bodies without, beforehand, the representatives of the customs authorities establishing the correct legal classification of the established fact , in accordance with the provisions relating to the customs field*. At the same time, by not respecting the imperative provisions mentioned above, the possibility of the incidence of the provisions of art. 16 lit. e) of Law no. 135/2010, Code of Criminal Procedure[4], on the legality of initiating the criminal action from the "*lack of authorization or notification of the competent body*" in the conditions in which, according to the provisions of art. 11 para. (3) of Law no. 86/2006, "*in case of flagrant offenses, the customs staff has the obligation to immediately forward the*

[1] Modified and completed by Emergency Ordinance no. 96/2020 for the amendment of Law no. 86/2006 on the Romanian Customs Code, published in the Official Monitor of Romania, Part I no. 500 of June 12, 2020.
[2] In customs premises and in places where operations are carried out under customs supervision.
[3] art. 280 para. (2) of Law 86/2006, Romanian Customs Code.
[4] Published in Official Monitor of Romania, no. 486 of July 15, 2010.

perpetrator to the prosecutor, together with the works performed and the means of proof".

The immediate consequence of non-compliance with the mandatory provisions presented above is to start criminal proceedings against offenders and send them to the courts who, in error caused by distorting the legal reality applicable to the act committed and by biased presentation of the act in competition with non-existence defenses capable of highlighting non-compliance with the procedures imposed by law, related to the application of decision 32/2015 of the HCCJ, pronounces unfair and abusive solutions with serious consequences on the fundamental rights of the person, the rule of law and the consolidated state budget.

Returning to the provisions of Decision 32/2015 of HCCJ, by applying it throughout the criminal process, there is a possible unconstitutional effect caused by amending, limiting or repealing certain legal texts such as:

- abrogation of the provisions of art. 17, 280 par. (2) - (3) and 281 of Law no. 86/2006 on the obligations of the bodies for the ascertainment of illicit acts of a customs nature;
- modification of the provisions of art. 653 of G.D. no 707/2006 by limiting the existence of the contravention liability strictly in case of arrest in flagrante delicto (on the occasion of customs control);
- limitation of the provisions of art. 13 of G.O. no 2/2001 regarding the prescription term of the finding of the contravention by introducing the phrase "except for the contraventions committed to the customs regime".

These effects prejudice the fundamental principle of the existence of the rule of law, established by the provisions of art. 1, par. 4 of the Constitution[1] whereas the judiciary is abusively intervening in the field of activity of the Romanian Parliament, as "*the supreme representative body of the Romanian people and the only legislative authority of the country*"[2].

Thus, in our opinion, the erroneous interpretation of the customs offense gave rise to the term "*pseudo-smuggling*", *as a legal institution applicable to criminal prosecution of the offender for alleged acts assimilated to the crime of smuggling, a*

[1] The state is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within the constitutional democracy.
[2] Constitution of November 21, 1991 (republished), Official Monitor of Romania no. 767 of October 31, 2003, art. 61 para. (1).

legal institution not regulated by law but which may attract the criminal liability of any person subject to a criminal trial governed by procedural-legal anarchy.

This criminal incrimination is identified by the criminal legal classification of the deed of contravention nature, provided in art. 653 letter a) of G.D. no. 707/2006 and which, according to the normative framework, is not smuggling in the conditions in which, during the prescription term of the contravention committed at the moment of crossing the border, regardless of the place or moment of finding the deed, it cannot be interpreted otherwise than in legal form of contravention. This act can be incriminated as smuggling if and only if it meets all the conditions required by the respective criminal law, the customs value of the material object of the deed, as provided by the extra-criminal law with criminal provisions or, recidivism. However, if the committed deed meets the conditions required by law for the existence of the crime, then the deed committed at the time of crossing the border will be strictly retained, not the assimilated deed.

Pseudo-smuggling arises from ***the act committed by omission*** which consists in "*evading from customs control any goods or merchandise that should be placed under a customs regime*", established and sanctioned as a contravention, according to art. 653, para. (1) letter a) of Decision no. 707/2006, Norms for the application of Law 86/2006, Romanian Customs Code.

In our opinion, pseudo-smuggling can be defined as: *the illicit act of a customs nature, provided and sanctioned by law as a contravention, committed repeatedly by the offender by possession, transport or marketing of products of foreign origin obtained as a result of the illicit act. Pseudo-smuggling occurs in the form of those illegal acts of a customs nature, provided and sanctioned by law as a contravention when crossing the border of goods or merchandise by evading customs control, but which, being found after the commission, is erroneously interpreted as an assimilated act the offense of smuggling, provided that the offender is in violation of the resolution of the offense committed at the time of crossing the border, consumed fact, which automatically involves the possession, transport or marketing of products of foreign origin, uncertain, obtained as a result of the offense committed*.

The legal conflict that arises from pseudo-smuggling finds its source in the misinterpretation of the misdemeanor act which consists in "*evading from customs control of any goods or merchandise that should be placed under a customs regime*", according to art. 653, par. (1), letter a) of G.D. no 707/2006, the norms of application of the Customs Code and the crime of smuggling provided in art. 270, para. (2) letter

a) of Law no 86/2006 on the Romanian Customs Code, committed in the same way as the contravention but "*the customs value of the stolen goods or merchandise is higher than 20,000 lei in the case of excisable products and higher than 40,000 lei in the case other goods or merchandise*".

As we can see, in both cases the illicit action consists in evading the vigilance of the customs bodies, and the existence of criminal liability to the detriment of the contravention liability is conditioned by the "customs value" of the stolen goods or goods, which must be higher than 20,000 lei. in the case of goods or merchandise subject to excise duty or 40,000 lei in the case of common goods or merchandise.

Therefore, this essential condition for the existence of the crime of smuggling is to exceed the value benchmark established by the law. Failure to meet this condition automatically attracts the contravention liability according to art. 653 para. (1), letter a) of G.D. no 707/2006, the application norms of the Customs Code, with the application, as the case may be, of the provisions of par. (2) of the same article and of the provisions of art. 653 ^ 1 of the same normative act. In my opinion, this contravention of the customs regime cannot be considered as the source of the facts assimilated to the crime of smuggling, since the notion of smuggling is not included in the norm regulating the contravention deed.

In the same sense, regarding the provisions of art. 270 paragraph (3) of Law no 86/2006 on incrimination of acts assimilated to the crime of smuggling, their applicability cannot be accepted in case of customs offenses because the perpetrator, regardless of the place or time of discovery, is strictly responsible for the act committed at the time crossing the border for the entire period of prescription of the finding of the deed, being unacceptable a double incrimination.

Regarding the interpretation of the notion of "smuggling", in our opinion, various methods of interpreting the law were used - the method of systematic interpretation, in the sense of interpreting it in conjunction with other laws, in order to establish the legal rule applicable at the time of the act. illicit and the method of interpreting the law by analogy where the meaning of a criminal norm can be made by means of another norm where a similar but clearer deed is provided

More precisely, when establishing the legal norm applicable to the committed deed, as an illegal action of a contraventional nature (art. 653 par. (1), letter a) of D. no 707/2006)[1], the provisions of art. 13 of G.D. 2/2001[2], the legal regime of the

[1] Published in the Official Monitor no. 520 of June 15, 2006.
[2] Published in the Official Monitor no. 410 of July 25, 2001.

contraventions (republished), where it is provided that, "*the application of the sanction of the contravention fine is prescribed within 6 months from the date of committing the deed*", concomitantly with the assimilated deed consisting of illicit actions of a commercial nature, is also sanctioned for minor offenses according to the provisions of art. 1, letter e) of Law no 12/1990, republished[1], respectively, "*performing production, trade or service activities, as the case may be, with goods whose provenance is not proven, in accordance with the law. (...). Documents of origin are understood, as the case may be, the fiscal invoice, the invoice, the notice accompanying the goods, the customs documents, the external invoice or any other documents established by law"*.

Therefore, we cannot claim that there is smuggling as long as the law provides concrete solutions to combat this illegal phenomenon belonging to the customs field, in the sense that if the legislator had in mind "smuggling" in the broadest sense, it would not be provided for the possibility of sanctioning acts of trade in goods or merchandise "*without holding customs documents or external invoice ...*", of uncertain origin, as a result of illegal acts of an extra-criminal nature.

The existence of pseudo-smuggling also appears, in our opinion, from the decisions of the courts convicting such deeds, as it appears (from many other such convictions) from the analysis of the Criminal Sentence no. 1473 of 02.10.2019, trying to highlight the way in which the judicial bodies, based on Decision no 32/2015 of the High Court of Cassation and Justice, reject the legal reality of the existence of the illegal action of a misdemeanor nature and abusively incriminate, in our opinion, the offender as perpetrator of a crime assimilated to the crime of smuggling.

Jurisprudence case, briefly:

On ..., the defendant CV, transported by car ..., the total quantity of 136 packs of cigarettes of different brands, on which were not applied appropriate tax markings issued by the Romanian authorities, knowing that they come from smuggling, deed provided and punished by art. 270 al. (3) of L86 / 2006.

(...) On the occasion of the detection as well as later during the hearings, the defendant stated that the entire quantity of cigarettes belongs to her, she hid her in

[1] Published in the Official Monitor no. 121 of February 18, 2014.

the car without the knowledge of her concubine P.V. and intended to capitalize on it in Square B ... in G. County ....

It also shows that he entered Romania on the same day through Girgiulești Customs without declaring the number of cigarettes he owned. (...)

Legal-criminal analysis of the facts presented:

From the analysis of those presented above and in accordance with the legal provisions in customs matters, it results that the illicit deed recognized and assumed by the defendant is provided and sanctioned for minor offenses, according to art. 653, para. (1), letter a) of the Government Decision no. 707/2006, with the application of par. (2) of the same article, the finding of this fact being made under the conditions of art. 280 para. (2) of Law no 86/2006, Romanian Customs Code, by other bodies with general competence to establish illicit facts, other than customs bodies.

The legal conduct would have presupposed the observance of the obligations imposed on the ascertaining bodies by the imperative provisions of art. 280, par. (2) of Law no. 86/2006, Customs Code of Romania respectively, the obligation to immediately present the documents drawn up to the nearest customs authority, together with the goods subject to the contravention, following that the latter, after verifying the legal classification of the deed, take legal action accordingly.

It should be noted that, in the text of the special law with criminal provisions, Law no 86/2006, Romanian Customs Code, at art. 281, par. (1) refers to the fact that, "the provisions of art. 279 and 280 regarding the contraventions are completed with the provisions of the Government Ordinance no. 2/2001 regarding the legal regime of contraventions, (...) except for art. 28, para. (1) and (3) and art. 29 "which presupposes that, on the committed deed, the prescription term of 6 months operates with priority in which the contravention deed can be ascertained, according to art. 13 of the Government Ordinance no. 2/2001. The application of these provisions presupposes that, regardless of the place or moment of the contravention, within this term, it cannot be classified under any form of liability other than the contravention, since the possession and transport of the object of the contravention is a natural continuation of the contravention, their origin is not from smuggling but from committing a customs contravention that is not called smuggling.

On the contrary, by disregarding the mandatory obligations set out above, the bodies of inquiry have notified the judicial bodies of the finding of criminal acts, acts assimilated to smuggling in the form of possession and transport of goods or

merchandise derived from smuggling, although on the occasion detection, the perpetrator recognizes and assumes the commission of the deed of contravention provided by art. 653, par. (1), lit. a) of GD 707/2006.

At the same time, once notified, the judicial bodies showed superficiality in verifying the legality of the notification, more precisely they should have ascertained the lack of special notification belonging to the representatives of the customs authority and sent the documents drawn up together with the material object of the contravention to the latter, establishing the fair classification of the deed in the customs provisions.

Another exaggerated effect of the extensive application of the notion of smuggling in the case of assimilated facts stems from the hypothetical situation according to which the customs offense was committed in competition by two or more persons together and by wrongly assigning criminal liability for assimilated acts to the crime of smuggling, being ascertained after its commission, the provisions of art. 274 of Law 86/2006.

Thus, in the opinion of some authors, it is "*estimated that the possibility that two primary offenders, who have a relatively small number of contraband cigarettes, or who even put them up for sale, be sentenced to 5 to 15 years is excessive and contrary to the spirit of the new Romanian criminal legislation*"[1].

We agree with this view, especially since the existence of smuggling was strictly conditioned by the illegal passage of goods or merchandise through places other than those established by law and, as is clear from the law, the legislator established a more severe sanction applicable to those criminal factions. specific to organized crime.

For example, in case the contravention provided in art. 653, par. (1), letter a) of G.D. no. 707/2006 was committed by two persons together, the provisions of art. 10, para. (3) of G.D. no 2/2001[2]. If the deed is ascertained under the conditions of art. 280, para. (2) of Law no. 86/2006, Romanian Customs Code, by other bodies with general competence to establish illicit facts, other than customs bodies and they notify the

[1] Drd. Bogdan Mihai Dumitru, Judecător Judecătoria Constanța și Drd. Adinan HALIL, Judecător Judecătoria Galaţi, „Reflecţii cu privire la necesitatea modificării art. 274 din Codul vamal", Universitatea Titu Maiorescu, Publicat în "REVISTA PANDECTELE ROMÂNE" cu numărul 6 din data de 31 decembrie 2019/PhD Bogdan Mihai Dumitru, Judge of the Constanţa Court and Drd. Adinan HALIL, Judge of the Galati District Court, "Reflections on the need to amend art. 274 of the Customs Code", Titu Maiorescu University, Published in „Romanian Pandects Journals" number 6 of December 31, 2019.

[2] If several persons participated in the commission of a contravention, the sanction will be applied to each one separately.

judicial bodies for acts assimilated to smuggling according to art. 270, par. (3) of Law no 86/2006, the provisions of art. 274 of Law no 86/2006, the deed being committed by two persons together, which generates an unacceptable legal situation: punishment with imprisonment of 5 to 15 years for committing an act of a misdemeanor nature.

We can conclude in the sense that the incrimination of the deed deduced to the court is based on an act of contravention nature that is not related to the notion of smuggling, as defined in the special legislation, but which, confused with the latter, produces legal effects, more precisely, the basis for criminal prosecution is **pseudo-smuggling.**

In this sense, by decriminalizing the facts of contraventional nature, according to art. 279 of Law no. 86/2006, they are removed from the incidence of the criminal law without being able to do so, they constitute a "ground of criminal liability" especially in the conditions imposed by art. 281 of the same law which stipulates that the provisions of the general rule on the contravention regime are applicable to the contravention facts and which provide for the existence of the contravention character in time and space, by establishing prescription terms, terms within which, regardless of the place or time the bodies empowered by law are aware of the commission of that contravention, they may apply the contravention sanction according to the law.

At the same time, the non-finding within the limitation period of the committed deed attracts its prescription, respectively, its non-existence from a legal point of view and, implicitly, this fact can no longer be the essential feature of the crime provided in art. (2) of Law no. 86/2006.

Or, following these effects, the fundamental principle established by the provisions of art. 1, par. 4 of the Constitution[1], the judiciary intervening in the field of activity of the Romanian Parliament, as "*the supreme representative body of the Romanian people and the only legislative authority of the country*"[2].

Although, as we tried to show during this paper, in our opinion it would be necessary first of all to know, observe and apply the legal provisions as a whole and not to

[1] The state is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within the constitutional democracy.
[2] Constitution of November 21, 1991 (republished), Official Monitor no. 767 of October 31, 2003, art. 61, par. (1).

interpret some legal texts taken out of the context of the framework law, to solve the identified problems. must, as a matter of urgency:

1. **De lege ferenda,** in order to eliminate the erroneous interpretation of some notions of "smuggling" from the content of art. 270, par. (3) of Law no. 86/2006, Romanian Customs Code, its replacement with the notion of "smuggling offense".

2. **De lege ferenda**, regarding the material competence of the judicial bodies and in order to establish the material competence strictly according to the specific activity of the institution it represents, the introduction of the following paragraphs to art. 55 of the New Criminal Procedure:

(7) Civil servants, namely appointed under the law, within the state institutions whose activity is regulated by special extra-criminal laws with criminal provisions, are assimilated to the special bodies of the judicial police.

(8) In the case of offenses provided for in special extra-criminal laws with criminal provisions, the material competence to carry out criminal prosecution acts belongs exclusively to the criminal investigation bodies of the judicial police specially designated within state institutions with specific activities regulated by those special laws, and who have received the assent of the Prosecutor General of the Prosecutor's Office attached to the HCCJ or the opinion of the prosecutor appointed for this purpose.

The need to adopt such measures to complete the legislative framework, as we have shown above, is argued by the fact that, although smuggling is seen as an illegal phenomenon with serious repercussions on the consolidated state budget, the criminal activity of the perpetrator, in the case of deeds assimilated to smuggling offenses, can generate to the state considerably higher expenses than the damage caused by committing the deed.

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