

**THE ANALYSIS OF THE LEGAL TEXT INCRIMINATING THE
ACT OF POACHING, PROVIDED BY ART. 42 OF THE LAW
NUMBER 407/2006 OF THE HUNTING AND HUNTING FUND,
WITH SPECIAL REFERENCE TO PARA. (1), LETTERS M) AND
O), AS WELL AS LEGAL TEXT PROVIDED
BY ART. 43 PARA. (1), OF THE SAME LEGAL DOCUMENT**

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ABSTRACT: *Given the multitude of situations that can be encountered in real life in terms regarding the violation of the provisions of the legal document that regulates hunting and protects the hunting fund, it is necessary the constant intervention of the legislator to adapt the rules to new methods of acting in committing one or another of the incriminated facts. This is also the reason for the existence of this approach, in the sense that we wanted to briefly analyze the aspects under which the rules found in the articles indicated in the title have been recently amended and supplemented by the provisions of Law no. 13/2020.*

KEYWORDS: *act, poaching, hunting, amendment, provision.*
JEL Code: *K14, K42.*

Law¹ no. 407 of November 9, 2006 regulates the hunting and protection of the hunting fund. In the fifth chapter of the respective law, entitled "Responsibilities and sanctions", several facts are incriminated, as a crime of poaching, among which the facts described by the provisions of art. 42 para. (1) letters m) and o), incrimination norms that were most recently amended by Law² no. 13 of January 9, 2020.

Thus, following the above-mentioned amendment, the legal text provides, in the basic version: "(1) The following acts constitute a crime of poaching and shall be punished by imprisonment from 6 months to 3 years or by a fine: (...) m) hunting in the light of headlights or lighting devices, except in emergencies established by derogations granted by the central public authority responsible for the environment for the collection of wild

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¹ The law on hunting and protection of the hunting fund, published in the Official Gazette of Romania no. 944 of November 22, 2006, as subsequently amended and supplemented. Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliuDocument/77053> , last accessed: December 3, 2021.

² Law for amending and supplementing the Law on hunting and protection of the hunting fund, published in the Official Gazette of Romania no. 14 of January 10, 2020. Documentation made online, using the website: <http://legislatie.just.ro/Public/DetaliuDocument/221948> , last accessed: May 16, 2021.

boar specimens to prevent damage or to control epizootic diseases, and hunting by using the devices provided by art. 39 para. (1) letter (ad); (...) (o) the use, for any purpose, of chemicals which cause poisoning, sterility or death of game fauna specimens, except in the cases provided by art. 1 letter (ad); (...) ".

In connection with the need to amend and supplement the legal provisions of Law no. 407/2006 by those of Law no. 13/2020, we consider, compared to the second paragraph of the explanatory memorandum³, that the aim was to adapt the content of the normative act to the requirements of objective reality, thus taking into account the aspects reported in judicial practice, including the content of the above incriminations.

Although the facts presented above are also incriminated in the aggravated version, through the provisions of art. 42 para. (2), in any of the three alternative situations described in letters a), b) and c), this analysis focuses on the changes of the incrimination in the basic version.

Regarding the poaching offense described in art. 42 para. (1) letter m), we find that in the content of the above-mentioned article there are described two distinct facts, as follows: on the one hand, "hunting in the light of headlights or lighting devices", and, on the other hand, hunting by using the devices provided in art. 39 para. (1) letter ad)", from the content of Law no. 407/2006. This results from the grammatical interpretation of the legal text. The use of comma before the conjunction "and" shows that the second hypothesis indicated above is not an exception, in the express sense provided in the legal text regarding "emergencies established by derogations granted by the public authority responsible for the environment for harvesting wild boar specimens in order to prevent damage or to control epizootic diseases ".

Moreover, an additional argument in supporting the fact that in this legal text we find incriminated two distinct facts is that if the legislator had considered that the two acts are equivalent and that either of them would have been committed or if both would have been committed, specifically, in the same circumstance, the criminal unit would not have been affected, the conjunction "or" would have been used. Thus, we claim that, if in particular, a person commits, in the same circumstance, hunting in the light of headlights or lighting devices, not finding himself in the exceptional situation expressly provided in the second thesis of art. 42 para. (1) letter m), and hunting by using the devices provided in art. 39 para. (1) letter ad), in charge of that person will be retained two poaching offenses.

From the point of view of the material element, it is represented in the case of both deeds by the term "hunting"⁴. In the sense of art. 1 letter a) of Law no. 407/2006 by "hunting" we mean "the act of hunting, searching, provoking, pursuing or any other activity aimed at capturing or killing specimens of species provided in Annexes no. 1 and 2, which are in the wild." For the purposes of the second thesis of the same letter of the same article, two hypotheses have been provided in which the facts "do not constitute an

³ Documentation made online, using the site:

http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17797 , last accessed: May 16, 2021.

⁴ According to the Explanatory Dictionary of the Romanian language (EDR), by "hunting" we mean "the action of hunting and its result". Documentation made online, using the site: <https://dexonline.ro/definitie/v%C3%A2n%C4%83toare> , last accessed: May 16, 2021.

act of hunting"⁵, namely: "authorized capture of specimens of species of scientific interest for scientific purposes, followed by release and (...) the removal or immobilization of animals that threaten the life or bodily integrity of persons or the integrity of their property or the immobilization of animals whose life or bodily integrity is endangered as a result of human intervention by any legal means of protection and immobilization by the authorized personnel of the Ministry of Internal Affairs in the performance of their duties". Thus, if, for example, specimens of species of hunting interest are caught with authorization for scientific purposes, followed by their release, the capture being made in the light of headlights or lighting devices, this act does not constitute the crime of poaching⁶. Nor in the second case, that represented by the "removal or immobilization of animals that threaten the life or bodily integrity of persons or the integrity of their property or the immobilization of animals whose life or bodily integrity is endangered by human intervention with any legal means of protection and immobilization by the authorized personnel of the Ministry of Internal Affairs in the performance of their duties", the deed is not typical.

It constitutes a crime of poaching, according to art. 42 para. (1) letter m) 1st thesis, hunting in the light of headlights⁷ or lighting devices⁸. Directive⁹ 2014/45 / EU of the European Parliament and of the Commission of April 3, 2014 on the periodic technical inspection of motor vehicles and their trailers and on repealing Directive 2009/40 / EC refers to "lighting equipment" when the minimum requirements regarding the content of the inspection and the recommended methods of application are listed in Annex no. 1 of the above-mentioned directive, a phrase also transposed into national law, in Chapter IV, point 3.4.1 from RNTR 7 - "lighting equipment". In point 5.1 of the same normative act it is stipulated that "the lighting installation (...) must include the devices listed in Annex 2", as follows: „, conditions for the installation of lighting devices on vehicles (...) 1. Road lights (...) b Number: two or 4 headlights (...)”¹⁰. We find that the reference in the

⁵ We consider inadequate the reference in the legal text to "the hunting action", taking into account the definition in the EDR, presented above; the action is that of "hunting." We propose *de lege ferenda* the modification of this phrase with the following: "it does not constitute an action that is limited to the notion of hunting (...)" because the legislator has in view the reference to the alternative actions presented in the first thesis of art. 1 letter ad).

⁶ We have in mind the notion of "criminal law", as it is defined in art. 173 of the Criminal Code: "Criminal law means any criminal provision contained in organic laws, emergency ordinances or other normative acts that at the time of their adoption had the force of law." Documentation made online, using the website: <http://legislatie.just.ro/Public/DetaliuDocument/109855>, last accessed: May 16, 2021.

⁷ According to the EDR, "headlight" means a "luminaire (for cars, locomotives, etc.) that projects light in a certain direction in the form of a divergent beam." Documentation made online, using the site: <https://dexonline.ro/definitie/far>, last accessed: May 16, 2021.

⁸ According to the EDR, by "device" we mean a "set of parts connected to each other in a certain way (usually immovable), which performs a well-defined function in a technical system. Documentation made online, using the site: <https://dexonline.ro/definitie/dispozitiv>, last accessed: May 16, 2021.

⁹ Documentation made online, using the site: <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02014L0045-20140429&from=EN>, last accessed: May 16, 2021.

¹⁰ Regulations issued by the Ministry of Transport, Construction and Tourism on December 8, 2005 on individual type-approval, identity card issuance and certification of the authenticity of road vehicles – RNTR 7, published in the Official Gazette of Romania no. 1160 of December 21, 2005. Documentation made online, using the website: <http://legislatie.just.ro/Public/DetaliuDocumentAfis/204079>, last accessed: December 3, 2021.

text of the law from art. 42 para. (1) letter m) to the “headlight light” is superfluous, the headlights being part of the category of lighting devices.

It constitutes the crime of poaching according to art. 42 para. (1) letter m) the third thesis, “hunting by using the devices provided by art. 39 para. (1) letter ad)” of Law no. 407/2006. These devices, according to the last indicated article, are the following: “laser sighting devices, night sighting systems comprising electronic waste light converters or amplifiers, infrared sighting devices and thermal imaging devices”, when are used for night shooting. The exception established by the provisions of art. 39 para. (1) letter ad) the final thesis is a situation in which the use of lighting devices of “(...) targets (...) is allowed, with a derogation from the central public authority responsible for the environment” if wild boar, jackal and fox species are hunted. The meaning of the notion of “lighting devices” is the same as in art. 42 para. (1) letter m) 1st thesis. If the legislator wanted to exempt the use of devices that are prohibited from being used for night shooting, when they were used for hunting wild boar, jackal and fox species, with a derogation from the public authority responsible for the environment, the reference would have as follows: “except for the use of these devices (...)”. In accordance with the above-mentioned legal provisions, if, in a specific case, target lighting devices are used for hunting wild boar, jackal and fox species, with a derogation from the central public authority responsible for the environment, the act is not typical. As a condition of time, in the case of the poaching offense provided in art. 42 para. (1) letter m) 3rd thesis, the deed is committed “at night”. The same condition is implicit for the poaching offense provided in art. 42 para. (1) letter m) 1st thesis of Law no. 407/2006, otherwise the use of lighting devices being senseless. Of course, from a strictly theoretical point of view, we could also think of the situation in which hunting in the light of headlights or lighting devices would take place during the day, during a total solar eclipses, but given the relatively short time for the development of this phenomenon, we believe that this situation is unlikely.

However, we consider appropriate the express provision of the time condition, in the content of art. 42 para. (1) letter m) 1st thesis, taking into account the requirements of legislative technique, in the sense that the text of the law must be clear, precise.

On the other hand, from the *per a contrario* interpretation of the provisions of art. 42 para. (1) letter m) 3rd thesis, reported to art. 39 para. (1) letter ad) 1st thesis, it turned out that hunting by using sighting devices that operate on the laser principle for daytime shooting is not typical. The use of this category of sighting devices, different from night sighting systems, infrared vision devices or thermal vision devices, referred to in art. 39 para. (1) letter ad), is not conditioned by the time of night, they can be used with the same effectiveness during the day because they allow the aiming point to be taken with great precision. But according to art. 5 para. (2) of Law¹¹ no. 295 of 2004 on the regime of weapons and ammunition, “it is prohibited (...) the use (...) by persons (...) of the following systems and devices for weapons: a) sighting systems operating on the laser principle; b) sighting systems at night; c) devices intended or adapted to reduce the noise caused by the burning of a load”. According to art. 5 para. (3) of Law No. 295/2004“, the

¹¹ Republished in the Official Gazette of Romania no. 425 of June 10, 2014, with subsequent amendments and completions. Documentation made online, using the site: http://legislatie.just.ro/Public/DetaliuDocument/53150#id_capA19_ttl , last accessed: May 16, 2021.

following are exempted from the provisions of para. (2): a) public institutions with responsibilities in the field of defense, public order and national security, b) legal persons producing the systems and devices referred to in para. (2) intended exclusively for public institutions with responsibilities in the field of defense, public order and national security or for transfer to another Member State or export to a third country”.

Thus, we can consider that the incrimination from art. 42 para. (1) letter m) 3rd thesis of Law no. 407/2006 constitutes a special incrimination in regards to the incrimination of the act of non-compliance with the arms and ammunition regime provided by art. 342 para. (1) of the Criminal Code, being applied with priority, according to the principle *specialia generalibus derogant*. From the analysis of the provisions of art. 5 para. (2) letter c) of Law no. 295/2004 we notice that the legislator did not take into account in art. 39 para. (1) letter ad), the hypothesis in which devices intended or adapted to reduce the noise caused by the burning of a load are used. Thus, in the case of hunting by using such devices, whether the act is committed during the night or during the day, it will not be considered committing the crime of poaching, but the crime of non-compliance with the regime of weapons and ammunition, as described in art. 342 para. (1) of the Criminal Code, with reference to lethal weapons.

The exception referred to by the legislator in the second thesis of letter m) of art. 42 of Law no. 407/2006 is a special justifying cause, in which hunting in the light of headlights or lighting devices is carried out in emergency situations, established by derogations granted by the central public authority responsible for the environment, for the collection of wild boar specimens, in order to prevent damage or to combat epizootic diseases¹². We note that only in respect of a given species is harvesting permitted under the conditions set out above, with the aim of either preventing damage or combating epizootic diseases.

According to art. 26 para. (4) of Law no. 407/2006: „ By exception from letter A point 13 of the annex no. 1, for the male, female and piglet of the boar species (*Sus scrofa*), the hunting period extends throughout the year, within the limits of the immediately approved harvest quotas, from the moment of official confirmation of an outbreak of African swine fever on the surface of one or more many hunting funds until the disappearance of swine fever on the territory of Romania, at any time the National Sanitary Veterinary and Food Safety Authority deems it necessary in the situation of increasing the degree of risk for African swine fever ”.

The central public authority responsible for the environment is the Ministry of Environment, Waters and Forests.

In art. 42 para. (1) letter o) of Law no. 407/2006, we find incriminated the act of poaching by “using, regardless of the purpose, the chemical substances that cause intoxication, sterility or death of game fauna specimens, except for the situations provided in art. 1 letter ad)”.

¹² According to the EDR, by "epizootic" we mean "the spread of a contagious disease in a short time, by contamination, to a large number of animals in a locality, region, etc.; disease, epidemic, plague". Documentation made online, using the site: <https://dexonline.ro/definitie/epizootie> , last accessed: May 16, 2021.

The material element is represented by “use”, which implies “the action of using and its result”¹³. The exception referred to by the legislator in the second thesis of letter o) of para. (1) of art. 42 of Law no. 407/2006 represents a special justifying cause, in the sense that “the use, regardless of the purpose, of the chemicals that cause intoxication, sterility or death of game fauna specimens (...)” does not constitute poaching if the situations described in art. 1 letter ad) are incidental. In this last indicated article, the term “hunting”¹⁴ is defined, in the 1st thesis, and in the second thesis, the actions¹⁵ that do not constitute hunting are established. In these exceptional situations from art. 1 letter ad), the deed does not constitute poaching. We consider that the establishment of these justifying causes, in which the use of the chemicals provided in the legal text does not constitute poaching, is in opposition to the condition relative to “whatever the purpose”. Thus, *de lege ferenda*, the condition “regardless of the purpose” should be removed from the legal text because the use in any other situation than those provided in art. 1 letter ad) constitutes a crime.

Consequently, in relation to this aspect, we consider that this legislative solution does not have the role of clarifying or eliminating any kind of ambiguity, as this desideratum is expressed in the Explanatory Memorandum¹⁶ of Law no. 13/2020.

The immediate consequence in the case of any of the facts is the creation of a state of abstract danger for the protected social value, represented by the protection of the hunting fund.

The act of poaching is an intentional crime, an aspect also supported by art. 16 para. (6) of the Criminal Code¹⁷.

The crime is susceptible to development over time. The acts of preparation are not incriminated. Regarding the attempt, it is incriminated, being assimilated to the finished deed. Thus, in art. 1 letter ad) “poaching” is defined as “the attempt or action carried out for the purpose of acquiring or capturing game fauna, completed with result or not, in violation of the provisions of this law”. A derogation is thus established from the common law in the matter, represented by the general part of the Criminal Code¹⁸. In art.

¹³ Documentation made online, using the site: <https://dexonline.ro/definitie/utilizare> , last accessed: May 16, 2021.

¹⁴ According to the first thesis of art. 1 letter ad) of Law no. 407/2006 by "hunting" we mean "the act of hunting, searching, provoking, pursuing, chasing or any other activity aimed at capturing or killing specimens of the species provided in Annexes no. 1 and 2, in a state of freedom". Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/77053> , last accessed: May 16, 2021.

¹⁵ According to the second thesis of art. 1 letter ad) of Law no. 407/2006, it does not constitute a hunting action the authorized capture of specimens of species of hunting interest for scientific purposes, followed by their release, nor the removal or immobilization of animals that threaten the life or bodily integrity of persons or their property or the immobilization of animals, whose life or bodily integrity is endangered as a result of human intervention carried out with any legal means of protection and immobilization by the authorized personnel of the Ministry of Internal Affairs in the performance of their duties". Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/77053> , last accessed: May 16, 2021.

¹⁶ Documentation made online, using the site: <http://www.cdep.ro/proiecte/2019/400/10/3/em588.pdf> , last accessed: May 16, 2021.

¹⁷ According to art. 16 para. (6) of the Criminal Code, “the deed consisting in an action or inaction constitutes an offense when it is committed intentionally. The act committed through guilt constitutes a crime only when the law expressly provides it”. Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/109855> , last accessed: May 16, 2021.

¹⁸ Represented by Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, as subsequently amended and supplemented.

33 of the Criminal Code it is provided that “(1) The attempt shall be punished only when the law expressly provides for it. (2) The attempt shall be sanctioned with the punishment provided by law for the crime committed, the limits of which shall be reduced by half. When the law establishes the punishment of life imprisonment for the crime committed, and the court would turn to it, the attempt is sanctioned with a prison sentence of 10 to 20 years”. We propose *de lege ferenda* the modification of the definition of poaching, in the sense of eliminating the reference to the attempt and the inclusion of a provision relative to the punishment of the attempt, at the end of art. 42 of Law no. 407/2006.

In art. 43 para. (1) of Law no. 407/2006¹⁹ it is provided as follows: „ it constitutes an offense and it is punishable by imprisonment from one month to one year or by a fine the non-compliance with the provisions of art. 6 para. (1) letter f ^ 1) and art. 39 para. (1) letters g) and z)”.

In art. 6 para. (1) letter f^1) it is provided that “the main attributions of the hunting fauna administrator are the following: (...) f^1) it grants annual intervention and prevention level, for the prevention of damages and accidents to the species from annex no. 2²⁰ ; the level of prevention is approved no later than May 15 of each year ”.

In art. 39 para. (1) letter g) it is provided that: “without prejudice to the provisions of art. 37 para. (2) of the Government Emergency Ordinance no. 57/2007, approved with modifications and completions by Law no. 49/2011, as subsequently amended and supplemented, the following are also prohibited: (...) g) access with a hunting weapon, other than worn in a holster, in national parks, in scientific reservations, in strictly protected areas or in integral protected areas part of the protected natural areas included in hunting funds, without the necessary authorization”.

In art. 39 para. (1) letter z) it is provided that: “Without prejudice to the provisions of art. 37 para. (2) of the Government Emergency Ordinance²¹ no. 57/2007, approved with modifications and completions by Law no. 49/2011, with the subsequent amendments and completions, the following are also prohibited: (...) z) access with the hunting weapon not introduced in the holster in the “Danube Delta” Biosphere Reserve ”.

From the point of view of the material element, the deed is committed by non-compliance, in the sense that it acts contrary to the provisions contained in the articles and the letters indicated in the legal text.

The use of the conjunction “and” marks the fact that, in order to be in the presence of this crime, in a specific case, a person should not cumulatively comply with the provisions mentioned above. However, at an analysis of the provisions of art. 6, respectively of art. 39 of Law no. 407/2006²², we find that, on the one hand, in the case of the first indicated article, the obligation to comply with the provisions rests with the

¹⁹ Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/77053> , last accessed: May 16, 2021.

²⁰ This Annex refers to the amount of compensation in the case of unlawful acts for species for which hunting is prohibited. Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/77053> , last accessed: May 16, 2021.

²¹ Government Emergency Ordinance no. 57/2007 on the regime of protected natural areas, conservation of natural habitats, wild flora and fauna, published in the Official Gazette of Romania no. 442 of June 29, 2007, as subsequently amended and supplemented. Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocumentAfis/83289#A370> , last accessed: May 16, 2021.

²² Documentation made online, using the site: <http://legislatie.just.ro/Public/DetaliiDocument/77053> , last accessed: May 16, 2021.

hunting fauna administrator. The notion of “administrator” benefits from a legal definition, in art. 1 letter a) of Law no. 407/2006, as follows: “administrator - the central public authority responsible for hunting and ensuring the management of game fauna”. On the other hand, in the case of the second indicated Art., the obligation to comply does not lie with a specific person, not being a circumstance operated by the legislator, but with any person who enters the places expressly indicated in the legal text, with the hunting weapon. Since the deed of the legal person is actually also committed by a person, the latter person may not comply with the provisions of art. 39 para. (1) letter g) and z) of Law no. 407/2006, but not as a person acting on behalf of the hunting fauna administrator, but as a private person. We consider that we cannot concretely identify any situation in which to have the non-compliance by one and the same person, in the same circumstance and with the same criminal resolution, of the provisions indicated in the text of the incrimination norm. Thus, *de lege ferenda*, we propose to replace the conjunction “and” with “or” in order to be able to talk about alternative ways of committing the material element, any of them being committed in a specific case leading to the consideration that the crime in question has been committed, if it is the will of the legislator. But we consider that this is not the desire of the legislator, the hypotheses of non-compliance in art. 43 para. (1) of Law no. 407/2006 having no connection with each other. Therefore, we consider that, in reality, these are two distinct crimes, assessed by the legislator as having the same level of danger, judging by the fact that an only sanction it is established. Consequently, we propose, *de lege ferenda*, from the point of view of the legislative technique, the separation of these two hypotheses, either by entering two letters, a) and b), in the content of art. 43 para. (1), following the model adopted in the case of criminalization of poaching, or by introducing a separate paragraph, (11), in which one or the other of the two hypotheses mentioned above can be found, mentioning the phrase “with the same penalty it also sanctioned (...)”, because the level of danger is appreciated by the legislator as being the same.

We find, therefore, that the goal which was taken into account by the legislator to amend and supplement the rules contained in the articles indicated in the title, that of clarifying and eliminating any ambiguity in the way of describing the facts, was not achieved because frequent references to various other articles in the same normative act containing exceptions to prohibited conduct make it difficult to understand the legal text and to know the will of the legislator, leading in the future to difficulties in interpreting and applying the rules in question to specific cases.

REFERENCES

- Law no. 295/2004 on the regime of weapons and ammunition, republished in *the Official Gazette of Romania no. 425 of June 10, 2014*, with subsequent amendments and completions;
- Law no. 407/2006 on hunting and protection of the hunting fund, *published in the Official Gazette of Romania no. 944 of November 22, 2006*, as subsequently amended and supplemented;
- Law no. 286/2009 on the Criminal Code, *published in the Official Gazette of Romania no. 510 of July 24, 2009*, as subsequently amended and supplemented;

Law no. 13/2020 for the amendment and completion of the Law on hunting and protection of the hunting fund, *published in the Official Gazette of Romania no. 14 of January 10, 2020*;

Regulations issued by the Ministry of Transport, Construction and Tourism on December 8, 2005 on individual type-approval, identity card issuance and certification of the authenticity of road vehicles – RNTR 7, *published in the Official Gazette of Romania no. 1160 of December 21, 2005*;

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www.eur-lex.europa.eu

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