

SOME CONSIDERATIONS REGARDING THE OFFENSE OF RECRUITING MINORS FOR SEXUAL PURPOSES, PROVIDED IN ARTICLE 222 OF THE ROMANIAN CRIMINAL CODE

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ABSTRACT: *Every member of society enjoys equal legal protection, including through criminal law. However, the reality shows us that the legislation must be constantly changing in order to be able to maintain the protection of social values and, when it is found that a certain type of acts that contravene the criminal rules are committed in an increasing number, the sphere of the affected subjects of law comprising a category of society's members whose personality is in formation, the prompt intervention of the legislator, by the means at its disposal, appears all the more necessary.*

KEYWORDS: *crime; minor; age; sexual purposes.*
JEL Code: *K14, K42.*

The norm of criminalization of the act of recruiting minors for sexual purposes was modified by the intervention of the legislator, on the date of entry into force of Law¹ no. 217/2020 for the amendment and completion of Law no. 286/2009 on the Criminal Code, as well as for the amendment of art. 223 para. (2) of Law no. 135/2010 on the Code of Criminal Procedure.

Thus, prior to the amendment, the legal content of the incrimination was unique, the provisions of art. 222 of the Criminal Code being the following: “The act of the adult person to propose to a minor who has not reached the age of 13 to meet, in order to commit an act of those provided in art. 220 or art. 221, including when the proposal was made by means of remote transmission, shall be punished by imprisonment from one month to one year or by a fine ”².

Currently, in the content of art. 222 of the Criminal Code there are two paragraphs containing legal provisions, as follows: “(1) The act of the adult person to propose to a minor who has not reached the age of 16 to meet, in order to commit an act of those

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¹ Law no. 217/2020 for the amendment and completion of Law no. 286/2009 on the Criminal Code, as well as for the amendment of art. 223 para. (2) of Law no. 135/2010 on the Code of Criminal Procedure, published in the Official Gazette of Romania no. 1012 of October 30, 2020. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/231967>, (Accessed: 16 March 2022).

² Available at: <https://anes.gov.ro/wp-content/uploads/2018/07/L-286-2009.pdf>, (Accessed: 16 March 2022).

provided in art. 220 or art. 374, including when the proposal was made by means of remote transmission, shall be punished by imprisonment from 6 months to 3 years or by a fine. (2) The act of the adult person to propose to a minor who has not reached the age of 14 to meet, in order to commit an act of those provided in art. 221, including when the proposal was made by means of remote transmission, shall be punished by imprisonment from 6 months to 3 years or by a fine”³.

Usually, in the first paragraph of an article, the incriminated deed is described, in the basic version, and in the subsequent paragraphs we will find either attenuated, assimilated or aggravated versions of the respective crime.

We find that, from the point of view of the legislator's option to draft the legal text, a change is observed. Thus, in para. (1) of the art. 222 of the Criminal Code the recruiting of minors for sexual purposes is described in a basic form.

We would be tempted to consider that in para. (2) of the art. 222 of the Criminal Code we find an assimilated version of the crime in question, arguing that the legislator provided alternative sanctions, imprisonment or a fine, regarding the first being set the same special minimum and maximum limits, respectively from 6 months to 3 years.

However, we believe that this was not the intention of the legislator. If he had considered this aspect, he would have used the phrase “with the same punishment”, which he also used when describing some assimilated variants in the case of other crimes, such as: the crime of blackmail [art. 207 para. (2) of the Criminal Code]⁴, the crime of rape [art. 218 para. (2) of the Criminal Code]⁵ or the use of the phrase “shall also be considered (...)”, as is the case with the description of the assimilated version of the crime of illegal deprivation of freedom [art. 205 para. (2) of the Criminal Code]⁶ (Dobrinou, V. and Neagu, N., 2011, p. 96; Udriou, M., 2019, p. 30).

For this reason, we consider that the crime of recruiting minors for sexual purposes is one with alternative contents (Streteanu, F. and Nițu, D., 2018, p. 16), in the sense that in the content of art. 222 of the Criminal Code two distinct offenses are described, which, if they have the same author, being the same adult, as provided in the criminal rule, that author may be accused of committing two offenses if all the other conditions imposed by the legislator are met. Therefore, if in a specific case, an adult proposes to a minor who has not reached the age of 14 to meet in order to commit an act of those provided in art. 374 of the Criminal Code⁷, as well as of an act from those provided in art. 221 of the

³ Available at: <https://legislatie.just.ro/Public/DetaliuDocument/109855>, (Accessed: 16 March 2022).

⁴ According to art. 207 para. (2) Criminal Code: „With the same punishment shall one be punished for threatening to disclose a real or imaginary deed, compromising for the threatened person or for a member of his family, for the purpose provided in para. (1).” Available at: <https://legislatie.just.ro/Public/DetaliuDocument/109855>, (Accessed: 16 March 2022).

⁵ According to art. 218 para. (2) Criminal Code: „With the same punishment shall one be punished for any other acts of vaginal or anal penetration committed under the conditions of para. (1).” Available at: <https://legislatie.just.ro/Public/DetaliuDocument/109855>, (Accessed: 16 March 2022).

⁶ According to art. 205 para. (2) Criminal Code: “Shall also be considered deprivation of freedom the abduction of a person unable to express his will or to defend himself.” Available at: <https://legislatie.just.ro/Public/DetaliuDocument/109855>, (Accessed: 16 March 2022).

⁷ According to art. 374 of the Criminal Code: “Child pornography (1) The production, possession, procurement, storage, display, promotion, distribution, and making available, in any way, of pornographic materials with minors shall be punished by imprisonment of one to 5 years. (1 ^ 1) With the punishment provided in para. (1) the incitement or recruitment of a minor for the purpose of his participation in a pornographic show, the obtaining

Criminal Code⁸, including when the proposal was made by means of remote transmission, the adult will be charged with committing both the crime of recruiting minors for sexual purposes, provided in art. 222 para. (1) of the Criminal Code, as well as of the offense of recruiting minors for sexual purposes, provided in art. 222 para. (2) of the Criminal Code, with the application of art. 38 para. (1) of the Criminal Code⁹.

In the event that the adult proposes to a minor who has reached the age of 14 to meet in order to commit an act of those provided in art. 221 of the Criminal Code, including

of benefits from such a show in which minors participate or the exploitation of a minor in any other way for the performance of pornographic shows shall also be punished. (1 ^ 2) The viewing of pornographic shows in which minors participate is punishable by imprisonment from 3 months to 3 years or by a fine. (2) If the facts provided in para. (1) have been committed through a computer system or other electronic means of storing computer data, the penalty is imprisonment from 2 to 7 years. (3) Unauthorized access to pornographic materials through a computer system or other electronic means of storing computer data shall be punished by imprisonment from 3 months to 3 years or by a fine. (3 ^ 1) If the facts provided in para. (1), (1 ^ 1), (1 ^ 2) and (2) were committed in the following circumstances: a) by a family member or by a person living with the victim; b) by a person in whose care, protection, education, guarding or treatment the minor is or by a person who has abused his or her recognized position of trust or authority over the minor; c) the act endangered the life of the minor; d) by a person who has previously committed an offense against the sexual freedom and integrity of a minor, an offense of child pornography or pimping against a minor, the special limits of penalties shall be increased by one third. (4) Child pornography means any material which portrays a minor or an adult as a minor, having sexually explicit conduct or which, although not a real person, credibly simulates a minor having such a behaviour as well as any representation of the genitals of a child for sexual purposes. (4 ^ 1) A pornographic performance means the live exposure to an audience, including information and communication technology, to a child involved in sexually explicit conduct or to a child's genitals for sexual purposes. (5) The attempt shall be punished". Available at: <https://legislatie.just.ro/Public/DetaliiDocument/109855>, (Accessed: 16 March 2022).

⁸ According to art. 221 of the Criminal Code: "Sexual corruption of minors (1) Committing an act of a sexual nature, other than the one provided in Art. 220, against a minor who has not reached the age of 14, as well as the determination of the minor to bear or perform such an act shall be punished by imprisonment from one to 5 years. (2) The punishment is imprisonment from 2 to 8 years and the prohibition of the exercise of certain rights, when: a) the act was committed by a member of the minor's family or by a person living with him; b) the minor is in the care, protection, education, guarding or treatment of the perpetrator or he has abused his position of trust or authority over the minor or his manifestly vulnerable situation, due to a mental or physical disability, a situation of dependence, a state of physical or mental incapacity or other cause; c) the act was committed for the purpose of producing pornographic materials; d) the deed endangered the life of the minor. (2 ^ 1) The deed provided in para. (1), committed by an adult with a minor aged between 14 and 18, shall be punished by imprisonment from two months to 3 years and the prohibition of the exercise of certain rights if: a) the minor is a family member of the adult; b) the minor is in the care, protection, education, guarding or treatment of the perpetrator or he has abused his position of trust or authority over the minor or his manifestly vulnerable situation, due to a mental or physical disability, a situation of dependence, a state of physical or mental incapacity or other cause, c) the act endangered the life of the minor, d) was committed for the purpose of producing pornographic materials. (3) Sexual intercourse of any kind committed by an adult in the presence of a minor under the age of 14 shall be punished by imprisonment from 6 months to 3 years or by a fine. (4) The determination by an adult of a minor under the age of 14 to attend the commission of acts of an exhibitionist nature or of shows or performances in which sexual acts of any kind are committed, as well as making pornographic material available to the minor are punishable by imprisonment from 3 months to 2 years or by a fine. (5) The facts provided in para. (1) shall not be sanctioned if the age difference does not exceed 3 years. (6) The attempt to the offenses provided in para. (1), (2) and (2 ^ 1) shall be punished. " Available at: <https://legislatie.just.ro/Public/DetaliiDocument/109855>, (Accessed: 16 March 2022).

⁹ According to art. 38 para. (1) of the Criminal Code: „A person shall be convicted for committing several crimes when two or more crimes were committed by the same person, through distinct actions or inactions, before being definitively convicted for any of them. There same situation shall apply when one of the offenses has been committed for the commission or concealment of another offense.” Available at: <https://legislatie.just.ro/Public/DetaliiDocument/109855>, (Accessed: 16 March 2022).

when the proposal was made by means of remote transmission, the deed has no criminal relevance.

Instead, in the hypothesis in which the adult person proposes to a minor who has reached the age of 14 to meet in order to commit an act of those provided in art. 220 or 374 of the Criminal Code, including when the proposal was made by means of remote transmission, the deed constitutes the offense of recruiting minors for sexual purposes, provided in art. 222 para. (1) of the Criminal Code.

From the point of view of the severity level of the acts from art. 220, 221 and 374 of the Criminal Code, judging by the sanction provided by law in the basic version of the respective offenses, considering the fact that for the three offenses in question the same sanction is provided, namely the prison sentence from 1 to 5 years, we do not find any aspect that would lead the legislator to create two distinct incriminations. Thus, from this perspective, there would have been no impediment if the legislator had chosen to maintain an incrimination with a unique content, as it happened before, content that includes the reference to both the acts from art. 220 and 374 of the Criminal Code, as well as those from art. 221 of the Criminal Code.

From the point of view of the qualification of the passive subject, in the case of the crime provided in art. 222 para. (1) of the Criminal Code, he must be a minor who has not reached the age of 16, in the case of the crime provided in art. 222 para. (2) of the Criminal Code, he must be a minor who has not reached the age of 14.

If for this second hypothesis we can identify the reason that was the basis for choosing this threshold of the minor's age, being identical to that of the age of the passive subject of the crime of sexual corruption of minors, provided in art. 221 para. (1) of the Criminal Code, we cannot do the same regarding the two alternative modalities from the first hypothesis, regarding the acts to which the proposal can be made by the adult.

Thus, in the case in which an adult proposes to a minor who has not reached the age of 16 to meet in order to commit one of the acts provided in art. 220 of the Criminal Code, the reason for establishing the threshold of the age of 16 can be justified by the fact that in the basic version of committing the crime of sexual intercourse with a minor, provided in art. 220 para. (1) of the Criminal Code, the protection is offered through the rules of criminal law to the minor who is between 14 and 16 years old. But for the situation in which the adult person proposes to a minor who has not reached the age of 16 to meet in order to commit an act of those described in art. 374 of the Criminal Code, this limit is not justified because in the legal text which criminalizes the act of child pornography, we do not find any limit on the age of the minor, which means that a person under the age of 18 may be a passive subject of the crime, regardless of gender. Consequently, we propose *de lege ferenda* the modification of the content of the norm contained in art. 222 of the Criminal Code in the sense of splitting para. (1) in two distinct paragraphs describing the acts of recruitment of minors for sexual purposes with reference, in a paragraph, to one of the acts provided in art. 220 of the Criminal Code, maintaining the reference to the age of the minor who has not reached 16 years of age, and, in the other paragraph, to one of the acts provided in art. 374 of the Criminal Code, without any reference to the age of the minor, this aspect being in accordance with the provisions of art. 374 of the Criminal Code.

Given that the literature (Dobrinou, V. and Neagu, N., 2011, p. 163) states that the offense of recruiting minors for sexual purposes is, in essence, a preparatory act for committing an offense of sexual intercourse with a minor, child pornography or sexual

corruption of minors, which benefit from a distinct criminalization, we consider it appropriate, *de lege ferenda*, for the provisions to contain aggravated versions of the offense of recruiting minors for sexual purposes that take into account the qualification of the active subject, namely: being a family member of the minor or a person that lives with the minor in the same household or being a person in whose care, protection, education, guarding or treatment the minor is, as these hypotheses are found in the aggravated versions of the crimes described in art. 220, 221 and 374 of the Criminal Code.

We agree with the constant need to amend and supplement the legal provisions in force, in general, and even more so with regard to the rules of criminal law, given the principle of last resort in their application, but we consider that all these changes at the legislative level must be operated in a coordinated manner in order to ensure consistency as to the reason for the criminalization of certain facts.

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