



Analysis of the Amendment of the Content of Crimes that Endanger the Integrity and Sexual Freedom of Minors. The Recruitment of Minors for Sexual Purposes in the New Regulation of Law 217/2020

Ana Alina Ionescu Dumitrache¹

Abstract: This article highlights the main changes in the content of crimes against the integrity and sexual freedom of minors, changes made by 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. It is also analyzed, in detail, with the presentation of examples from judicial practice, the crime of recruiting minors for sexual purposes.

Keywords: sexual freedom and inviolability of minors; recruitment of minors for sexual purposes; sexual intercourse with a minor; child prostitution

Commentary on Changing the Content of Crimes that Endanger the Sexual Integrity and Freedom of Minors

Crimes against the sexual freedom and integrity of minors were amended by 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, the criminal legislator drawing attention to the negative consequences that sexual abuse has on minors on their emotional development, on their correct and healthy development, especially at the psychological level. In the Explanatory Memorandum of this law are highlighted the states of anxiety, stress associated with the events they went through, learning or concentration difficulties, dangerous behavior, sadness, etc.

The penalties for these offenses have been aggravated, and it is considered necessary to align the sanctioning regime for child sexual abusers with the system of penalties established for such acts in the European Union. Last but not least, the

¹ Senior Lecturer, PhD, Danubius University of Galati, Faculty of Law, Romania, Address: 3 Galati Blvd, Galati 800654, Romania, Corresponding author: soosalina@univ-danubius.ro.

justification of these changes was argued in the Explanatory Memorandum by the large number of final convictions in Romania for cases of sexual intercourse with a minor and rape of minor victims, emphasizing the change in the legal classification of acts of sexual intercourse with minors under the age of 14-15 from rape, to sexual intercourse with minors, due to the lack of evidence to force the minor to have sexual intercourse or his inability to oppose it. Moreover, Romania has lost all cases concerning crimes against sexual integrity and freedom with minor victims.

The age limits of minor victims of sexual offenses against them have been changed, from 13 to 15 years to 14 to 16 years, the age limit of 13 years has been replaced by 14 years; new paragraphs were introduced regarding the quality of the passive subject that aggravates the facts, for example the aggravation of the offenses provided in art. 220 - 222, if the perpetrator is a person who has previously committed a crime against sexual freedom and integrity against a minor, a crime of child pornography or pimping against a minor.

In the explanatory memorandum to this law, it was proposed that any act involving sexual contact with a minor under the age of 15 to be directly considered rape, without the need to prove the victim's inability to defend himself or herself or to pose resistance.

It was also argued the need to increase the minimum age for which such an act can be considered consent, from 15 to 16 years¹.

Amendments to Art. 222 of Criminal Code

Unlike the regulation prior to the amendment made by 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 Procedure², the recruitment of minors for sexual purposes involves two variants of the crime, a standard variant and an assimilated one. The criminal legislator modified the age of the passive subject in case the proposal of the major refers to the meeting with the minor who did not reach the age of 16 in order to commit an act provided by art. 220 - sexual intercourse with a minor or art. 374 - child pornography. In the version prior to this amendment, the criminal legislator

¹ The explanatory memorandum of 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 Monitor of Romania no. 1012 of 30. 10. 2020, accessed at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=18409, on 16.11. 2020.

² Published in Official Monitor of Romania no. 1012 of 30. 10. 2020.

provided for the qualification of the passive subject to be a minor who has not reached the age of 13. Also, the recruitment of minors for sexual purposes did not refer to the purpose of committing an act specific to child pornography.

Another modification of this crime consists in the introduction of another paragraph that refers to the act of the adult to propose to a minor who has not reached the age of 14 to meet in order to commit an act specific to the sexual corruption of minors - art. 221. The age of the minor to whom this article referred before the amendment was up to 13 years.

1. The Legal Content

Art. 222 - Recruitment of minors for sexual purposes

(1) The deed 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 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 deed 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 distance transmission, shall be punished by imprisonment from 6 months to 3 years or by a fine.”

2. The Pre-Existing Conditions

2.1. The Object of the Crime

The **legal object** consists in the social relations regarding the protection of minors who have not reached the age of 16 to develop naturally, without being affected by their sexuality through early acts of attraction in sexual activities specific to sexual offenses with a minor, sexual corruption of minors or child pornography.

The **material object** of this crime is missing because the material element of the crime consists in the proposal made by the major of the minor to meet in order to commit sexual acts specific to art. 220 of Criminal Code, 221 of Criminal Code and 374 of Criminal Code.

2.2. The Subjects of the Crime

The **active subject** of the crime can only be an adult, regardless of gender, so a special qualification is required.

Criminal participation is possible in the form of co-authorship, complicity and instigation.

If we are in the presence of co-authorship or concomitant complicity, the provisions of art. 222¹, if the facts provided in art. 220-222 are committed by two or more persons together, the deed is more serious and the increase by 1/3 of the special limits of the punishment is applied.

Therefore, in order to be subject to the provisions of art. 222, the active subject of both variants must be an adult who has not previously committed a crime against sexual freedom and integrity against a minor, a crime of child pornography or pimping on a minor, otherwise the provisions of art. 222¹ are applied.

A minor cannot be an active subject of this crime.

The passive subject, in the variant provided by art. 222 para. 1 may be a minor, who has not reached the age of 16, and in the version provided by art. 222 para. 2, a minor who has not reached the age of 14. The sex of the minor is irrelevant.

The plurality of taxable persons will attract a plurality of offenses.

3. The Constitutive Content

3.1. The Objective Side

In the standard version, the material element consists in the action of the adult to propose to the minor who has not reached the age of 16 to meet in order to maintain an act of those provided in art. 220 (sexual intercourse with a minor) or art. 374 (child pornography), including when the proposal was made by means of remote transmission.

Thus, the text of the law refers to the proposal to meet in order to commit sexual intercourse, oral or anal intercourse, as well as any other acts of vaginal or anal penetration or an act specific to child pornography, respectively: production, possession, procurement, storing, displaying, promoting, distributing and making available in any way child pornography or urging or recruiting a minor for the

purpose of his participation in a pornographic show, watching pornographic shows involving minors.

In the assimilated variant, the material element of the objective side consists in the proposal of the major made 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.

In this variant, the adult proposes to the minor to meet in order to commit an act specific to the sexual corruption of minors, respectively any act of a sexual nature as described in the crime of sexual assault.

The proposal to meet must be explicit or implicit, concrete, determined or determinable in time and space.

The minor must be represented by the content of this proposal and it is not necessary to have accepted the perpetrator's proposal to meet.

For the existence of this crime, it is necessary to have made only the proposal and not to have committed sexual acts specific to the crimes mentioned in the text of the law, otherwise, if the minor was persuaded, after meeting with the perpetrator, to maintain those acts or to participate in the specific actions of child pornography, in the same circumstance, the crime of sexual intercourse with a minor, sexual corruption of minors or child pornography will be retained (Toader, 2019, p. 227).

If, in another circumstance, after a sufficient period of time has elapsed, but as a result of the perpetrator's conviction, the minor commits sexual acts or activities specific to the crimes provided by art. 222 para. 1 and 2, the competition of crimes between the recruitment of minors for sexual purposes and sexual intercourse with a minor, the corruption of minors for sexual purposes or child pornography will be retained (Udroiu, 2020, p. 280).

The proposal may be made by any means of communication, including by means of remote communication.

In criminal practice, the crime of recruiting minors for sexual purposes was retained, the deeds of the defendant who, while in a furniture warehouse, having the wrong belief that there are no other people in that space, initiated and held discussions of sexual nature with the minor under the age of 8, a context in which, at one point, he took his genitals out of his pants and showed them to the minor, and then, after asking her if she could read and write, receiving an affirmative answer, he wrote obscene words and a message on a note that represents an

implicit proposal to have sexual intercourse, handing the note to the minor in order to read it.¹

The act of the defendant who, during September 2016, sent to the minor injured person aged 12 years, text messages and messages through the messenger application, having sexual connotations, asking her to meet her to kiss and touch her breasts, on the bottom and make other gestures of a sexual nature, meets the constitutive elements of the crime of recruiting minors for sexual purposes, art. 222 Criminal Code, text based on which according to art. 396 para. 10 of Code of Criminal procedure will sentence the defendant to 2 months imprisonment².

The immediate consequence is the creation of a state of danger for the sexual inviolability of the minor up to 16 years of age or up to 14 years old, depending on the variant of the crime.

The *causality relationship* exists from the materiality of the deed.

3.2. The Subjective Side

The form of guilt is the direct intention, the perpetrator seeks and accepts the production of the result of his deed, endangering the sexuality of the minor through the proposal he makes in order to commit specific acts of sexual offenses with a minor, sexual corruption of minors or child pornography.

For the existence of the crime, the perpetrator must have known the age of the minor, if he was wrong about this age, believing that the person proposing to meet in order to have sex with a minor or child pornography has more than 16 years old or the person to whom he proposes to meet for the purpose of committing sexual acts specific to the sexual corruption of minors is over 14 years old, the deed will not constitute a crime.

4. Forms. Sanctions

Acts of preparation and attempt are not punished.

The consumption of the crime takes place at the moment when the meeting proposal was launched for the purpose mentioned in the text of art. 222, when the immediate consequence of the crime occurs.

¹ Filași District Court, Decision no. 139/2019 of 14-Oct-2019, www.rolii.ro.

² Oradea District Court, Decision no. 719/2019 of May 27, 2019, www.rolii.ro.

If it is committed at certain intervals, on the same passive subject and in reaching the same criminal resolution, the deed is exhausted once the last act of execution is performed.

Penalties

For both the standard version and the assimilated version, the penalty is imprisonment from 6 months to 3 years or a fine. We notice that the criminal legislator aggravated the sentence which was imprisonment from 1 month to 1 year.

According to art. 222¹, if the facts provided in art. 220-222 are committed by two or more persons together or by a person who has previously committed a crime against sexual freedom and integrity against a minor, a crime of child pornography or pimping on a minor, the act is more serious and applies the increase by 1/3 of the special limits of the punishment.

5. Procedural Aspects

The criminal action is initiated *ex officio*. The criminal investigation is carried out by the criminal investigation bodies of the judicial police under the supervision, control and leadership of the prosecutor and the competence to judge the case in the first instance rests with the court.

6. Conclusions

The changes occurred in the content of crimes that endanger the sexual freedom and inviolability of minors, by 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 are welcome, especially in terms of aggravating punishments and changing the age limits of minor victims of such assaults.

We consider appropriate the intervention of the criminal legislator on the sanctioning system of the crime of using child prostitution - art. 2161, criminal act in the category of crimes of trafficking and exploitation of vulnerable persons, in the sense of aggravating the sentence which is currently imprisonment from 3 months to 2 years or a fine, if the act does not constitute a more serious crime. We argue this proposal by the fact that the person who has any sexual acts with a minor

who practices prostitution, knowing this, presents at least the same social danger as the person who has sex with a minor free of charge, under the conditions of art. 220 and which is punished, depending on the normative way of this crime, with imprisonment from 1 to 12 years and the prohibition of exercising certain rights.

Bibliography

Toader, T. (2019). *Drept penal român. Partea specială, Vol. I/Romanian criminal law. Special Part, Vol. I.* Bucharest: Universul Juridic.

Udroiu, M. (2020). *Sinteze de drept penal. Partea specială/Synthesis of criminal law. The special part.* Bucharest: C.H. Beck.

Legislation

Exemption of reasons of 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 Monitor of Romania no. 1012 of 30. 10. 2020, accessed at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=18409, on 16.11. 2020.

Filiași District Court, Decision no. 139/2019 of 14-Oct-2019, www.rolii.ro.

Oradea District Court, Decision no. 719/2019 of May 27, 2019, www.rolii.ro.