

REFLECTIONS ON THE OFFENCE OF CHILD PORNOGRAPHY THROUGH COMPUTER SYSTEMS OR OTHER ELECTRONIC MEANS OF COMMUNICATIONS

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Abstract

Starting from the provisions of the Article 9 of the European Council on Cybercrime and the provisions of the Article 5 of the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography and the provisions of the Article 20 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, all referring to offences related to child pornography, this article analyzes the offence of child pornography provided by the Article 374 of the Romanian Criminal Code, focusing on the crime of child pornography committed through computer systems or other electronic means of communications, in order to ensure that the Romanian legislator transposed the provisions of the three legal instruments at international and European level.

Keywords: *child pornography; information system; pornographic material with minors; pornographic performance; computer data.*

§1. Preliminary considerations

Child pornography differs from other forms of sexual exploitation by the fact that the victim does not come in direct contact with the consumers of pornographic material with minors. Victims are used by child pornography offenders to perform obscenity and lascivious acts, and child pornography offenders produce, record, store, distribute materials about the victim's activity.

While there is no definition of child pornography unanimously accepted internationally, there is at least a general consensus that this is a material. The format of pornographic materials with minors in the online environment is in the form of digital images.

The content of child pornography, less dangerous, may include images of children posing nude in provocative poses as well as images of a child's genitals or pubic area. The pornographic materials with minors may have a much more

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dangerous content, including images of a child who carries out sexual acts with adults or images of children and adults who have sex with another child. The extremely dangerous child pornographic materials may include images depicting children tortured or tormented by different adults who cause them physical injury, which may even lead to death. Therefore, we can see that the pornographic materials with minors can be extremely varied.

The pornographic materials with minors can also be done using pseudo-photographs made using a computer system without involving and abusing a real child. These pseudo-photographs can be made either by modifying an image of a real child who doesn't have an explicit sexual behaviour, or can be completely accomplished using a computer system.

§2. The definition and offences related to child pornography

From a legal point of view, the definition of child pornography may vary from one jurisdiction to another depending on how national legislation has developed the legal framework on child pornography. At the European and international level, the definition of child pornography is provided in the following legal instruments: Article 2 (c) of the Directive 2011/92/EU² on combating the sexual abuse and sexual exploitation of children and child pornography; Article 20 para.2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse³ from 2007; Article 9 para.2 of the Council of Europe Convention on Cybercrime⁴. In Romania, the definition of child pornography is provided by the provisions of the Article 374 para.4 of the

² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Official Journal of the European Union, 17.12.2011, L 335/1. The Article 2 (c) of the Directive 2011/92/EU stipulates: "child pornography means: (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes".

³ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.201), Lanzarote, 25 of October 2007, Retrieved 10th of November 2017 from: [https://www.coe.int/en/web/children/convention#%2212441481%22:\[2\]](https://www.coe.int/en/web/children/convention#%2212441481%22:[2]); The Article 20 para.2 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse stipulates: "child pornography shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes".

⁴ The European Council Convention on cybercrime. The Article 9 para.2 of the European Council Convention on cybercrime stipulates: "child pornography shall include pornographic material that visually depicts: a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct".

Romanian Criminal Code In the view of the Romanian legislator, by *pornographic materials with minors* it is understood “any material featuring a minor or a major person as a minor, having an explicit sexual behaviour, or who, while not presenting a real person, reliably simulates a minor having such behaviour, as well as any representation of the genital organs of a child for sexual purposes”. We believe that through pornographic materials with minors may be understood objects, engravings, photographs, drawings, writings, prints, publications, films, video and audio recordings, computer programmes and applications, songs and any other forms of expressing which depict an explicit sexual behaviour with minors.

The offences relating to child pornography committed through computer systems or other electronic means of communication are provided by the following legal instruments at the European and international level in the field of cybercrime: Article 5 of the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography which refers to offences concerning child pornography, stipulates in para. 3 the offence of knowingly obtaining access, by means of information and communication technology, to child pornography; Article 20 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse which refers to offences concerning child pornography, stipulates in para.1 (f) the offence of knowingly obtaining access, through information and communication technologies, to child pornography; Article 9⁵ from the European Council Convention on cybercrime which refers to offences related to child pornography committed through a computer system. In Romania, the offences related to child pornography are provided by the provisions of the Article 374 of the Romanian Criminal Code: para.1 of the Article 374 of the Romanian Criminal Code (production, possession, acquisition, storing, exhibition, promotion, distribution, and making available, in any way, pornographic materials with minors); para.1¹ of the Article 374 of the Romanian Criminal Code (impelling or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes); para.1² of the Article 374 of the Romanian Criminal Code (watching pornographic performances involving minors); para.2 of the Article 374 of the Romanian Criminal Code (the offences provided in the para.1 were committed through a computer system or other means of storing computer data);

⁵ The Article 9 from the European Council Convention on cybercrime stipulates: “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium”.

para.3 of the Article 374 of the Romanian Criminal Code (access, without right, of pornographic materials with minors through computer systems or other electronic means of communications). The offence provided by the Article 374 of the Romanian Criminal Code is at the limit between the crimes committed with the help of the computer systems and those committed through the computer systems.

Under the Article 374 para.4¹ of the Romanian Criminal Code, the pornographic performance refers to “direct exposure to a public, including through information and communication technology, of a child engaged in a sexually explicit conduct or of genital organs of a child, for sexual purpose”.

In the Article 181 of the Romanian Criminal Code are defined the notions of *information system* and *computer data*. Information system means “any device or set of devices interconnected or in functional relation, of which one or more ensure the automatic processing of data, with the help of an information programme”. At the same time, according to the Article 35 (1) (d) of the Law no.161/2003⁶ on some measures to ensure transparency to exercise public dignities, public office and business environment, prevention and to sanction corruption, in this category is also included any computer programme which can determine the achieving a function by an information system.

A minor is defined, in accordance with the provisions of the paragraph 3 of the Council of Europe Convention on Cybercrime, as any person below the age of eighteen years, although Member States may require a lower age limit, which may not be less than sixteen years.

In view of the above, we have noticed that the legal definition of child pornography does not include all pornographic materials which have as subject the minors, which an adult who has a sexual interest in minors can take into account. In order to understand the causes of the commission of child pornography offences, we must analyze this illegal behaviour beyond the legal definition of child pornography.

The definition of child pornography from an illegal perspective refers to the construction of a simple classification system that highlights the characterization of the content of pornographic materials with minors and provides a discriminatory approach that indicates the characteristics of such material. This approach helps to improve our knowledge of the factors that allow and support the offender's behaviour, as the relationships between illegal behaviour and the child pornography material become more obvious. Accessing a collection of photographs showing an adult having a child sexual interest helps to develop a discriminatory approach for the management of the combat of the offences of child pornography by the law enforcement bodies. In the literature ⁷ it was supported the idea that victimization is the central theme when analyzing the content of a

⁶ The Romanian Official Gazette no. 279 from the 21st of April 2003.

⁷ Taylor, Max; Quayle, Ethel (2003). *Child Pornography. An Internet Crime*, New York: Taylor & Francis Group, Brunner Routledge, p. 31.

pornographic material with minors and when attempting to develop different descriptive categories. In the case where a pornographic material with minors is intentionally or accidentally accessed, whenever this material is accessed for sexual purposes, the minors in that pornographic material become victims through the perpetrator's fantasy. We therefore consider that minors in pornographic materials become victims in the online environment, first when it is committed and when the sexual abuse is recorded by the offender, and then they become victims whenever that recording is accessed in cyberspace.

A classification of different types of pornographic materials with minors is based on a descriptive analysis of an extensive collection of pornographic materials with minors, existing in a database, based on a project called **COPINE- Combating Paedophile Information Networks in Europe** - developed by the Cork University in Ireland⁸. This database contains examples of child pornography materials available to the public, relying entirely on Internet resources. The researchers in the COPINE project have made a classification of pornographic materials with minors on ten levels⁹ of severity, which differ according to the increase in sexual victimization. This classification system deliberately includes child pornography materials that do not fall under any legal definition of child pornography, and in view of this, it is important to emphasize that these child pornography collections in the COPINE database, in essence, is not an inappropriate indicator¹⁰.

§3. The use of Internet to promote child pornography

Internet contributes to the development of child pornography by increasing the amount of pornographic materials with minors available in the cyberspace, through efficient distribution and easy access to these materials. Child pornography through the Internet poses a number of challenges that traditional pornographic materials with minors do not have. The Internet gives criminals the possibility to hide their true identity, thus becoming anonymous, this characteristic contributing to an increase in the number of consumers of child pornography. Internet anonymity also allows adults to create different profiles in the online environment, claiming that they are actually children, making it easier to contact minors. Online criminals easily use anonymous proxy servers, many of which are free and located in other countries. Proxy servers allow a single computer system connected to the Internet to interact with one or more computer systems. Using a

⁸ Sheldon, Kerry; Howitt, Dennis (2007). *Sex Offenders and the Internet*, Chichester, West Sussex: John Wiley & Sons Ltd., p. 46; Wortley, Richard; Smallbone, Stephen (2012). *Internet Child Pornography. Causes, Investigation and Prevention*, Santa Barbara, California: ABC-CLIO, LLC, pp. 60-72.

⁹ Wortley, Richard; Smallbone, Stephen (2012). *Child Pornography on the Internet*, Community Oriented Policing Services. U.S. Department of Justice, Problem-Oriented Guides for Police. Problem-Specific Guides Series No.41, Washington D.C.: Center for Problem-Oriented Policing, Inc., pp. 8-9.

¹⁰ Taylor, Max; Quayle, Ethel (2003). *Child Pornography. An Internet Crime*, New York: Taylor & Francis Group, Brunner Routledge, pp. 31-32.

proxy server, a person's online criminal activity seems to have been committed by the proxy server.

Another challenge in addressing the issue of child pornography through the Internet is that the pornographic material depicting minors with an explicit sexual behaviour is relatively cheap and easy to produce. The relatively easy Internet access leads to the increase of abuse of children by creating a demand for new pornographic materials with minors.

We consider that child pornography through the Internet plays an important role in the recruitment and control of some victims, not only by determining minors to believe that having sexual relations between adults and children is a normal act, but also by using pornographic materials with minors which were created as a possible blackmail in order to silence the victim.

Child pornography offenders use computer systems both to locate potential victims and to exchange and distribute pornographic materials that present minors having an explicit sexual behaviour¹¹.

We believe that, with the increase in the number of children who frequently use the Internet, the number of potential victims among children in the online environment will increase too. Child pornography offenders take advantage of child-specific naivety by obtaining personal information and developing online relationships for the purpose of luring them for sexual purposes.

§4. Conclusions

The increased risk of child pornography, as well as the need to ensure maximum protection of social relations regarding morality, has led the Romanian legislator to establish a special regime of criminalization and sanctioning of these violations¹². The offence is provided in the Article 374 of the Romanian Criminal Code in two types of variant, an aggravating variant and two attenuated variants.

It is the type variant, according to para.1 of the Article 374 "the production, possession, acquisition, storage, exposure, promotion, distribution, and making available in any way of pornographic materials with minors shall be punishable by imprisonment from one to five years". The second type variant is provided by par.1¹ of the Article 374 and refers to "impelling or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes" shall be punishable with the same punishment mentioned above.

¹¹ Loftus, Rebecca Ayers (2008). *Disconnecting Child Pornography on the Internet: Barriers and Policy Considerations*, in Forum on Public Policy, No.1, Spring, p. 4; Gercke, Marco (2009). *Obligations of Internet Service Providers with regard to child pornography: legal issues*, Council of Europe. Octopus Interface Conference 2009. Cooperation against Cybercrime, Strasbourg, France, 10-11 March 2009, Retrieved 10th of November 2017 from: http://www.coe.int/t/dghl/cooperation/economic_crime/cybercrime/cy%20activity%20interface%202009/IF_2009_presentations/default_en.asp, consultat la 31.08.2015.

¹² The Article 374 of the Romanian Criminal Code.

It is an aggravating variant, according to the Article 374 para.2 “if the offences referred to in paragraph (1) have been committed by a computer system or other means of storing the computer data, the punishment shall be imprisonment from 2 to 7 years”.

It is an attenuated variant, according to the Article 374 para.1² “watching pornographic performances involving minors is punishable by imprisonment from 3 months to 3 years or by fine”. It is also an attenuated variant, according to the Article 374 para.3 “the access, without right, of pornographic materials with minors, through computer systems or other means of electronic communications, shall be punishable by imprisonment from 3 months to 3 years or by fine”.

According to the judicial practice in this field, the offence of child pornography committed in the type variants and the aggravated variant may enter the concurrence of crimes, with the crimes against freedom and sexual integrity only if the constitutive elements of these crimes are carried out¹³.

We believe that in order to have child pornography offence it is imperative that all the normative modalities listed relate to pornographic materials with minors and pornographic performances. If those essential requirements are not met, then those actions can not constitute the material element of the child pornography crime in all the five variants.

As regards the provisions of the Article 374 para.3 of the Romanian Criminal Code, namely *the access, without right, of pornographic materials with minors, through computer systems or other electronic means*, we consider that the legislator should have explained the situations when the pornographic materials with minors are being accessed with right, and to specify the categories of persons who can legally access the pornographic materials with minors.

Following the analysis we made, we noticed that the provisions of the Article 9 (offences related to child pornography) from the European Council Convention on cybercrime have been transposed into the Article 374 of the Romanian Criminal Code. We believe that the offence provided by the Article 374 of the Romanian Criminal Code is at the limit between the crimes committed with the help of the computer systems and those committed through the computer systems.

We have noticed that the European Council Convention on cybercrime has not defined all of the key terms used in the Article 9, but preferred to define them later in the the Explanatory Report to the Convention on Cybercrime. Such a key term is also *the explicit sexual behaviour* which was not defined in the Council of Europe Convention on Cybercrime, nor in Law no.161/2003 and the Romanian Criminal Code.

The text of the Article 374 of the Romanian Criminal Code also adapted to the provisions of the Article 5 (offences concerning child pornography, in para.3 is

¹³ Dobrinou, Vasile; Neagu, Norel (2011). *Drept penal. Partea specială. Teorie și practică judiciară*, Bucharest: Universul Juridic Publishing House, p. 751.

stipulated the offence of knowingly obtaining access, by means of information and communication technology, to child pornography) from the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, as well to the provisions of the Article 20 (offences concerning child pornography, in para.1 (f) is incriminated the offence of knowingly obtaining access, through information and communication technologies, to child pornography) from the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of the year 2007.

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12. Law no.161/2003 on some measures to ensure transparency to exercise public dignities, public office and business environment, prevention and to sanction corruption.