

## INFORMATIVE NOTE

The process of implementing information technologies in the Republic of Moldova has determined the evolution of criminal phenomenon and its extension in the cyber space.

An insufficient answer of the national legal framework contributes to the spread of such kind of criminal activities and the development of the IT area have caused the aggravation of these challenges as well, facilitating solicitation of children for sexual purposes, production and distribution of images depicting sexually abused children and at the same time offering anonymity to the criminals.

After the ratification of the Lanzarote Convention by the Law no. 263 of 19.12.2011, the Republic of Moldova reinforced the efforts in the process of implementing a common criminal policy, in the field of combating sexual abuse and exploitation of children, including on-line offences.

Regarding the report on the 7th meeting of the parties to the Convention, that took place in Madrid on the 9<sup>th</sup> of December 2013, we would like to provide the following comments on the substantive criminal law.

The article 23 of the Convention, titled “Solicitation of children for sexual purposes” provides that “Each Party shall take the necessary legislative or other measures to criminalize the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2 [*in the case of the Republic of Moldova – age of 16*], for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a, or Article 20, paragraph 1.a, against him or her, where this proposal has been followed by material acts leading to such a meeting”.

Here we are talking about preparing one of the following criminal offences from the Article 18, paragraph 1.a, or Article 20, paragraph 1.a of the Convention:

- engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities;
- producing child pornography;

We can notice that Article 23 of the Convention provides on the one hand a proposal of arranging a meeting with a child who has not attained the age set in application of Article 18, in order to commit any of the crimes referred to in Article 18, paragraph 1.a, or Article 20, paragraph 1.a, and on the other hand, further performance of material acts leading to such a meeting.

Therefore, the construction of Article 23 provides criminal liability for committing a certain harmful activity and preparing another one.

With reference to the criminal law of the Republic of Moldova, we would like to mention that Article 175 of the Criminal code, titled “Perverted actions” incriminates the following activities: “Perverted actions perpetrated against a person certainly known to be under the age of 16, consisting in exhibition, indecent touches, **discussions of obscene or cynical nature worn with the victim regarding sexual relations**, determining the victim to participate or to attend pornography shows, offering or making available to the victim pornographic materials, as well as **other actions of sexual nature**”, which is punished with **3 to 7 years of imprisonment.**”

Also, the further material acts, which are described in Article 23 of the Convention, self-represent preparing another sexual crime, as according to Article 26 paragraph (1) of the Criminal code of the Republic of Moldova, “The preparation for a crime shall be considered the preliminary agreement to commit the crime, **the purchase, manufacture, or adjustment of devices or tools, or the intentional creation by other means of conditions for its commission**, provided that due to reasons independent of the perpetrator’s will, the crime failed to produce the expected effect.”

This way, we are speaking of preparing one of the following criminal offences:

- Rape, i.e. sexual intercourse committed by the physical or mental coercion of the person, or by taking advantage of the victim’s incapacity to defend himself/herself or to express his/her will (Art. 171, paragraph (2), b) of the Criminal code of the Republic of Moldova – which provides for punishment by **imprisonment for 5 to 12 years**. If the child victim is under the age of 14 – Art. 171, paragraph (3), b) of the Criminal code, which provides for punishment by **imprisonment for 10 to 20 years**);

- Violent Actions of a Sexual Character, i.e. homosexuality or satisfying sexual needs in perverted forms committed through the physical or mental coercion of the person or by taking advantage of the person’s incapacity to defend himself/herself or to express his/her will (Art. 172, paragraph (2), b) of the Criminal code of the Republic of Moldova – which provides for punishment by **imprisonment for 5 to 12 years**. If the child victim is under the age of 14 – Art. 172, paragraph (3), a) of the Criminal code, which provides for punishment by **imprisonment for 10 to 20 years**);

We would like to mention that the Court of Justice of the Republic of Moldova, established in the Plenary Session Resolution No 17 of 07.11.2005 about court practice in the cases of sexual crimes, that having sexual intercourse, homosexuality or lesbianism with a child of tender age (under 14), **whose consent does not have a legal value, because he does not understand the meaning of what is going on**, shall not be qualified in accordance with Art. 174 of the Criminal Code of the Republic of Moldova (“Sexual Intercourse with a Person under the Age of 16”), but according to Art. 171 (“**Rape**”), paragraph (3), b) or Art. 172 (“**Violent Actions of a Sexual Character**”), paragraph (3), a) of the Criminal Code.

- Sexual intercourse other than rape as well as any other acts of vaginal or anal penetration committed with a person certainly known to be under the age of 16 (Art. 174, paragraph (1) of the Criminal Code – which is applied in case if the victim’s age is between 14 and 16 years – provides for punishment by **imprisonment for 3 to 7 years**);

- The recruitment of a child for the purpose of commercial or non-commercial sexual exploitation in pornographic industry (Trafficking in Children, provided in Art. 206, paragraph (1), a) of the Criminal Code of the Republic of Moldova, which is punished by **imprisonment for 10 to 12 years**. In case of physical or mental violence, sexual abuse and violence or the abuse of the child’s vulnerability, the threat of disclosure of confidential information to the child’s family or to other persons – Art. 206, paragraph (2) of the Criminal Code, which provides for punishment by **imprisonment for 10 to 15 years**. And in case if the child victim is under the age of 14 or the acts were committed against two or more children – Art. 206, paragraph (3) of the Criminal Code, which provides for punishment by **imprisonment for 15 to 20 years**);

- Producing child pornography (Art. 208<sup>1</sup> of the Criminal Code, which provides for punishment by **imprisonment for 1 to 3 years**).

As a result, we have to deal with a **cumulation of crimes** (Art. 175 + Art. 171/ 172/ 174/ 206/ 208<sup>1</sup>) and the sentence is calculated by **summing up the punishments** for those crimes provided in certain articles of the Criminal Code.

In this context, we would like to mention that the legal provisions that intersects partially, “overlap” each-other, lead to doubling criminal law provisions, and consequently, to the appearance of situations where qualification of facts becomes difficult. Such situations always make favors to the abusers and even make it easy to avoid criminal liability.

Thus, there is an urgent need for the separation of particular criminal acts from a circle of criminal activities, as criminal policy requires special social and legal assessment of the facts, which can be determined only in a particular legal regulation.

In general, the rules governing competition gives criminal justice system redundancy, as generators of confusion in the case law.

Basing on the above and on the purpose of the Lanzarote Convention of protecting children against sexual exploitation and sexual abuse, we express our position on the desirability of **excluding from the Article 23 of the Convention of the text: “where this proposal has been followed by material acts leading to such a meeting”**, in order to eliminate the phase of preparing another offence from the constitutive elements of the crime.

**With respect,**

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