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Communication from Romania concerning the group of cases M. G. C. v. Romania (Application No. 61495/11) and E.B. v. Romania (Application No. 49089/10)

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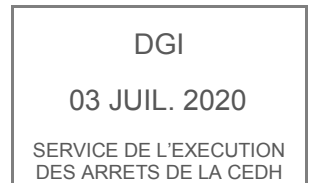
Communication de la Roumanie concernant le groupe d'affaires M. G. C. c. Roumanie (requête n° 61495/11) et E.B. v. Romania (requête n° 49089/10) (**anglais uniquement**)

L / 2147 / 3 July 2020

4227 R/AG/ 102

4371 R/AG/ 82

5280 R/AG/ 107



Action Plan

3 July 2020

Individual and general measures in the group of cases *M.G.C. v. Romania* (M.G.C. v. Romania, no. 61495/11 and I.C. v. Romania, no. 36934/08) and in the case of *E.B. v Romania* (no. 49089/10)

I. Summary of the cases

The cases of *M.G.C. v. Romania* (no. 61495/11, judgment final on 15/06/2016) **and *I.C. v. Romania*** (no. 36934/08, judgment final on 24/08/2016) concern the failure of the prosecution authorities and the courts to conduct effective and victim-sensitive investigations and court proceedings into allegations of rape of the applicants, two young girls of 11 and 14 years old at the time of the facts (2007-2009).

The Court found a violation of Article 3 of the Convention in both cases, and, additionally, in the case of *M. G. C.*, it also found a violation of Article 8.

The European Court found that the national courts had failed to develop a settled and consistent practice when addressing the issues related to the victim's consent, in order to clearly differentiate between cases of rape and those of sexual intercourse with a minor in cases in which there was no evidence of physical resistance from the victims. Against this background, the courts which tried the applicants' cases had failed to adopt a context-sensitive approach when assessing the facts and the evidence adduced in particular as regards the applicants' alleged consent. In doing so, they attached little or no weight at all to the particular vulnerability of the first applicant, on account of her young age, and of the second applicant, on account of her age and the intellectual disability she had been diagnosed with, nor to the special psychological factors involved in cases concerning rape of children. This breached the State's positive obligations to apply effectively a criminal-law system punishing all forms of rape and sexual abuse against children.

The case of *E. B. v. Romania* (no. 49089/10, judgment final on 19/03/2019) concerns the ineffectiveness of the criminal investigation carried out between 2008 and 2010 into allegations of rape, due to the excessive reliance by the authorities on the lack of proof of resistance by the applicant, a woman diagnosed with a slight intellectual disability, and the failure of the authorities to adequately respect her rights as a victim of violence.

Consequently, the Court found that national authorities have breached the applicant's rights under articles 3 and 8 of the Convention.

The European Court thus questioned the authorities' failure to conduct a context-sensitive investigation into the incident denounced by the applicant by putting undue emphasis on the absence of any injuries on the victim's body, aggravated by the fact that no psychological or psychiatric assessment had been carried out to obtain a specialist analysis of the applicant's reaction from the point of view of her mental capacity. It also questioned the authorities' omission to inform the victim of her procedural rights, to provide her with free legal assistance and counseling and to consider the need for protective measures in her case, which had deprived the national legal framework on violence against women and protection of victims of its

purpose and was inconsistent with international standards on these issues. In the Court's view, these deficiencies raised doubts as to the effectiveness of the system put in place by the State under its international obligations.

II. Individual measures

In all three abovementioned cases, the just satisfaction determined by the Court was paid within the deadline set for the authorities.

Regarding the revision actions of the final judgments in the cases of *M.G.C. v. Romania*, *I.C. v. Romania* and *E.B. v. Romania*, from the information received, it results that the revision of the domestic judgment that formed the object of the ECHR proceedings has been requested, following the Court's judgement, only in the case *M.G.C. v. Romania*.

The civil part *M. G. C.* requested at the Deva Court of First Instance the revision of the criminal judgement no. 487/2010 of the Deva Court of First Instance)

This court declined its competency in favor of the Alba-Iulia Court of Appeal.

The Alba-Iulia Court of Appeal admitted the revision and by criminal judgement no. 1/R/2017 of 27 April 2017 quashed the criminal judgements no. 70/2011 of the Alba-Iulia Court of Appeal, no. 328/A/2010 of the Hunedoara County Court, no. 487/2010 of the Deva Court of First Instance and ordered the retrial of the case by the Deva Court of First Instance.

The Deva Court of First Instance delivered the criminal judgement no. 138/2020 of 13 February 2020 (file no. 9098/221/2016*) and convicted the author *J. V.* to 5 years of prison for committing the offence of rape. Currently, the appeal of the author is pending before the Alba-Iulia Court of Appeal.

National courts informed that, in the cases of *I. C.* and *E. B.*, no request for revision of the relevant domestic judgments has been requested, so far.

III. General measures

Following the judgements of the Court, we proceeded to gather information on the current practice of the courts of law and prosecutor's offices on:

- the manner of analysis the consent/lack of consent in cases of sexual crimes against minors or vulnerable persons if there is no evidence of opposition from the victim's side (for example, traces of violence)
- the omission to inform the victim on the procedural rights, free legal assistance and counselling and protective measures for the victims.

The Ministry of Justice focused its response on the current legal framework covering such crimes.

The courts of law and prosecutors' offices from all over the country transmitted their opinions and the relevant practice starting with the year 2016.

It is important to stress that the following information deals with cases concerning sexual crimes committed against both minor victims (such as in the case of *M. G. C. v. Romania*) and victims unable to express their valid consent due to medical issues (such as in the case of *E. B. v. Romania*).

III. A. The Ministry of Justice has communicated (address no. 2/32317/2020/13.05.2020) the following aspects related to the execution of the two abovementioned cases:

III.A.1. Amendments and improvements of the legal framework adopted after the date of the events in the cases of M. G. C., I. C. and E. B.

Following the adoption of the new Criminal Code (hereinafter referred as “CP”) and Criminal Procedural Code (hereinafter referred as “CPP”) in year 2014, the Emergency Ordinance no. 18/18.05.2016 entered in force amending both regulations and Law no. 304/2004 on judicial organisation. Consequently, in these matters the current legislation stipulates:

- specific provisions (art. 113 CPP) on certain **categories of victims who are presumed to be vulnerable**, like children, victims of the sexual violence, victims with disabilities. In addition, the same article of law stipulates certain **protective measures** that can be applied by the criminal prosecution authorities when dealing with vulnerable victims.
- the hearing of persons under 14 year old may take place in the presence of a parent, the tutor, the person or the representative of the institution carrying for the child. If any of these persons is a suspect, the hearing takes place in the presence of a representative of the tutor authority or an adult relative, in accordance with the decision of the judicial body.
- the criminal prosecution authorities or the court may declare, at request or *ex officio* **the hearing in the presence of a psychologist**, with the aim of mitigating the negative effect of the hearing on the psychological state of the child.
- the vulnerable victims may be subject to **protective measures**, like surveillance and security of their residence or be provided with a temporary residence, protection during travels, data protection through a pseudonym on the statement, hearing of the victim without being attending, thorough means of audio video transmission, with distorted voice and image if other means are not sufficient;
- the victim is informed by the judicial bodies of its **rights** under the Criminal Procedural Code and Law no. 211/2004 on certain measures to ensure information, support and protection of the crime victims;
- the **legal assistance** is compulsory if the victim or the civil party is a person lacking capacity to act or with limited capacity to act, as well as each time the judicial body considers that the victim, the civil party or the responsible party cannot defend herself properly (art. 93 CPP);
- the victim must be aware of her rights and obligations among which is the right to be assisted by a lawyer and, in cases of compulsory assistance, the victim has the right to an *ex officio* lawyer (art. 111 paragraph 2 letter a CPP); such assistance is **free of charge** (art. 274 paragraph 1, art. 275 paragraph 6 CPP);
- the Criminal Code stipulates as **aggravating circumstances**, warranting the initiation *ex officio* of the criminal action, the rape (art. 218 CP) of a minor or of a victim under the care, education, surveillance or treatment of the perpetrator, as well as the crime of committing a sexual act with a minor (art. 220 CP) if the minor is in the care, education, surveillance or treatment of the perpetrator or he abused his known position of confidence or authority over the minor or of the extremely vulnerable position of the minor, following a **physical or physiological handicap** or following a **situation of dependency**;
- in case of crimes against the sexual integrity and liberty of minors, the prescription term starts from the date the minor comes of age; if the minor died before this date, the prescription term starts from the date of death;

- the criminal action starts *ex officio* in cases of crimes against the sexual integrity and liberty of minors, based on the principle of the mandatory initiation and exercise of the criminal action (art. 7 CPP), as these crimes are not among those for which the law requires a prior complaint in order to initiate criminal proceedings;
- moreover, the action starts *ex officio* if the complaint is made against the perpetrator who is the legal representative of the child (art. 289 paragraph 8, art. 2925 paragraph 3);
- the person who suffered a moral, material or physical injury through a criminal act for which the criminal action starts *ex officio* and does not wish to take part in the criminal trial must nevertheless inform the judicial body which, if necessary, may still hear him/her as witness; ;
- the prosecutor also has the obligation, and not just the possibility, to exercise the civil action in the name of the victim lacking the capacity to act or with limited capacity to act (art. 19 paragraph 3 CPP) and to request the civil responsible party to be brought in the case (art. 21 paragraph 3 CPP); furthermore, if the civil action has been started by the prosecutor and, after the final criminal judgement, from the new evidence results that the damage has not been fully covered, the difference may be demanded through a separate action before the civil court;

It is also worth noting that, in the process of elaborating the new criminal code and criminal procedural code and of amending the Law on the organization of the judicial system (Law no. 286/2008 on Criminal Code, Law no. 135/2010 on Criminal procedural Code, Law no. 187/2012 on entering into force of Law no. 186/2009 on Criminal Code, Law no. 255/2013 on entering into force of Law no. 135/2010 on Criminal Procedural Code, EGO no. 18/2016 on amendment and completion of Law no. 286/2009 on Criminal Code, Law no. 135/2010 on Criminal Procedural Code and art. 31 paragraph 1 of Law no. 304/2004 on judicial organization), the national authorities have also transposed a number of relevant European provisions, such as:

- Directive 2011/93/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;
- Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
- The provisions of The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse adopted at Lanzarote in 25 October 2007 ratified by Romania by Law no. 252/2010 have been also considered.

In conclusion, the abovementioned legislative changes, that have already taken place, provide a significantly higher level of protection for the vulnerable victims of sexual crimes (such as young children or persons unable to validly express their consent), and allow the prosecution to take a more active role in supporting these victims. It is worth noting that the new provisions deal both with the criminal and civil responsibility of perpetrators having committed sex crimes.

III.A.2. Amendments of the relevant legal framework taken into consideration

As regards the possibility to redefine the crimes of rape and sexual aggression, in the sense of including a direct reference to the *lack of valid consent of the victim*, the Ministry of Justice argue that such a redefinition is not necessary.

As a condition attached to the material element, which forms a part of the objective aspect of the crimes of rape and sexual aggression, the act must be done without the victim's consent in one of the three alternative modalities indicated by the law (i) forcing the victim (by physical or psychological means) (ii) putting the victim in impossibility to defend or to express her will (new condition, expressly stipulated from the previous regulation, which presumes the active intervention of the offender as a cause of this condition) or (iii) taking advantage of the victim (the offender uses a pre-existing condition of vulnerability of the victim). Both the doctrine and the judicial practice have unanimously acknowledged the fact that the compulsion may be physical or of psychological in nature (moral compulsion).

Both the doctrine and the judicial practice argue that if the age of the minor is young, the crime should be classified as rape and not sexual act with a minor, even if the sexual act was not performed using physical compulsion, considering that the age of the victim puts her in the impossibility to defend herself or to express her will.

Furthermore, currently under debate before the Chamber of Deputies (acting as decisional chamber), there is a legislative bill on the amendment and modification of Law no. 286/2009 on the Criminal Code, as well as the amendment of art. 223 paragraph 3 of Law no. 135/2010 on the Criminal Procedural Code (Plx 101/2020¹) which refers to the amendment of articles 211, 213, 218-222 and 374 of the Criminal Code.

This bill aims to increase the criminal liability for cases of sexual abuses against minors, both with regard to the limits of the prison sentences and concerning the conditions of criminal responsibility and the qualification of the criminal acts. The present action plan is accompanied by a copy of the legislative proposal, which, among others, brings substantial amendments to articles 211 (trafficking of minors), 213 (primping), 218 (rape), 219 (sexual aggression), 220 (sexual acts committed with a minor), 221 (sexual corruption of minors), 222 (recruiting minors for sexual purposes) of the Criminal Code, and introduces a new article 222¹, raising the limits of prison sentences for sexual crimes committed against minors in particularly severe circumstances (by two or more persons or by a person who has already committed a sexual crime against a minor in the past).

Therefore, there appears to be no need to further amend national legislation in order to include a direct reference to the lack of a valid consent of the victim, as the previous modifications made to the criminal legislation, as well as the amendments currently under consideration, provide an adequate framework for dealing with sex crimes committed against minors and persons unable to express their valid consent.

III.A.3. Measures taken as an effect of ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence adopted at Istanbul on 11 May 2011 (“the Istanbul Convention”)

In order to ensure the implementation of the provisions of the Istanbul Convention, the National Agency for Gender Equality between Women and Men (ANES) and the Ministry of Justice have developed a complex set of normative acts, which amended and completed the existing legal acts, in accordance with the Istanbul Convention.

As such, after the ratification of the Istanbul Convention, the Ministry of Justice initiated the legislative proposal that became Law no. 25/2012 for the amendment and completion of Law no. 217/2003 on the prevention and combating of violence in the family, published in the Romanian Official Journal no. 618 of

¹ Available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=18409

18 July 2018, through which the **protection order and the temporary protection order have been introduced in the legislation.**

Moreover, this new legislation has created, for the authorities, an approach centered on the victim and developed preventive measures to be taken in case of acts of domestic violence (psychological counselling in cases of divorce with precedents of domestic violence, monitoring the protection orders/preventive measures of their breach) and equally, has stipulated emergency intervention measures in situations posing an immediate risk.

In addition, according to the Ministry of Justice, a number of **measures regarding the protection of victims** have been introduced, such as providing them with information, general assistance services, assistance in individual/collective complaints through specialized services, setting up corresponding shelters, the organization of emergency call lines open 24/24 hours, opening of complaint and support centers in cases of crises following rape, the implementation of protection and assistance services for children witnesses and the creation of a framework under which a witness to violence crimes is encouraged to report to the competent authorities.

Currently, the Ministry of Justice does not have under consideration any new measures as an effect of ratification of the Istanbul Convention.

III.A.4. Thematic control of the activity of courts and prosecutors' offices carried out by Judicial Inspection

The Ministry of Justice also informed the Agent of the Government that the members of the Superior Counsel of Magistrates have decided in majority to notify the Judicial Inspection with the purpose of carrying out a thematic control of domestic courts and the prosecutor's offices on the manner in which the pending investigations and conclusion are performed in the cases of sexual life with minors (rape, sexual act with a minor) starting with the 1st of February 2014.

The object of the thematic control refer to the practice of courts and the prosecutor's offices on:

- the appreciation of the consent as valid or not valid considering the age of the victim;
- the standard of proof which lead to the solution of sending the file to the court or the criminal liability or, on contrary, the solution of not sending the file at the court or acquittal in these cases.

The Government will keep the Committee informed on the evolution and results of this thematic control.

III.B. The Prosecutor's Office attached to the High Court of Justice and Cassation transmitted in 2020 that, as regards the compliance with the principles stemming from the judgements of the Court in the cases *M.G.C. v. Romania* and *I.C. v. Romania* a network of prosecutors specialized in conducting the cases with minors was created within the Public Ministry. The measure has been taken by Order no. 294 of 5 December 2018 of the General Prosecutor of the Prosecutor's Office attached to the High Court of Justice and Cassation. The prosecutors-in charge manage cases that have as object offences committed both by minors, and **particularly against the minors**, analyse the case-law of prosecutor's offices and draft proposals for taking over the complex cases, intensively covered by media, which have not been finalized. Furthermore, these prosecutors disseminate the specialized information that they gathered in their activity on the occasion of the decentralized training sessions in which they partake, and they also transmit information on the newest domestic, E.C.H.R. or international jurisprudence on human rights.

III.C. The General Inspectorate of the Romanian Police informed the Agent of the Government that they apply the provisions of Law no. 211/2004 on certain measures to ensure the information, the support and the protection of the victims of the offences. The provisions include the mandatory information of the victim from the first contact with the judicial body, about the services or organizations that ensure psychological counselling or other forms of assistance, the judicial body competent to deal with the case, the right to legal assistance, the conditions and the procedure for granting free legal assistance, the procedural rights of the victim, the conditions and the procedure on the protection of the victim and the witnesses.

In addition, the General Inspectorate of the Romanian Police informed that the victims of domestic violence benefit from the special protection measures, in accordance with Law no. 217/2003 on the prevention and stopping the domestic violence. As well, by Government Decision no. 49 of 19 January 2011 two methodologies on the multi-disciplinary interventions in cases of violence on children or children exploited or victims of human traffic, under which the Police activity is carried out. The General Inspectorate of the Romanian Police added that, in its activity, it respects the provisions of the Istanbul Convention for the prevention and combatting of violence against women and domestic violence. They informed on the application of order no. 146/2578/2018 of the Minister of Internal Affairs and the Minister of Employment and Social Justice, published in the Official Journal at 28 December 2018, which regulates the procedure to handle the cases of domestic violence by the police officers.

III. D. Regarding the application of the legislative framework, the courts of law have transmitted the following practice developed by the judicial bodies:

As general observations, both courts of law and prosecutor's offices argue that:

- the analysis of the consent/lack of valid consent in cases of sexual crimes against minors or vulnerable persons, even if there is no evidence of opposition from the victim's side (for example, traces of violence), is done in majority of the cases through evaluation reports of the victim (such as a psychologic or psychiatric expertise), in conjunction with other pieces of evidence in the file;
- the vast majority of courts agree that the young age of the victims leads to their impossibility to express will and consent to sexual relations, thus leading the courts to find that the victims have been subjected to rape, and not to mere sexual acts with a minor;
- Therefore, departing from the practice identified by the ECHR in cases such as M. G. C. and E. B., where domestic courts and prosecutor offices deduced the consent of victims from the lack of traces of violence, nowadays, national institutions carry out a much more exhaustive analysis of the existence of consent, which is based, among others, on psychiatric and psychological assessments, social investigations etc., in view of establishing the existence of trauma specific to sexual abuse.
- the procedural rights of the victims are fully respected; no case of omission to inform the victim on the procedural right have been identified, free legal assistance is always provided, counselling was also provided if necessary;

Additionally, the magistrates have also informed the Agent of the Government (the Prosecutor's Office attached to the Buftea Court of First Instance respectively) that as regards the hearing procedure of the victims, the judicial body adopt a pluri-disciplinary perspective in accordance with the Methodological Guide on hearing minor victims of violence drafted following the project *Model of multidisciplinary and*

inter-sectorial intervention, dated April 2017, to provide an efficient and coordinated response to the needs of children victims of the violence in the family, project co-financed through a grant offered by Switzerland through the Swiss Contribution to an extended European Union. The guide can be accessed at the following link:

http://www.fonpc.ro/downloads/programe/model-interventie-multidisciplinara/Ghid_audierea_minorilor_victime_violen%C8%9Bei.pdf

III.D.1. Information provided by the courts of law

The information provided below represents a brief presentation of the practice adopted by various courts and prosecutors' offices in cases concerning sexual crimes committed against minors or vulnerable persons, as it results from addresses sent by authorities and the examples of judicial practice they provided.

1.1. The Bucharest Court of Appeal transmitted that the unitary practice of the Bucharest County Court and the first instance courts in its area of competence reveal that the lack of physical violence on the victim is not a determining factor in analysing the consent. The courts always considered the statements in view of the facts and the discovery of truth. In addition, the relation between the parties, the conditions of time and place, the witnesses are relevant in acknowledging at least the emotional state of the parties.

The rule is the undertaking of a psychologic evaluation of the victim either during the prosecution, or during the court proceedings.

The Călărași County Court argued that the victim under 15 year old cannot express a valid consent to sexual relation, the lack of discernment being clear.

The Ialomița County Court provided information on several aspects. Thus, for the analysis of physical violence, any means of evidence is administered, including the forensic examination of the bodies of the victims. If the physical violence is missing and the victim is very young so that the existence of consent is impossible to be established, the crime is classified as rape. If the victim is not of a very young age but yet (s)he did not turn 15 years (legal age of consent to sexual acts) the consent is analyzed on each case, by evaluation of all circumstances of the case. The judicial bodies administer any necessary means of evidence, such as statements, psychological/psychiatric evaluations/expertise in order to determine the consent of the victim. The court provided examples of jurisprudence where the magistrates concluded that, following the statements and the forensic expertise, the victim expressed a valid consent and thus the charges were of sexual act with a minor (files no. 783/229/2018 – 14 years, no. 2406/229/2018 – 13 years, no. 3652/229/2018 – 13 years).

The Ilfov County Court, the Teleorman County Court and the Turnu Măgurele First Instance Court also indicated that psychiatric legal-medical expertise is necessary in order to establish the capacity of the victim to express a valid consent to sexual acts or relations, the discernment and the normal reactions of the victim in such cases.

The Giurgiu County Court transmitted that the existence of consent is analyzed in view of classifying sex crimes committed against minors, and it is done on based on the capacity of the victim to appreciate critically the content and the negative consequences of the actions at their age, the social condition, the family environment, their education and the level of psychical development following a psychiatric legal-medical expertise. As relevant case law, the court indicated the file no. 16432/236/2016 in which the psychiatric legal-medical expertise revealed the lack of discernment of the minors aged 10 and 9 years respectively. The charges brought in this case were of rape, and not sexual acts with minors.

The Alexandria First Instance Court mentioned that it considers that even cases where the victim does not oppose physical resistance could be classified as rape.

The Zimnicea First Instance Court also underlined the capacity of the victim to express a valid consent, shown by the psychiatric legal-medical expertise. In accordance with Order for the approval of the Norms of procedure on expertise, conclusions and other forensic documents no. 1.134/C/25.05.2000 of the ministry of Justice and no. 255/04.04.2000 of the Ministry of Health and Family, the file of the expertise performed on minors must contain the social investigation and data on school performance and the examination of the minor by the court must be direct.

1.2. The Cluj Court of Appeal transmitted that, from the information indicated by the Bistrița Năsăud County Court, crimes of rape and sexual acts with a minor have been put to trial and led to sentences, along with other crimes brought to the courts through the bills of indictments issued by D.I.I.CO.T. – Territorial Office of Bistrița Năsăud referred to court with regard to crimes of traffic of minors or persons. From the analysis of such cases, it results that both the court and the D.I.I.CO.T. – Territorial Office of Bistrița Năsăud proceed to the hearing of the minors/vulnerable victims in the presence of *ex officio* or appointed lawyers, psychologists and legal representatives and, if it was the case, the judicial bodies of the court proceeded to carry out a psychiatric forensic expertise.

The magistrates of the criminal section of **Bistrița Court of First Instance** transmitted that in cases of sexual aggressions against minors, **it is not necessary to establish the existence of a threat, violence, physical or moral compulsion in order to classify the act as rape.** Moreover, *de lege ferenda*, the magistrates argued that the legislator did not introduce a presumption of lack of discernment for minors under a certain age in case of rape although such a presumption should be stipulated for minors younger than 15 years. The practice is to consider the minors aged 11 years are in the impossibility to express a valid consent to sexual relations, whether they suffer from mental issues or not.

For example, by judgement no. 1716/28.11.2017 of Bistrița Court of First Instance, there were no threats, physical compulsions or violence against the minor, but the court considered that the victim could not have the necessary discernment to consent to a sexual relation. Therefore, the very young age of the minor was sufficient for the court to classify the crime as rape.

Furthermore, the Bistrița Court of First Instance transmitted that the practice of the Prosecutor's Office attached to the Bistrița Local Court starting with year 2016 was to hear the minors/vulnerable persons in the presence of specialists, psychologists and psychiatrics respectively and in most of the cases, a psychological/psychiatric expertise of the victims was performed to establish the discernment.

Gherla Court of First Instance, Maramureș County Court and Șimleu Silvaniei Court of First Instance also submitted criminal judgements attesting the manner in which the victim's consent was assessed and psychological/psychiatric evaluation/expertise performed in order to establish the victims' discernment and the normal reaction of the minor/vulnerable victim in cases dealing with sexual crimes.

1.3. The magistrates of the **Galați Court of Appeal** are of the opinion that the young age of the victims in cases they have analyzed excludes the idea of a free expression of their will to take part in sexual relations or sexual acts with the offender, since the victims do not have a conscious representation of both psychological and biological significations resulting from such acts. **Thus, such acts have been classified as rape and punished accordingly.**

1.4. The Constanța Court of Appeal transmitted that, as a constant practice in cases of rape or sexual act with a minor, the prosecution bodies and the courts ordered legal-medical psychiatric expertise for the

purpose of determining the existence of discernment of minors and vulnerable victims as well as to establish if the victims were aware of the significance and the consequences of a sexual act in order to express a valid consent. In certain cases, psychological evaluation performed by psychologists of D.G.A.S.P.C. may be necessary in order to evaluate the existence and the effects of the sexual abuse of the victim, including from the perspective of establishing the existence of inexistence of discernment.

The Tulcea Court of First Instance transmitted that the consent to a sexual act is established for individual each case. The magistrates argue that the young age of the victim indicates the lack of a valid consent of the victim. In addition, the age of 13 years does not entail the existence of a discernment of the victim, and therefore it is necessary to carry out a psychiatric and psychologic examination of the victims to check the existence of the capacity to express a valid consent to sexual acts. In all cases, however, the consent of the victim cannot be implied from the specific reactions of children suffering such trauma, as the fact that they did not informed their parents or did not scream for help. The lack of violence or compulsion on the victim does not exclude the offence of rape, the existence of discernment being decisive in the correct framing of the offence.

The Medgidia Court of First Instance indicated as example the file no. 6917/256/2017 in which the court held the offence of rape against a 14-year-old victim. The report of legal-medical psychiatric expertise indicated the lack of valid consent, the fact that the victim did not understand the significance and the real consequences of a sexual act and mental development issues.

1.5. The Pitești Court of Appeal argued that although no relevant case law was identified in the courts in the territorial area of the Pitești Court of Appeal, in cases of rape and sexual act with a minor the judges consider that consent of the minor and/or vulnerable person is analyzed even if the victim did not physically oppose, based on an psychologic, psychiatric expertise or the examination of the conditions in which the facts occurred, for each case.

1.6. The Alba Iulia Court of Appeal transmitted examples of relevant jurisprudence of the Alba Iulia First Instance Court, the Deva First Instance Court, the Aiud First Instance Court, the Hunedoara First Instance Court and the Petroșani First Instance Court, showing that the courts ordered legal-medical expertise in order to establish the consent of the victim.

1.7. The Suceava Court of Appeal transmitted examples of case-law where the court held the offences of rape against minors aged 7 years could not express a valid consent due to their young age (file no. 2755/40/2015 of the Suceava Court of Appeal).

1.8. The Timișoara Court of Appeal transmitted examples of relevant jurisprudence on how the consent is analyzed by the Timișoara First Instance Court, the Sânnicolau Mare First Instance Court, the Deta First Instance Court, the Făget First Instance Court and the Reșița First Instance Court.

The Timișoara First Instance Court held in the file no. 28243/325/2019 that the accused was guilty of rape following the psychiatric legal-medical expertise of the minor victim which revealed, along the young age of 11 years, a mental issue making impossible the expression of a valid consent, freely express on the sexual relation. Legal-medical expertise and psychiatric legal-medical expertise were also performed in file no. 12022/325/2019 revealing the lack of valid consent of the minor aged 11 years.

The Sânnicolau Mare First Instance Court informed that the practice is to order a psychological expertise concluding whether the minor victim has the capacity to consent to the sexual relation (as examples, the judgements is the files no. 3709/295/2017 and no. 1133/295/2016)

The Deta First Instance Court and the Reșița First Instance Court transmitted other examples of judgements on charges of rape where the legal-medical expertise and psychiatric legal-medical expertise were done and that revealed the minor victim's lack of consent (files no. 521/220/2018, no. 1442/220/2014, no. 1480/220/2019, no. 398/220/2016 of the Deta First Instance Court and file no. 2731/290/2018 of the Reșița First Instance Court)

The Făget First Instance Court presented a case where the report of psychiatric legal-medical expertise showed that, following an expertise, the victim had the capacity to consent to the sexual act and had discernment, although she had a slight mental disability (file no. 213/832/2019). Nevertheless, the court held the charges of rape on the basis of all the pieces of evidence.

1.9. The Bacău Court of Appeal transmitted the relevant jurisprudence of the Bacău Court of Appeal, the Bacău First Instance Court, the Târgu Neamț First Instance Court and the Roman First Instance Court in case of offences of rape against minors. Legal-medical expertise and psychologic evaluation of D.G.A.S.P.C. were done (file no. 3787/260/2017 the Bacău Court of Appeal, file no. 15504/180/2015 of the Bacău First Instance Court in which the court held that the minor aged 10 years could not express a valid consent to sexual relations, files no. 624/291/2019 and no. 5199/291/2017 of the Roman First Instance Court in which the court concluded that the consent was obtain by moral compulsion, file no. 1668/321/2018 of Târgu Neamț First Instance Court).

1.10. The Târgu-Mureș Court of Appeal transmitted relevant jurisprudence in which the courts held the offences of sexual act with a minor following the existence of consent of the minor victim (files no. 1115/289/2018 and no. 2186/289/2017 of Reghin First Instance Court).

1.11. The Craiova Court of Appeal informed that in analyzing the existence of the offence of rape, it does not matter if the victim opposed or not physical resistance, being sufficient the expressed refuse of the victim.

Moreover, in cases of minor or vulnerable victims, an important aspect to consider is their age, the circumstances of the fact, the conclusions of the psychologic evaluation or expertise. The lack of evidence of physical resistance does not lead per se to the conclusion that there was no compulsion or putting the victim in the impossibility to defend of to express the will.

The Craiova Court of Appeal indicated relevant jurisprudence of Caracal First Instance Court, Corabia First Instance Court, Balș First Instance Court, Baia de Aramă First Instance Court, Orșova First Instance Court, Drobeta-Turnu-Severin First Instance Court, Vânju Mare First Instance Court, in which **psychiatric legal-medical expertise along with other means of proof revealed the existence or inexistence of the victim's consent.**

1.12. The Iași Court of Appeal transmitted the relevant case laws and opinions of the Iași Court of Appeal, the Iași First Instance Court, the Pașcani First Instance Court, the Hârlău First Instance Court, the Vaslui First Instance Court, showing that the consent of the victim is determined on proofs of the case and in the most of the cases, the psychologic/psychiatric expertise was conducted. In file no. 6781/333/2016 of the Vaslui First Instance Court, the court held that the minor aged 12 years was in the impossibility to express a valid consent to sexual relations, and held that she was a victim of rape.

1.13. The Ploiești Court of Appeal transmitted relevant jurisprudence.

In the file no. 1561/2014/2018 of the Câmpina First Instance Court the psychiatric legal-medical expertise revealed the emotional condition of the victim aged 14 years and the court held the conviction to sexual act with a minor and bad treatments applied to a minor. In the file no. 15043/281/2017 of the Ploiești First

Instance Court the prosecution held that although no physical compulsion was shown, the victim's age of 12 years and 9 months reveals the lack of valid consent.

1.14. The Braşov Court of Appeal informed that the psychological evaluations are carefully considered when determining the existence or not of the victim's discernment and the consent to sexual relations.

In the judgement no. 634/Ap of 23 September 2016, the Braşov Court of Appeal held the offence of rape against a 9 year minor, stating that due to the young age, the victim cannot express a valid consent to sexual relation. The legal-medical expertise and the psychologic evaluation were done during prosecution.

In the file no. 1204/293/2019, the Rupea First Instance Court held that the eventual consent of the victim could not have been valid due to the level of physical and psychical development, as revealed by the legal-medical expertise in the file. Thus, the offence was classified as rape.

In the file no. 1091/338/2017, the Zărneşti First Instance Court ordered the drafting of a new psychologic evaluation of the victim due to the fact the evaluation performed during the prosecution and the medical documents submitted by other psychiatrist doctors were in contradiction.

The Braşov First Instance Court held in the file no. 8407/197/2018 that the fact that the minor victim was forced to consume alcoholic drinks in order to put her in the impossibility to defend herself from the sexual relations is classified as rape. Among other evidence, the judicial bodies ordered the legal-medical and psychological expertise. The same conviction held the Braşov First Instance Court in file no. 13663/197/2016 following similar facts and the psychiatric legal-medical expertise that showed a mental issue and thus the lack of valid consent to sexual relations. The psychologic evaluation was also performed in the file.

III.D.2. Information provided by the prosecutors' Offices attached to courts of law

2.1. The Prosecutor's Office attached to the Bucharest County Court argues that the analysis of the minors'/vulnerable individuals' consent is done on the basis of multiple pieces of evidence in the case, such as statements of the victim and of the offender, photographic charts, forensic expertise, psychological evaluations/psychiatric expertise of the victim, social investigations, behavior analysis performed by the specialists of the General Inspectorate of the Romanian Police - the Service for Behavior Analysis, in certain cases.

The hearing of minors/vulnerable persons is done in the presence of mandatory assistance, provided either by a psychologist, of a representative of the General Direction of Social Assistance and Child Protection (hereinafter referred as "D.G.S.A.P.C.") or of legal representatives, and is carried out by prosecutors who were trained for the application of the Protocol National Institute of Child Health and Human Development (at the Prosecutor's office attached to the Bucharest Tribunal) or by using the principles exposed in the NICHD Protocol (Prosecutor's Office attached to Bucharest 4th District Court of First Instance).

The Prosecutor's Office attached to the Bucharest 1st District Court of First Instance transmitted that besides the general measures of protection (the hearing of the minor victims in the presence of the legal representative, the mandatory legal assistance based on art. 93 paragraph 1 CPP, the hearings held by the same persons, the hearing by a person of the same gender), there are a number of standards for the protection of minors/vulnerable victims during the legal proceedings. Therefore, in order to avoid the risk of repeated and secondary victimization and for an effective protection of such victims, the hearing takes place in the presence of a psychologist or a representative of D.G.S.A.P.C. The attendance of a specialized person is important because it eliminates the risk of suggestion and ensures the correctness of information. Furthermore, in cases of crimes of sexual acts committed with a minor and rape, the psychological

evaluation is conducted in order to establish the level of intellectual-cognitive development, temporal-spatial orientation, the victim's discernment and the capacity to express a valid consent. For example, in file no. 3612/P/2018, a psychological evaluation performed on a 17-year-old minor victim of rape in continuous form evidenced the symptoms of post-traumatic stress.

The Prosecutor's Office attached to the Bucharest 2nd District Court of First Instance also transmitted that hearings takes place in the presence legal representatives of the same gender with that of the victim or of a psychologist from D.G.S.A.P.C. or another authorized psychologist. The prosecutor or the criminal investigation body of the same gender hears the victim in special equipped rooms and the lawyer assists behind protection windows in order to limit the number of attending persons at the hearing. A psychiatric expertise establishes the existence of the victim's capacity to express a valid consent. This evaluation also considers the data regarding the social and family environment, the degree of education, which is collected through a social investigation. The psychological evaluation of the victim aims at establishing the existence of a trauma specific to sexual abuse and if the personality profile allows the expression of a valid consent. The psychologist attending the hearing usually drafts this evaluation. The prosecutor's office transmitted several examples of cases in which the judicial body conducted psychiatric legal-medical expertise and psychological evaluation on the victims. For example, **in file no. 6360/P/2018 the judicial body stated that, among other causes, the objective impossibility of the victim to defend and express her will was caused by the very young age of the minor, i.e. 11 year old.**

The Prosecutor's Office attached to the Bucharest 3rd District Court of First Instance, the Prosecutor's Office attached to the Bucharest 4th District Court of First Instance, the Prosecutor's Office attached to the Bucharest 5th District Court of First Instance and the Prosecutor's Office attached to the Bucharest 6th District Court of First Instance transmitted relevant examples of practice in similar cases.

In file no. 3599P/2018 the Prosecutor's Office attached to the Bucharest 3rd District Court of First Instance stated that the lack of consent was generated by the impossibility of the victim to defend herself or express her will, due to the fact that, at the moment of the crime, the victim was 9 years old, thus lacking the aptitude to understand and consent to acts of sexual nature and to oppose to sexual acts committed on her.

In one of the cases exemplified, the prosecutor stated that the jurisprudence considers the crimes committed by the offender against minors (aged between 7 and 10 years at the beginning of the commission of the crimes) placed in his care and education as rape, even in the absence of a proof of physical resistance of the victim and also stated that the physical or psychiatric compulsion which annihilates the victim's consent must not be irresistible or materialized in evidences/bruises (file no. 1036/P/2017 of the Prosecutor's Office attached to the Bucharest 4th District Court of First Instance).

The Prosecutor's Office attached to the Bucharest 4th District Court of First Instance transmitted in a letter to the Agent of the Government that the young age of the victim, although there is not legal or jurisprudential delimitation to certify the age that allows a minor under 15 years to express a valid consent to a sexual act, in practice the appreciation is done *in concreto*, by reference to the results of psychologic and psychiatric analyses establishing the development status.

The Prosecutor's Office attached to the Bucharest 5th District Court of First Instance transmitted in a letter to the Agent of the Government that the legal framework is rape in case of sexual acts with a person, without using psychical or physical violence, **but taking advantage of the young age or the mental illness.**

The Prosecutor's Office attached to the Bucharest 6th District Court of First Instance transmitted cases in which the judicial bodies stated that the victims were in the impossibility to express their will due to their young ages of 9 and 10 years (files no. 8287/P/2017, 2371/P/2017, file no. 3555/P/208).

The Prosecutor's Office attached to the Bucharest 6th District Court of First Instance concluded that the judicial body considered the existence of compulsion acts, independent of the existence or inexistence of a physical opposition of the victim. As regards the consent validly expressed, which determines the crime as rape or sexual act with a minor, the impossibility to express such consent to young ages has been considered, along with the facts and psychiatric legal-medical expertise and psychologic evaluations.

The Prosecutor's Office attached to the Călărași County Court also indicated jurisprudence of crimes of sexual nature although there were no traumatic injuries and no opposition of the victim, the ages of 12 and 13 years indicate the vulnerability of the victims.

The Prosecutor's Office attached to the Giurgiu County Court transmitted that no psychiatric forensic or psychologic expertise had, as its sole objective, the determination of the victims' discernment to express the consent to sexual acts. However, during the expertise conducted to establish whether the person had been the victim of a sexual aggression, the specialists also analyse the victim's intellectual capacity at the moment of crimes. For example, in file no. 2390/P/2016, the victim aged 17 years declared that she gave her consent, but the psychiatric legal-medical expertise of the victim revealed the lack of consent so the offence was framed as rape.

The Prosecutor's Office attached to the Ialomița County Court argued their opinion in the sense that the minor of young age who reached the anatomic puberty may not be considered automatically able to express a valid consent to sexual relations, regardless of gender.

The Prosecutor's Office attached to the Urziceni Court of First Instance communicated that the lack of evidence of physical resistance of the victims is not an essential criterion to frame the crime as sexual act with a minor or rape. In all cases, evaluation reports and psychologic counselling were performed and the victims were heard in the presence of their legal representative, a lawyer and psychologist. The psychiatric expertise had as objective to establish the existence of discernment of the minor victim to sexual relations.

The Prosecutor's Office attached to the Urziceni Court of First Instance mentioned that, in accordance with the facts of the cases it deals with, the judicial body conducts psychiatric and/or psychologic expertise on the victim. For evaluating the consent expressed by minors or vulnerable persons, in order to establish the legal frame of the crime as sexual act with a minor or rape, the judicial body takes into consideration the statements of the victim, of witnesses, the social investigation and, if the case requires, the evaluations of specialists – psychologists or psychiatrics.

The Prosecutor's Office attached to the Teleorman County Court mentioned that they follow the directions indicated in the judgements of the ECHR in similar cases. The analysis of consent implies looking at all the pieces of evidence in the case and the reports of psychologic evaluation and psychiatric expertise have an important role.

The Prosecutor's Office attached to the Buftea Court of First Instance indicated that in cases where the capacity of the victim to express a valid consent to sexual relations was under question, the prosecutors have considered all the pieces of evidence available and requested the opinions of experts. **For example, in file no. 4710/P/2019 the report of psychological expertise shown that the victim aged 17 years was in impossibility to express her will, due to her mental condition.** As regards the hearing procedure of the victims, the judicial body adopt a pluri-disciplinary perspective in accordance with the Methodological Guide on hearing minor victims of violence drafted following the project Model of multidisciplinary and inter-sectorial intervention to provide an efficient and coordinated response to the needs of children victims of the violence in the family, project co-financed through a grant by Switzerland by intermediary of the

Swiss Contribution to an extended European Union (presented in more detail above). Also, the judicial body indicated the good cooperation with specialized personnel from the Department for Social Assistance and Protection of Children (DGASPC) Ilfov in order to reach the scope of the criminal trial and to avoid re-victimization.

The Prosecutor's Office attached to the Cornetu Court of First Instance mentioned that in sexual crimes cases dealing with the issue of the victim's consent, the report of psychological evaluation, among its objectives, seeks to establish the presence of symptomatology characteristic of a victim of crimes of sexual nature, if there was an experience with major post-traumatic potential and what was the victim's representation of the crime. In addition, the judicial body indicated that they follow the legal rules on hearing the minor victims and the provisions of Law no. 211/2004 on certain measures to assure the protection of the victims of crimes.

2.2. The Prosecutor's Office attached to the Timișoara Court of Appeal informed that the psychological expertise of the victim in these cases aims to establish the facts of the case. On a case by case basis, such expertise may aim at establishing the existence of discernment, the valuation of the psychical development of the victim, the existence of trauma and its consequences.

An example in this sense is file no. 88/P/2006 of the Prosecutor's Office attached to the Arad First Instance Court where a psychological expertise was ordered, but considering that the age of the victim was 6 years, the existence of consent was not in question. Therefore, the author was charged with rape. Collaterally, in practice there were cases in which the victims have been accommodated by the DGASPC as urgent measure.

The Prosecutor's Office attached to the Timișoara Court of Appeal also mentioned that at least one parent, the chosen or *ex officio* lawyer and a social worker from the city hall in whose area the offence was committed attend the hearing of the minor. As a principle, an investigation body of the same sex gender as the victim conducts the hearing.

The Prosecutor's Office attached to the Timiș County Court argues that the unanimous practice of the judicial body and its subordinated units is to carry out a psychological evaluation (through psychologists from the DGASPC) and/or a psychiatric expertise by the Institute of Legal Medicine of the minor victims in cases of crimes of sexual nature, in order to appreciate the victims' possibility/impossibility of expressing a valid consent to sexual relations.

In certain cases, considering the minor's age, in practice the correct framing of the crimes is rape and not sexual act with a minor, thus the psychological or psychiatric evaluation is not necessary since, according to the practice of said Prosecutor's Office, a minor younger than 11-12 years cannot express a valid consent to sexual relations.

In cases of crimes committed against vulnerable persons (with disabilities/issues of psychical nature), the judicial bodies appreciate in fact if the offender has known or has taken advantage of the vulnerable condition of the victim. For this purpose, a psychiatric expertise is done in order to establish the discernment and thus, the validity of the person's consent to sexual relations.

Furthermore, in the unitary practice, the hearing of minors is done in the presence of specialized personnel of DGASPC and of the lawyer appointed *ex officio* by the judicial body, having the same gender as the victim. Unfortunately, there have been cases where the hearing could not be done by a person of the same gender (feminine) due to lack of personnel among the judicial body.

For example, in file no. 1030/P/2017 of **the Prosecutor's Office attached to Sânnicolau Mare Court of First Instance** solved by indictment on 31.01.2019, the judicial body established that the offender, using compulsion over the course of approximately 5 years, had sexual relations with the victim (his stepdaughter) aged between 11 and a half years - 16 and a half years at the time of the facts. In order to establish the facts, the judicial bodies heard the minor victim in the presence of an *ex officio* lawyer and the medical-legal psychiatric expertise shown symptoms of a complex mental trauma (repetitive and long-term abuses) and lack of any simulated behavior of the facts. Under these circumstances, the offender was accused of rape in continuous form stipulated by art. 218 paragraph 3 letters a and c CP, with the application of art. 35 paragraph 1 CP.

In file no. 793/P/2019 of the Prosecutor's Office attached to Sânnicolau Mare Court of First Instance, concluded by indictment of 20.01.2020, the judicial body established that the offender took advantage of the impossibility of the 14-year-old victim to express a valid consent and had sexual relations during May 2019. The judicial body heard the minor victim in the presence of an *ex officio* lawyer and the medical-legal psychiatric expertise evidenced post-traumatic stress disorder and incapacity to express a valid consent to sexual relations; also, the evaluation report performed by a psychologist of DGASPC Timiș had shown elements indicating sexual abuse in the psychological development of the minor. Under these circumstances, the offender was accused of rape in continuous form stipulated by art. 218 paragraph 3 letters a and c CP.

In file no. 185/P/2020 of **the Prosecutor's Office attached to Lugoj Court of First Instance**, concluded by indictment on 24.03.2020, the judicial bodies established that the offender had, by compulsion, sexual relations with his niece aged 12 years who got pregnant. During the investigation, the psychological evaluation of the minor and the social enquiry revealed post-traumatic stress disorder following the sexual abuses and the impossibility to express a valid consent to sexual relations. Under these circumstances, the offender was accused of rape in continuous form stipulated by art. 218 paragraph 3 letters a and c CP, with the application of art. 35 paragraph 1 CP.

2.3. The Prosecutor's Office attached to the Galați Court of Appeal transmitted that the consent of the minor and/or vulnerable persons is analyzed by the judicial bodies based on the pieces of evidence available, the psychological evaluations of victims, the young age of victims, of less than 12-13 years, and their impossibility to express will and consent to sexual relations, since the level of development does not allow the representation of acts. The opinions grounded on national jurisprudence, *i.e.* decision no. 542/2008 and no. 1914/2009 of the High Court of Justice and Cassation.

Additionally, regarding the hearing of these vulnerable categories of persons, it is done only in the presence of the parent/tutor, a psychologist, of another specialist in victim's counselling and an *ex officio* lawyer.

As far as the vulnerable persons are concerned, the judicial bodies request medical documents on their medical condition, a psychological evaluation and psychiatric legal-medical expertise to establish if the victim had the possibility to express consent and representation of the facts.

The Prosecutor's Office attached to the Galați Court of Appeal transmitted a number of bills of indictment of the subordinated units.

The Prosecutor's Office attached to the Tecuci Court of First Instance transmitted a bill of indictment of a rape crime committed against a minor aged 6 (file no. 2/P/2020), a bill of indictment of a rape crime committed against a minor aged 11 years (file no. 350/P/2018) which mentions that, during the investigation, psychological evaluation and psychiatric legal-medical expertise were performed on the victim.

The Prosecutor's Office attached to the Tecuci Court of First Instance also transmitted a bill of indictment of a rape crime committed against a minor aged 17 years suffering from mental development issues (file no. 4201/P/2018). The judicial bodies ordered the psycho-diagnosis of the victim and his clinical and psycho-educational evaluation and the severe mental condition determined the judicial bodies to consider his discernment abolished and consider that he was a victim of rape and not of sexual acts with a minor.

The Prosecutor's Office attached to the Liești Court of First Instance transmitted a bill of indictment of a rape crime, in which the judicial bodies ordered, beside legal-medical expertise of the victim aged 14 year, a neuro-psychiatrically and psychological evaluation.

The Prosecutor's Office attached to the Adjuđ Court of First Instance transmitted a bill of indictment of a rape crime against a minor aged 9 years (file no. 1377/P/2019) in which the offender was aged 15.

The Prosecutor's Office attached to the Galați Court of First Instance transmitted a bill of indictment of a rape crime committed against a person aged 21 years with mental handicap (file no. 2675/P/2018) in which the judicial bodies performed a psychiatrically legal-medical expertise of the victim.

The Prosecutor's Office attached to the Focșani Court of First Instance transmitted a bill of indictment of a rape crime committed against a minor aged 8 years (file no. 2840/P/2019). The judicial body considering that the minor at this very young age of the minor could not even have a vague representation of biological or moral sexual relation so her will was not freely expressed.

2.4. The Prosecutor's Office attached to the Brașov County Court transmitted that, at the hearing of minors or vulnerable persons, a psychologist from DGASPC, the parents or the legal representatives and the lawyer also attend. Usually, in these cases, the judicial body performs a psychologic evaluation and psychiatric expertise and the categorization of the crime as rape, even in the absence of any traces of physical resistance or any other crimes related to sexual life is done based on the particularities of the cases, including the results derived from the psychological/psychiatric evaluation.

2.5. The Prosecutor's Office attached to the Constanța Court of Appeal transmitted, that, in their practice, it is always required to have a psychiatric legal-medical expertise / evaluation of the victim, whose main objective is to establish the existence of the victim's discernment and her/his capacity to express a valid consent to sexual relations. These evaluations aim at establishing in which way the victim was affected and her/his physical attitude towards the acts and the way in which the victim perceived them. Moreover, the behavior analysis studies the accuracy of the victims' claims, verifies the suspicions of the influence of other persons on the victim and indicates if the acts committed by the perpetrator against the victim have severely jeopardized her or his moral, intellectual or physical development. As much as possible, persons of the same gender hear the minor victims / vulnerable persons (even if there is no express request from the victim), and the hearings take place in the presence of a lawyer and a psychologist from the DGASPC. The case law transmitted shows, for example, that the judicial body found that vulnerable persons (both 14 years old) were unable to express a valid consent to sexual acts (files nos. 1545/P/2016 and 3151/P/2016).

2.6 The Prosecutor's Office attached to the Cluj Court of Appeal informed the Agent of the Government that the magistrates of the prosecutor's offices attached to the first instance courts in the area of the prosecutor's office attached to the Cluj Court of Appeal consider the following criteria:

- the age of the victim

The victims of 0-14 year old are too young to express a valid consent and considering that the criminal law presumes the lack of discernment during these ages and no criminal liability is held, and the civil law admits that the limited capacity to act starts at the age of 14 years, therefore the offences are classified as rape.

However, in practice, when victims are aged between 13-18 years, they undergo a forensic/psychiatric/psychological expertise to establish their discernment.

- the existence of traces of violence which may lead to the conclusion of a physical compulsion, the presence of indications on the existence of a pressure or physical compulsion of the victim to consent the sexual act

With regard to the identification of pressures and psychological compulsion, several aspects are analyzed, such as the capacity of the author is analyzed in relation with the victim (whether the author is a parent, brother, close relative, person living with the victim, close person to the victim, person in whose care the victim is), the balance of forces between the author of the crime and the victim, the circumstances of time and place of the offence, evaluation of the physical state of the victim, including the analysis of normal reactions in situation of aggression.

- the conclusions of the physiological expertise and physiological evaluation of the victim performed regularly, the conclusions of the report of psychiatric expertise on the existence of discernment, as the case may be

During the prosecution, it is mandatory for the investigation bodies to order the report on the physiological evaluation of the victim, his/her discernment and the traumatic symptoms, performed by authorized physiologists of D.G.S.A.P.C. If necessary, depending on the specific of each case, a physiological/psychiatric legal-medical expertise is performed on the existence/lack of discernment, the post-traumatic stress syndrome respectively in case of vulnerable/minor victims.

The Prosecutor's Office attached to the Cluj Court of Appeal transmitted that the hearings of the minors are held in a place specially planned in the presence of the physiologist of D.G.S.A.P.C., an *ex officio* lawyer and a legal representative. Particularly, at the Prosecutor's Office attached to the Cluj First Instance Court, the hearings of the minor victims are held in a special AUDIS room belonging to the D.G.S.A.P.C. – the County Center of Intervention for Abused Children, which is fitted with video-audio means of recording the hearings.

Following the hearing the attending psychologist drafts a physiologic observation sheet.

Personnel of the judicial police specialized in offences against liberty and sexual integrity work on these cases.

If members of the family commit the offences, the competent authorities are notified, in order for them to take the necessary measures for the protection of the victim, during the criminal trial.

As an example, the Prosecutor's Office attached to the Cluj Court of Appeal transmitted by letter of 10 April 2020 a case in which the Prosecutor's Office attached to the Cluj First Instance Court started the investigation for the offence of sexual act with a minor aged 14 years. Following the physiological evaluation and the report of forensic psychiatric expertise and the decision of the Commission for Child Protection, which revealed the diagnostic of moderate mental issues and therefore the lack of a valid consent and the victim's impossibility to express her will, the offence was classified as rape.

The Prosecutor's Office attached to the Zalău First Instance Court concluded that the offence committed against minor victims aged 7, 8 and 13 years was rape, the authors taking advantage of the impossibility to validly express their wills. The physiological/psychiatric expertise was not necessary because the lack of a valid consent was clear, but the victims were heard in the presence of a psychologist.

The Prosecutor's Office attached to the Jibou First Instance Court transmitted an example where the psychological diagnostic report and the clinical evaluation of the victim aged 11 years were used to prove that she was the victim of rape.

The Prosecutor's Office attached to the Dragomirești First Instance Court transmitted an example (file no. 354/224/2018) where the magistrates classified the offence as sexual act with a minor and not rape, **based on the fact that the psychological evaluation of the victim aged 13 years indicated a psychic and physical level of development superior to her biological age, the lack of trauma and the impossibility of a sexual aggression of the victim.**

The Prosecutor's Office attached to the Dragomirești First Instance Court also transmitted an example where the conclusions of the forensic expertise drafted in the case indicated a mental issue of the victim and therefore, the prosecutor argued that the victim had not capacity to express a valid consent and classified the offence as rape.

This shows that, based on various pieces of evidence related to the question of whether or not the victims had discernment and particularly relying on forensic expertise and psychological evaluations, prosecutors classify crimes committed against minors aged around 13 – 14 years old as either sexual acts with a minor or rape.

Other relevant examples of indictments have been transmitted by the Prosecutor's Office attached to the Cluj-Napoca First Instance Court, the Prosecutor's Office attached to the Dej First Instance Court and the Prosecutor's Office attached to the Huedin First Instance Court.

2.7. The Prosecutor's Office attached to the Alba Iulia Court of Appeal informed the Agent of the Government that in analyzing the consent of the minors/vulnerable persons, the hearings are held in the presence of a psychologist from D.G.A.S.P.C. which drafts a report on the aspects observed and physiological and psychiatric legal-medical expertise are performed.

The Prosecutor's Office attached to the Alba Iulia First Instance Court ,the Prosecutor's Office attached to the Aiud First Instance Court and the Prosecutor's Office attached to the Sebeș First Instance Court transmitted examples of files where during the prosecution a psychiatric legal-medical expertise and legal-medical expertise were performed.

2.8. The Prosecutor's Office attached to the Oradea Court of Appeal transmitted the motivated legal opinion of Oradea First Instance Court, according to which in case of offences of a sexual nature against a minor or vulnerable persons, the psychologic reports and expertise performed by qualified experts are required in order to identify the forms of sexual abuse (file no. 389/P/2018 of the Prosecutor's Office attached to Beiuș First Instance Court).

The psychologic conclusions largely contributed to the correct solving of cases by providing information on the victim's profile, the accuracy of statements (files no. 3790/P/2016 and no. 3317/P/2017 of the Prosecutor's Office attached to Oradea First Instance Court), the negative consequences suffered by the victim at the mental and physical level (file no. 2618/P/2015 of the Prosecutor's Office attached to Oradea First Instance Court).

Moreover, the minors and the vulnerable persons are heard in the presence of the lawyer and a psychologist from D.G.A.S.P.C. (file no. 389/P/2018 of the Prosecutor's Office attached to Beiuș First Instance Court).

The Prosecutor's Office attached to Marghita First Instance Court informed that **all means of proof and the psychological evaluation**, if it is the case, **aim at analyzing the consent of the victim.** The hearing

of the victim is done in the presence of a psychologist, being video-audio recorded. Additionally, if the facts so require (for example, if the victim has a limited capacity of understanding due to lack of education or intellect, the statements of the victim are contrary or the victim has not turned 13 year old) psychological evaluation/expertise of the victim is ordered.

The Prosecutor's Office attached to Salonta First Instance Court qualified the offence as rape in view of the fact that the lack of reaction or a certain reaction stemming from the trauma is not imputable to the victim. The recorded hearings are performed in the interest of the victim, by a person of the same gender as the victim and are performed only once in order to avoid the double victimization. In addition, the persons attending (lawyers, legal representatives, psychologist of D.G.A.S.P.C.) offer specific support to the victim.

The Prosecutor's Office attached to Negrești Oaş First Instance Court underlined that the offences against minors of less than 13 years are classified as rape, due to the victims lacking valid consent. However, there are special cases in which the adults set up families with minor persons, have children with the help of parents. The prosecutor's office is noticed in most of the cases by the medical centers when the minors became mothers. In these cases, the offences are classified as sexual act with a minor.

The Prosecutor's Office attached to Negrești Oaş First Instance Court indicated as jurisprudence the pending file no. 853/P/2018 where the classification of the offence changed from sexual act with a minor to rape in view of the fact that the minor was 11 year old and missed the effective discernment in order to express a valid consent and to understand the importance and the consequences of such acts.

The Prosecutor's Office attached to Carei First Instance Court informed that the psychiatric/psychologic evaluation is mandatory if the victim is under 15 years in order to analyze the consent and the classification as vulnerable person.

2.9. The Prosecutor's Office attached to the Iași Court of Appeal mentioned that following the Order no. 294 of 5 December 2018 of the general prosecutor from the Prosecutor 'Office attached to the High Court of Justice and Cassation to appoint a prosecutor for cases having as object offences by and against minors, the Prosecutor's Office attached to the Iași County Court proceeded with this order. The prosecutor in charge to conclude rapidly the cases of offences against minors is available to take over the cases with high level of complexity or cases in which the prosecution seems difficult due to high volume of activity of the prosecutors from the local prosecutor's offices or the sensitive character of the case.

During the year 2019, the Prosecutor's Office attached to the Iași County Court took over a number of 14 cases from the local prosecutor's offices. A team of 2 police women and a policeman from Iași County Inspectorate of Police are working at these cases as well.

The hearing of the minor victims or vulnerable persons are held in a special room from Iași D.G.A.S.P.C., the investigator has the same gender as the victim, at the hearing attends a psychologist of the institution and a lawyer, the depositions being audio-video recorded. Considering the age and the limits generated by the level of education and care, the hearings are conducted in the superior interest of the child, in the sense that the authorities try to ensure the psychological comfort of the child so that he describes the trauma without emotional barrier, as much as possible.

Along with the hearings, the victims are psychologically evaluated. The psychiatric expertise are avoided in case of very young victims to stop increasing the trauma, considering that such expertise is conducted in specialized hospitals and takes up to one month.

If the victims are sexually abused by persons in their circle of trust, they are taken from the dangerous environment by the DGASPC and then accommodated along with mothers and/or siblings at special locations of the D.G.A.S.P.C.

The Prosecutor's Office attached to the Iasi First Instance Court communicated that in both offences against minors and vulnerable persons the psychological or psychiatric expertise is done to establish the consent of the victim in most cases.

The Prosecutor's Office attached to the Hârlău First Instance Court stated that the analysis of the victims' consent helps in classifying the offence as rape or sexual act with a minor.

The Prosecutor's Office attached to the Vaslui County Court transmitted that the practice of local prosecutor's offices in case of offences of rape of minors is unitary. The victims are heard in the presence of the lawyer, a representative of D.G.A.S.P.C. and a psychologist. The authorities order the report of psychological evaluation and the psychological or psychiatric expertise if the specialized analysis of the victim's reactions from the point of view of his/her mental capacities is necessary.

As example, the Prosecutor's Office attached to the Vaslui County Court indicated the file no. 900/P/2018 of the Prosecutor's Office attached to the Huși First Instance Court, in which, although no lesions of violence were seen on the victim of 15 year old, the psychological evaluation indicated the lack of consent to sexual acts, so the offence was classified as rape. In file no. 1220/P/2016, the Prosecutor's Office attached to the Bârlad First Instance Court held that the 14-year-old minor did not have the moral, social and psychological development to understand the consequences on her development of the sexual act suffered, and, therefore, the offence was classified as rape. In addition, in file no. 1102/P/2016, the Prosecutor's Office attached to the Bârlad First Instance Court held that the offence was rape since the consent of the victim was missing, based on the victim's age of 11 years and the intellectual level of development. In these cases, psychiatric and physiological expertise were performed.

2.10. The Prosecutor's Office attached to the Bacău Court of Appeal informed that in cases of rape and sexual act with a minor committed against a minor, a person with mental issues, the hearing complies with the criminal procedural provisions, in conditions allowing the discovery of truth.

In order to establish the clear circumstances of the facts, in all cases a forensic expertise is performed to identify the sexual relation, the nature of the eventual injuries and the date they occurred. The minor victims and the vulnerable persons are heard in the presence of the lawyer, a legal representative and a representative of D.G.A.S.P.C.

In all these cases the psychological reports or the legal-medical psychiatric expertise aim at determining the level of cognitive development, the existence of discernment, the specific symptoms of sexual aggression, the causal link between the sexual aggressions suffered by the victims and ulterior the mental and physical damage suffered by the victims. Moreover, other facts are also taken into consideration, which lead to establishing the existence of a valid consent. In this sense, the previous sexual experience of the victim, the influence and the authority of the other on the victim, the difference of age between the author and the victim, the kinship relationship, the singular or repeated character of sexual acts are considered for each case

2.11. The Prosecutor's Office attached to the Suceava Court of Appeal informed that the analysis of the consent of the minors and/or vulnerable persons in order to classify the offence as sexual act with a minor or rape is mainly done based on the age of the victim.

- if the minor is of young age (under 12 year old) the practice of the local prosecutor's offices is to classify the offence as rape in aggravated form, considering the lack of consent to sexual relations.
- if the minor is between the ages of 12-15 years for each case the prosecutors analyze if the victim was subject to moral compulsion or if (s)he was able to express freely the will. In the majority of cases, the offence was classified as rape in aggravated form. In this sense, along with the facts of the case, the result of the psychological or psychiatric expertise/evaluation has a decisive role in establishing the existence of the discernment and the valid consent expressed.

The psychiatric or psychological expertise and evaluation is ordered in all cases of sexual aggression against the minors and/or vulnerable persons. At their hearing, a psychologist is present, the parents, lawyers, social workers and the victim may undergo psychological counselling.

In case of vulnerable persons, the nature of the vulnerability is considered. If there is a disability and the victim did not give his/her consent, the practice of the local prosecutor's offices is to classify the offence as rape, taking advantage of the victim's impossibility to express his/her will. Consequently, **in these cases the existence or the absence of any proofs of resistance from the victim's side is analyzed, but the evaluation of the facts is done in light of the victim's vulnerable condition.**

The practice of the local prosecutor's offices revealed that the victims of the offences of sexual act with the minor, unlike those of the offence of rape are generally persons between 13 and 15 years, developed somatic and the psychiatric legal-medical expertise or psychological evaluations shown the certainness of their representation on the significance of the sexual relation or act. It was revealed that the victims of offences of sexual act with a minor are persons with an active sexual or sentimentally attached to the authors.

The Prosecutor's Office attached to the Suceava Court of Appeal transmitted examples of files where the victim benefitted from psychological evaluation, counselling, legal-medical psychiatric expertise, at the hearing of the victim the social worker, the mother, the lawyer *ex officio* attended and the victim benefitted from psychological counselling (file no 1135/P/2017, file no. 833/P/2017, file no. 1034/P/2017). The facts of these cases have been established based on the data resulted from the psychologic evaluation/expertise in conjunction with the statements of witnesses.

2.12. The Prosecutor's Office attached to the Ploiești Court of Appeal informed that several criteria are considered when evaluating the consent of minors or vulnerable persons in order to classify the offence as rape or sexual act with the minor, such as the age of the victim, the expert opinion (psychological evaluation, and/or psychiatric forensic expertise to reveal the level of psychological development of the minor/vulnerable person, the socio-psycho repercussion of the offence, social environment, medical record) as well as the relation of power/influence between the victim and the author.

In all cases, a psychological evaluation and/or legal-medical psychiatric expertise was ordered.

The victims are usually heard in the presence of the legal representative, a specialist from the D.G.A.S.P.C and a lawyer.

The magistrates of the Prosecutor's Office attached to the Ploiești Court of Appeal also mention that in order to delimit the two offences (rape and sexual acts with minors), the age and the perception of victims are essential, the intellectual immaturity determining in principle the classification of the offence as rape, regardless of the age of the victim. It is worth mentioning that also in the lack physical resistance of the victim, the offence had been classified as rape if it resulted from the intellectual maturity of the victim, the difference of stature and weight between the aggressor and the victim, the moral ascendant of the aggressor on the victim.

As an example, in the indictment no. 699/P/2019 of the Prosecutor's Office attached to the Pogoanele First Instance Court the author was charged of rape against the minor aged 14 years. From the legal-medical expertise, it resulted that although the victim had consented formally, she was unable to understand correctly the content and the consequences of the actions, having abolished discernment.

As an another example, the Prosecutor's Office attached to the Buzău First Instance Court transmitted the indictment in the file no. 2726/P/2019 for the acts committed against a minor of 13 year old classified as rape. The psychiatric forensic expertise revealed that the victim did not have the mental capacity to appreciate critically the facts, because she had abolished discernment, therefore she was not able to freely consent to sexual relations with the author.

2.13. The Prosecutor's Office attached to the Târgu-Mureş Court of Appeal informed that the analysis of the consent of the minors and/or the vulnerable persons for the purpose of classifying offences as sexual act with a minor or rape is done based on the psychiatric forensic expertise and psychologic evaluations in accordance with the regulations of the Criminal Procedural Code. In addition, the age, the psychological and physical development of the victim, the relation between the victim and the author, the legal-medical evidence of the injuries suffered by the victims and other evidence obtained through technical means, video-audio recordings are considered as well.

A person of the same sex gender performs the hearing in the presence of the legal representative and the *ex officio* lawyer with the victim, if possible. The personnel from the Guardianship Authority of the city hall at the victim's domicile and psychologists from D.G.A.S.P.C. are also involved in dealing with the case. As example, in a file of the Prosecutor's Office attached to the Miercurea-Ciuc First Instance Court the author was charged of rape against a minor aged under 14 years, which did not have the capacity to understand and critical appreciate the consequences of facts or inactions forbidden by law, thus lacking the discernment. Consequently, the victim could not express a valid consent for the sexual relations.

2.14. The Prosecutor's Office attached to the Craiova Court of Appeal informed that its practice is that of performing a thorough examination of the circumstances in which the offence was committed (if the victim knew the author, if previously he/she had consented to sexual relations, the place of the offence) by considering the vulnerable condition of the victims and the age of the minor victim, which is also important.

If the victim is of a very young age or following the psychiatric legal-medical expertise and the psychologic evaluation results the impossibility for her/him to express a valid consent to sexual relations of any kind, the offence shall be classified as rape and not sexual act with a minor.

Furthermore, if the victim has disabilities and it is necessary, a psychiatric legal-medical expertise to establish if the author took advantage of the victim's impossibility to defend or to express the will is ordered.

The hearings are done in the presence of the legal representative, the chosen or *ex officio* lawyer, and a psychologist of the local directorate for the child protection. If necessary and useful, a report of the psychologist is ordered.

The Prosecutor's Office attached to the Craiova Court of Appeal underlined that following the judgements of the Court the practice of the prosecution bodies is to order a psychiatric/psychologic evaluation/expertise to determine the existence of discernment and the normal reactions of the minor or vulnerable victims, in similar cases.

As an example, the prosecutor's office indicated files no. 2354/P/2018 and no. 2016/P/2015 of the Prosecutor's Office attached to the Caracal First Instance Court where the court held the charges of rape against a minor victim and a vulnerable person respectively, following, among other evidence, the

psychiatric legal-medical expertise of the victims revealing their impossibility to defend or to express the will.

As a general conclusion, the abovementioned information provides that national courts and prosecutor offices are becoming increasingly aware of the need to perform a thorough and complex analysis of cases concerning sex crimes against minors or vulnerable adult persons, in order to determine whether they have been victims of a sex crime and, if so, whether the sex crime in question should be classified as a banned sexual act or as rape.

It is worth noting that national authorities place significant emphasis on forensic psychiatric and/or psychological assessments, particularly in cases where there are now visible physical signs of violence and/or coercion against minors or vulnerable persons, in order to investigate thoroughly if a sex crime was committed.

Further improvements can be noted in the areas of the way in which vulnerable victims are heard by the authorities (in the presence and with support from social workers and/or lawyers).

IV. CONCLUSIONS

In light of the abovementioned information, the Government respectfully ask the Committee to note the significant progress achieved in the execution of the cases of M. G. C., I. C. and E. B., particularly in the area of adopting general measures aimed at preventing future similar violations.

The Government will continue to provide information on the domestic situation and any relevant future evolutions, both regarding the legislative framework and its application by the courts and the prosecutor offices.